

January 26, 2018

Ms. Jennie Daniels
South Carolina Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250

Re: Third party payment processing fees draft guidance

Dear Ms. Daniels:

On behalf of the American Financial Services Association (“AFSA”),¹ thank you for the opportunity to comment on the Department of Consumer Affairs’ draft guidance for creditors regarding third party fee processing. While we appreciate the Department’s intent to provide clarity and guidance for creditors on this topic, we have concerns regarding the draft guidance and the administrative interpretation (“the interpretation”) underlying the guidance (*Administrative Interpretation No. 3.109,503-1603*).

It is important to encourage innovation and respond to customer needs by accepting as many payment options as possible, including payments through third parties where the third party charges a fee, whether through the creditor’s system or directly through the third-party payment processing company. We believe creditors should in all cases at least be permitted to recoup the costs for accepting payments through the many payment processing options available, though we understand this is not the Department’s position. We will provide comments on the factors that should be considered in determining whether a fee is permitted under the Department’s interpretation.

Determination of whether a fee violates the Consumer Protection Code should rely on three basic factors. First, does the consumer have a choice in payment method—*i.e.* did the consumer elect to use this third-party processor; is this payment method just one of many available to the consumer? Second, are creditors encouraging the use of a third-party processor or merely facilitating its use? Third, who is the party charging the processing fee? (*i.e.* does the fee go to the creditor or to the third-party processor? Is the creditor receiving a portion of the fee?)

Does the consumer have a choice in payment method?

The draft guidance identifies appearance of consumer choice as being one important determining factor, and we agree with this inclusion. AFSA members recognize the importance of consumer choice and seek to ensure that their consumers have payment options that are convenient, expedient, and reliable. The Department should consider as a factor whether the creditor accepts

¹ Founded in 1916, the American Financial Services Association (AFSA), based in Washington, D.C., is the primary trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including direct and indirect vehicle financing, traditional installment loans, mortgages, payment cards, and retail sales finance. AFSA members do not provide payday or vehicle title loans.

reasonable alternative payment methods, at least one of which would not result in a fee. Most creditors accept such payment methods, and consumers almost always have the option of mailing a check, or even utilizing their bank's online bill pay option to send a check without so much as the cost of a stamp.

In many cases, consumers knowingly pay a fee to use one more convenient or expedient payment option over a free option that may be less convenient or expedient in the consumer's determination. For example, if a creditor repossesses a consumer's vehicle, the fastest way for a consumer to receive possession of the vehicle is by paying the creditor with certified funds. MoneyGram, Western Union, etc. generally charge a fee for certified funds. If the creditor cannot accept certified funds, because a fee was charged, the consumer will likely need to wait several days for his/her funds to clear and, therefore, wait a longer period of time to take possession of the vehicle than if the consumer paid by certified funds. Because consumers may not know how to obtain certified funds, creditors may refer them to well-known third-party payment processors.

However, creditors do not control the consumer's choice of payment processor. Holding creditors responsible for the third-party processing fee when the consumer freely elects to pay for a more convenient or expedient means of payment would penalize creditors for simply accepting payments they are rightly due. Whether the creditor retains a portion of the fee or none of it, the consumer voluntarily chose this payment option based on personal convenience. This would have a chilling effect on commerce because there would be fewer convenient payment options available to consumers, if creditors no longer accept payments from third-party processors that charged a fee.

Are creditors encouraging the use of a third-party processor or merely facilitating its use?

While the draft guidance states that consideration will be given to the relationship between the creditor and payment processor, this does not adequately consider the distinction between encouraging the use of a specific third-party processor in order to receive a portion of a fee and merely facilitating or assisting the consumer in using a specific processor to make a payment in a more convenient or expedient manner. Many such relationships exist for the sole purpose of facilitating consumer payments to ensure proper payment, and the mere existence of an agreement or relationship between a creditor and third-party processor should not be the sole determining factor. Most creditors enter into agreements with third-party processors in order to setup the necessary links between the processor and the creditor for the creditor to receive the payments and to make it easier and more convenient for the consumer to make the payments using the third-party processor's service. In many instances, the creditor is even able to negotiate a benefit for the consumer through its relationship with third-party processors by way of reduced payment processing fees. Many times, by entering into agreements with the third-party processors, the creditor is able to secure a reduced processing fee for its customers compared to the processor's standard rates were the customer to use its services independently of the creditor's relationship.

A creditor that offers consumers a list of multiple different acceptable payment options, including one or more independent third-party processors, or even assists the consumer with

processing the payment is distinct from a creditor who refers consumers to specific preferred payment processors. However, in either case, providing such information to consumers is vital to protect consumers from fraudulent payment processors by ensuring they turn to reputable third parties, and creditors should not be penalized for providing additional choices to the consumer. The draft guidance even notes that such a responsibility lies with creditors, who must exercise “due diligence in determining the reputation of the business.” Consumers rely on their creditors for this vital information and may not otherwise know the many payment options available to them. Requiring creditors to absorb the processing fees simply because the creditor provided the consumer with the name of a reputable third-party processor or assisted the consumer in making the payment could harm consumers, as creditors, risking penalty by providing such information, may not provide the information at all. This would mean, where a consumer is late in making a payment, creditors would have to advise consumers that they cannot recommend third-party payment processors that can process an expedited payment or assist consumers in making that payment.

Who is the party charging the processing fee?

The draft guidance and the interpretation fail to distinguish between cases in which the creditor retains a portion of the processing fee and those cases in which the third-party processor receives the entirety of the fee. This is particularly problematic when the third-party processor collects the fee directly from the consumer without going through the creditor, as is the case when the consumer elects to use an independent third party to make the payment. Holding creditors accountable for fees collected entirely by a third-party processor freely chosen by the consumer unfairly penalizes creditors for fees over which they have no control.

When the Department considers factors that should be considered in determining whether the fee violated the Consumer Protection Code, the Department should not prohibit payment methods simply because the customer paid a fee for the payment method. Creditors should be allowed to recommend alternative payment options, including those through third-party processors that may charge a fee when receiving a payment in that manner. Creditors should also be able to facilitate payments through third parties for the convenience of their consumers. Any fees paid solely to third-party processors should not be attributed to the creditor.

Thank you in advance for your consideration. We appreciate the opportunity to work with the Department throughout the process. If you have any questions or would like to discuss this further, please do not hesitate to contact me at 952-922-6500 or dfagre@afsamail.org.

Sincerely,



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