

**STATE OF TENNESSEE**

OFFICE OF THE  
ATTORNEY GENERAL  
425 FIFTH AVENUE NORTH  
NASHVILLE, TENNESSEE 37243

January 31, 2001

Opinion No. 01-015

Government Official — Processing Fees for Use of Credit Cards

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**QUESTIONS**

1. Whether a credit card company, bank or other financial institution operating in Tennessee may restrict or not permit a Tennessee government official or office from collecting a reasonable processing fee for accepting a citizen's payment of a fee, tax, fine, etc. by credit card as authorized by Tenn. Code Ann. § 8-21-107 and Chapter 706 of the Public Acts of 2000 ("Chapter 706")?
2. May a county officer use his excess fees or the interest earned on funds held for him to pay the fees required to process a citizen's payment of a fee, tax, fine, etc. by credit card?
3. Are Tenn. Code Ann. § 8-21-107 and Chapter 706 in conflict with rulings of the Federal Trade Commission?

**OPINIONS**

1. No state or federal law specifically allows a credit card company to prohibit surcharges or processing fees; however, there is also no law specifically prohibiting a credit card company from seeking to prevent surcharges or processing fees *by contract*. Whether such contract would be enforceable and/or applicable to the fees authorized by Tenn. Code Ann. § 8-21-107 and Chapter 706 would have to be determined by a court of competent jurisdiction considering all of the facts and circumstances.
2. A county or other government official may not use excess fees or the interest earned on funds held by the official to pay the fees for processing a payment by credit card, as such would be in violation of both Tenn. Code Ann. § 8-21-107 and Chapter 706.
3. Tenn. Code Ann. § 8-21-107 and Chapter 706 do not appear to be in conflict with any FTC rulings.

**ANALYSIS**

Your first question asks whether a credit card company, bank or other financial institution (presumably authorized to issue credit cards) operating in Tennessee may restrict or prohibit a Tennessee government official or office from collecting a reasonable processing fee when a citizen uses his or her credit card to pay a fee, tax, fine, etc. Tenn. Code Ann. § 8-21-107 specifically authorizes the state, county or municipal court clerk and county clerk responsible for the collection of fees, fines, court costs or other charges to accept payment by credit card and to “[c]ollect a fee for processing the payment by credit card.” Subsection (c) requires that the clerk set the processing fee “in an amount that is reasonably related to the expense incurred by the court in processing the payment by credit card.” However, in no event may the fee exceed 5% of the amount of the fee, court cost or other charge being paid. Additionally, the statute requires that the county clerk state on any notice to a taxpayer “either the percentage of the processing fee for use of a credit card or the actual fee imposed for the use of a credit card.” Tenn. Code Ann. § 8-21-107(f) & (g).

This past session, the General Assembly amended Tenn. Code Ann. § 9-1-108 to authorize any municipal or county entity or officer to receive payment by credit card or debit card for any public taxes, licenses, fines, fees or other moneys collected by such municipal or county entity or officer. *See* 2000 Tenn. Pub. Acts ch. 706. However, if payment by credit card is accepted, the amendment mandates that the official or entity set and collect a processing fee in an amount equal to the amount paid by the entity or officer to any third party processor for processing the credit card payment. In no event may the fee exceed 5% of the payment collected by credit card or debit card. *Id.* Finally, the amendment also requires the entity or officer to state on any notice to the person owing the taxes, fine, fee or other money “either the percentage of the processing fee for use of a credit card or debit card or the actual fee imposed for the use of a credit card or debit card.” *Id.*

At one time, the federal Consumer Credit Protection Act did contain a provision that prohibited a seller from imposing a surcharge on a cardholder who elected to use a credit card in lieu of paying for goods or services by cash or check. *See* 15 U.S.C. § 1666f(a)(2) (P.L. 94-222, Section 3(c), 90 Stat. 197). However, this provision expired on February 27, 1984, and Congress has taken no further action with respect to this provision. *See* P.L. 97-25, Title II, Section 201, 95 Stat. 144. We have not found any other provision in either *state or federal law* that would allow the issuer of credit cards to restrict or prohibit a government entity or official from collecting a processing fee when accepting payment by credit card from a citizen, particularly when such fee is provided for by state law.

Additionally, the Consumer Credit Protection Act provides:

With respect to [a] credit card which may be used for extensions of credit in sales transactions in which the seller is a person other than the card issuer, the card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card.

15 U.S.C. § 1666f(a). Furthermore, such discount does not constitute a finance charge if offered to all prospective buyers and its availability is disclosed clearly and conspicuously. 15 U.S.C. § 1666f(b). Thus, while federal law does prevent a credit card issuer from prohibiting, *by contract* or otherwise, discounts to induce payment by means other than a credit card, we have found no other provision in either state or federal law that would prevent the credit card issuer from seeking to restrict or prohibit, *by contract*, a government entity or official from collecting a processing fee when accepting payment by credit card from a citizen. Indeed, the Middle Section Court of Appeals has recently recognized that credit card associations have in fact prohibited merchant surcharges through their contracts. *See Owner-Operator Independent Drivers Association, Inc. v. Concord EFS, Inc.*, App. No. M1999-02560-COA-R3-CV (Feb. 29, 2000) (2000 WL 225945), *perm. to app. granted* (Sept. 11, 2000).

