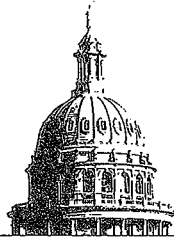


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OPINION COMMITTEE



FILE # ML-47912-15  
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**RQ-0084-KF**

**JIM KEFFER**

STATE REPRESENTATIVE • DISTRICT 60

December 17, 2015

Attorney General Ken Paxton  
Post Office Box 12548  
Austin, TX 78711-2548

RE: Request for an Opinion

Dear General Paxton:

As Chairman of the House Natural Resources Committee and pursuant to the requirements of section 402.042(c)(2) of the Texas Government Code, I request you issue a formal written opinion on the questions of:

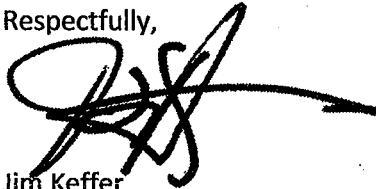
- (1) Whether an owner of rental property who offers an online payment option through a third-party payment processor can be deemed under Sections 339.001 and 604A.002 of the Texas Finance Code to be a party imposing a "surcharge" when the processor remits no portion of any fee imposed to make online payments to the owner?
- (2) Whether it matters to the application of Sections 339.001 and 604A.002 of the Texas Finance Code that a third-party vendor that provides arms-length payment processing services to a rental property owner or operator provides additional arms-length services to the owner or operator?
- (3) Whether a service fee for online payments is permitted and not a surcharge so long as it applies to all forms of online payment (credit, debit, ACH, electronic funds transfer or other electronic payment format) and does not single out credit or debit card payments?

I believe scope of Texas statutes prohibiting the imposition of surcharges on the use of credit or debit cards in the sale of goods or services is unclear and your opinion on these questions will benefit the public interest.

As supporting information, please see the attached background material and documentation of the statutes, previous Attorney General's opinions, and guidance by the Office of Consumer Credit Commissioner. Should you need more information, please do not hesitate to contact Adam Haynes in my office. The phone number is 512.463-0656 or his email is [adam.haynes@house.state.tx.us](mailto:adam.haynes@house.state.tx.us).

I thank you in advance for your timely attention to this matter and your service to our State.

Respectfully,

A handwritten signature in black ink, appearing to be 'JK', with a long horizontal stroke extending to the right.

Jim Keffer  
State Representative  
House District 60

## **Applicable Law**

Under the Texas Finance Code, sellers may not impose “surcharges” on the use of a credit card in the sale of goods or services. Specifically, the code provides: “In a sale of goods or services, a seller may not impose a surcharge on a buyer who uses a credit card for an extension of credit instead of cash, a check, or a similar means of payment.” TEX. FIN. CODE § 339.001(a). Similarly, sellers may not impose a surcharge in debit card transactions: “In a sale of goods or services, a merchant may not impose a surcharge on a buyer who uses a debit or stored value card instead of cash, a check, credit card, or a similar means of payment.” TEX. FIN. CODE § 604A.002(a) (formerly Section 59.402(a)).

The operative provision in Section 339.001 was formerly in Article 1.12, Title 79, Revised Statutes (Article 5069-1.12, Vernon’s Texas Civil Statutes), prior to the codification of the Finance Code in 1999. Since 1999, this provision has been placed in the Finance Code at Tex. Fin. Code § 339.001.

Section 59.402(a) was added to the code by the Legislature in the 83rd Regular Session by House Bill 3068 before being moved to Sec. 604A.002(a) in the 84<sup>th</sup> Regular Session by Senate Bill 641. It is substantially identical to Sec. 339.01(a), except that it applies to payments by debit or stored value cards rather than credit cards. As a result of its recent enactment, there appear to be no appellate opinions interpreting it. Due to its similarity to Sec. 339.001(a), it can be presumed that it would be interpreted similarly by a court.

Furthermore, Section 604A.001(5) of the Finance Code, enacted by the 84<sup>th</sup> Legislature in Senate Bill 641, provides as follows: “Surcharge” means an increase in the price charged for goods or services imposed on a buyer who pays with a debit or stored value card that is not imposed on a buyer who pays by other means. The term does not include a discounted price charged for goods or services to a buyer who pays with cash.

## **Discussion and Background**

At present, many rental property owners offer residents multiple payment channels to pay their rent and ancillary charges, such as by cash, check, ACH or credit card, and residents may be charged a convenience fee by the owner or a third-party online payment processor for the use of credit or debit cards. Most do not accept cash.

### *A. Online Convenience Fees Are Not Surcharges*

Credit card payments, particularly online, can require third-party services for things such as an electronic platform to make payments, which cost rental property owners money. When they or their third-party processor provides the convenience of a credit or debit card online payment processing system, charging a fee to recover costs is arguably a convenience fee, not a “surcharge.” Indeed, rental property owners may not want to offer that convenience if they have to bear the burden or costs without any recompense.

