



700 S. W. Jackson
Suite 300
Topeka, KS 66603-3796

Office of the State
Bank Commissioner

Phone: (785) 380-3939
Fax: (785) 371-1229
www.osbckansas.org

David L. Herndon, Bank Commissioner

Laura Kelly, Governor

**Testimony to the Senate Assessments
& Taxation Committee
HB 2316
February 8, 2022**

Chair Caryn Tyson and Members of the Committee, my name is Matt Shoger, and I am a staff attorney with the Office of the State Bank Commissioner (OSBC).

Thank you for the opportunity to present testimony related to House Bill 2316. The OSBC is neutral on this bill and has no concerns regarding it, but I wanted to clarify some of the context around the surcharge ban, K.S.A. 16a-2-403. The OSBC is the agency responsible for enforcing the uniform consumer credit code, and the surcharge ban repealed by this bill happens to fall within the uniform consumer credit code. As such, the OSBC has the statutory authority to receive occasional complaints regarding the surcharge ban, to investigate those complaints, and to enforce violations of the surcharge ban.

The OSBC views the surcharge ban as a disclosure statute, which requires the final dollars-and-cents price to be posted for consumers paying with a credit card. The justification for the surcharge ban was that consumers should not get surprised by an increase to the final price – in other words, the consumers would not have to do the math in their heads to add on a percentage surcharge rate but would instead see the final price posted. As long as the final dollars-and-cents price for consumers paying with a credit card is posted, a merchant would not violate the surcharge ban simply by having two separate prices for consumers paying with a credit card and those paying with cash. A merchant could, for example, offer a discount for consumers paying with cash. A merchant could also post two separate prices, one for consumers paying with a credit card and another for consumers paying with cash. A merchant is also free to refer to the increase for consumers paying with a credit card as a “surcharge” without violating the statute so long as the final dollars-and-cents price for consumers paying with a credit card is posted.

This interpretation finds support in the official Kansas Comments to the statute, a Kansas attorney general opinion from 1986, the legislative history of the statute, and case law from other states. The surcharge ban originates from a federal surcharge ban that expired in 1984. After it expired, ten states, including Kansas, reacted by passing legislation to replace the expired federal provision. In a few of these states, courts have stated these surcharge bans were unconstitutional, but those courts limited such statements, saying the surcharge ban was only unconstitutional “as applied” in each particular case, not in general. The Florida attorney general, for example, continues to enforce

the surcharge ban in Florida despite a court stating the Florida surcharge ban was “unconstitutional as applied” in a particular case. The *CardX* case in Kansas follows this pattern of stating the surcharge ban was unconstitutional only “as applied” in a particular case. Although some people have claimed that the New York surcharge ban was struck down by the U.S. Supreme Court, the Supreme Court actually only determined that the surcharge ban restricted speech, not that the restriction was unconstitutional. The surcharge ban is still actively enforced in New York under the same disclosure interpretation as the OSBC.

Colorado is the only one of the ten states to have reversed its surcharge ban in statute, but it still maintains a limit. Colorado now allows merchants to choose between either: (1) a fixed surcharge on all credit card transactions of up to 2%, or (2) passing on the fee charged by the processor or service provider in each transaction. Either way, the merchant must post certain signage for consumers regarding the surcharges.

Thank you again for the opportunity to present testimony related to House Bill 2316. I hope my testimony helps clarify the context surrounding the surcharge ban. As I stated earlier, the OSBC is neutral regarding this bill and has no concerns regarding the bill.

I am happy to answer any questions.

Matthew L. Shoger
Staff Attorney
Matt.Shoger@osbckansas.org
785-379-6568