In that case, the court described the credit card system as involving four separate contracts and being structured as something like a pyramid, with the credit card associations at the top. Only banks and other financial institutions are eligible for membership in these voluntary credit card associations (e.g., Visa and MasterCard). *Id.* at 2. These member banks constitute the second level of the pyramid. The credit card associations recognize two kinds of members, each performing a different function within the system. Issuing bank members contract with customers and issue credit cards to them, while acquiring bank members (i.e. merchant banks) process credit card transactions for merchants. These retail merchants make up the next level of the pyramid. When a cardholder uses a credit card to purchase something from a merchant, the merchant necessarily must contact both the issuing bank and the acquiring bank, as the issuing bank must approve the credit of the cardholder before the acquiring bank can process the transaction through its electronic communications network. *Id.*

The fourth and last level of the pyramid is made up of the cardholders themselves. In a regular credit transaction, the cardholder presents his card to a participating merchant who “swipes” the card through a point of sale device supplied by the merchant bank. The information on the card’s magnetic strip, together with information about the intended purchase, is transmitted to the credit card association and then to the issuing bank. If the issuing bank approves the sale, a number of electronic communications are then set into motion involving the issuing bank, the credit card association, the merchant bank and the merchant. *Id.* The issuing bank is ultimately responsible for the sums due and owing from its cardholders. There are, however, certain costs involved in the process by which the transactional paper (credit card draft) is moved from the merchant to the issuing bank, which are usually passed on to the merchant. Essentially, the merchant bank pays the merchant a discounted sum, and is subsequently reimbursed by the issuing bank, which makes payment through the credit card association. The issuing bank then bills the cardholder for the full amount of the transaction. The merchant bank, issuing bank and credit card association each make a small profit from the sale. *Id. See also National Bancard Corp. v. VISA U.S.A.*, 596 F.Supp. 1231, 1237, 1238 (S.D.Fla. 1984).

There are separate contracts between the entities in each of these four levels of the pyramid, and both the Visa and MasterCard credit card associations have promulgated rules that prohibit surcharges. For example, Rule 9.04 of the MasterCard rules provides that:

[t]he merchant shall not directly or indirectly require any MasterCard cardholder to pay a surcharge, to pay any part of any merchant discount, whether through an increase in price or otherwise, or to pay any contemporaneous finance charge in connection with the transaction in which a MasterCard is used. A surcharge is any fee charged directly or indirectly, deemed by this corporation to be associated with the use of a MasterCard that is not charged if another payment method is used.

*Owner-Operator Independent Drivers Association v. Concord EFS, Inc., supra.* The MasterCard rules further provide that each merchant agreement must contain the substance of this prohibition and that each member and each affiliate must use its best efforts to cause each of its merchants to observe the provisions of this rule. *Id.*

Your first question asks whether a credit card company may prohibit a government entity or official from charging a processing fee, as authorized and/or mandated by Tenn. Code Ann. § 8-21-107 and Chapter 706. We have found no state or federal law that would specifically allow a credit card company to prohibit surcharges or processing fees; however, there is also no law that would prohibit such credit card company from seeking to prevent surcharges or processing fees *by contract*. Whether such a contract would be enforceable and/or applicable to the fees authorized by Tenn. Code Ann. § 8-21-107 and Chapter 706 would have to be determined by a court of competent jurisdiction considering all of the facts and circumstances. For example, a governmental entity may have entered into a contract with a credit card company that contains such a prohibition before the 2000 amendment to Tenn. Code Ann. § 9-1-108. Under the amendment, a governmental entity is required, not merely authorized, to charge the processing fee. The effect of the amendment on the entity's contract with the credit card company would depend on the specific terms of that agreement. It should be noted that, in another context, the Middle Section Court of Appeals has held that holders of credit cards issued under such contracts are intentional beneficiaries of the no-surcharge provisions in such contracts and, therefore, may sue the merchant for breach of contract. *See Owner-Operator Independent Drivers Association v. Concord EFS, Inc., supra.*<sup>1</sup>

Your second question asks whether a county officer may use his excess fees or the interest earned on funds held for him to pay the fees required to process a citizen's payment of a fee, tax, fine, etc. by credit card? The language of both Tenn. Code Ann. § 8-21-107 and Chapter 706 make it clear that the purpose of the processing fee is to cover the costs incurred by the government entity or official in processing payment by credit card, so that the use of a credit card does not result in the government entity or official "collecting less than is otherwise required or permitted by law for the payment of the taxes, licenses, fees, fines or other moneys due and payable." 2000 Tenn. Pub. Acts ch. 706, § 1. As discussed above, under the credit card system, the county official is paid a discounted amount by the bank on each credit transaction. Thus, if a county official uses his excess fees or the interest earned on funds held by the

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<sup>1</sup>Permission to appeal was granted by the Tennessee Supreme Court on September 11, 2000, but a decision has not yet been rendered.

clerk to pay the processing fees, then the use of a credit card has in essence resulted in the county official collecting less than is otherwise required or permitted by law for the payment of the taxes, licenses, fees, fines or other moneys due and payable. Accordingly, it is our opinion that a county official may not use excess fees or the interest earned on funds held by the official to pay the fees for processing a payment by credit card, as such would be in violation of both Tenn. Code Ann. § 8-21-107 and Chapter 706.

Your final question asks whether Tenn. Code Ann. § 8-21-107 and Chapter 706 are in conflict with rulings of the Federal Trade Commission? We are not aware of any public or private rulings of the FTC that would prohibit a merchant (or in this case, a government entity or official) from charging a processing fee for the use of a credit card. Thus, Tenn. Code Ann. § 8-21-107 and Chapter 706 would not appear to be in conflict with any FTC rulings.

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