Moreover, in most cases, owners do not assess the fee for the use of a credit or debit card, but instead, third-party real estate services vendors or payment processors that provide the payment platforms impose the fees. Accordingly, the owner would not be the party actually imposing the fee,

and thereby the statutes should not be triggered. Indeed, the Office of Consumer Credit Commissioner has issued a bulletin where it has stated that a processor may charge a fee that is higher for credit cards if three conditions are met:

1. "The seller may not receive any portion of the fee charged by the processor, or any direct or indirect benefit from the fee (e.g., a discount on other services from the processor)." In OCCC's view, if "a processor imposes a greater fee for credit cards than for other forms of payment, and the seller receives a portion of this fee, then the seller is effectively imposing a credit card surcharge on the buyer."
2. The agency advises that "there must be an arm's-length relationship between the seller and the processor, limited to processing payments." The agency insists that in any case where an owner/operator has a continuing business relationship with a payment processor, "then the relationship should be limited to the processing of payments." Furthermore, if "the relationship goes beyond the processing of payments, or if the parties have a general-agency or joint-venture relationship, then the seller would effectively be imposing a credit card surcharge." Accordingly, this could be a problem for some owners/operators who use companies to process payments that also provide an array of other services to the owners/operators.
3. Finally, OCCC states that "multiple payment channels must be available to the buyer." The agency reasons that if "the seller requires the buyer to make payments through the processor and the processor requires the buyer to pay a greater fee for credit cards than for other forms of payment, then the seller is requiring the buyer to pay a credit card surcharge."

See OCCC Advisory Bulletin B15-2 (Revised June 25, 2015) available at:

<http://occc.texas.gov/sites/default/files/uploads/misc/b15-2-credit-card-surcharge-alternatives-6-25-15.pdf>

*B. It Should Not Matter if a Third-Party Payment Processor Provides a Real Property Owner or Operator Multiple Arms-Length Services*

In the rental housing industry, some owners/operators of multifamily housing may utilize third-party vendors that provide multiple services to the owners/operators. That is, a vendor may provide third-party payment processing, document management services, contract forms or other goods or services. So long as the vendor is a true third-party maintaining an arm's length business relationship with an owner/operator, residents (buyers) have multiple payment options, and the owner/operator receives no benefit from a convenience fee, it would seem that such a fee should not be deemed a surcharge merely because the vendor offers the owner/operator more than just payment processing services.

*C. A Uniform Fee for All Online Payment Forms Is Not a Surcharge*

OCCC's bulletin also advises that sellers of goods or services may impose a universal convenience fee on all forms of payment without violating Section 339.001. OCCC's bulletin cites Tex. Att'y Gen Op. No. GA-0951 (2012) for that proposition. However, some rental property owners may

wish to impose a fee on any type of payment made online, whether by credit card, debit card, ACH payment, etc., but not on payments not made online.

In Opinion No. GA-0951 2012, Representative Jim Jackson inquired whether a service fee could be imposed by a fast-food restaurant on all purchases exceeding \$10, so long as the fee was disclosed to the consumer prior to entering into the payment and providing that the fee was added to all methods of payment, not just credit card payments.

In that opinion, the office wrote that “[w]e conclude that no statute or constitutional provision prohibits a private retail establishment in Texas from charging an itemized and disclosed ‘service fee’ on a consumer transaction, provided that the fee is not limited to the use of a credit card.”

In many cases, residential rental property owners do not have the capacity on-site to take payments by credit card, debit card, ACH, or other electronic transfer. They tend to contract with third-party vendors, who in turn collect a service charge for processing these forms of payments online. In this scenario, the service charge is not limited to credit card or debit card transactions, but rather is a convenience fee for accepting payment on-line, regardless of the method of payment, which can include electronic funds transfers that are neither credit card nor debit card payments. Also in this scenario, to the extent that a property owner has the capacity to take credit payments on-site, a tenant who pays by credit in person would not be assessed the surcharges; therefore, it appears that the surcharge is for the convenience of using the on-line payment system (and to offset the cost of contracting to provide such a system) and not for the provision of credit.

In such instances, the owner/operator’s motive is based on the expense of providing online payment platforms/systems and not necessarily the specific mode of online payment. The purposes of the statutes referenced herein are patently designed to preclude singling out credit or debit cards for charges. Accordingly, imposing a uniform online transaction fee arguably does not conflict with the statutory purposes and should be permitted.

### **Conclusion**

Sections 339.001 and 604A.002 of the Texas Finance Code have caused many questions and much consternation as applied to rental property transactions. Accordingly, your opinion on the scope of those sections’ application to such transactions, as set forth in more detail above, is requested.