

**LETTER OPINION**  
**95-L-275**

November 30, 1995

Colonel James M. Hughes  
North Dakota Highway Patrol  
600 East Boulevard Avenue  
Bismarck, ND 58505-0240

Dear Colonel Hughes:

Thank you for your letter asking if the Highway Patrol would be in violation of 1995 House Bill 1120 if it accepts payment of oversize/overweight permit fees by using a credit card service company to obtain payment. Your letter explains that the service company would provide the Highway Patrol with the credit card scanner and instant check printer. The procedure provides for the Highway Patrol to accept an application for a permit by telephone, facsimile, or in person. The Highway Patrol would then enter the permit applicant's credit card number in the credit card scanner. If the credit is approved, a check immediately would be printed on-site for the actual permit fee. The permit would then be faxed to the applicant who would be billed by the service company for the permit fee plus a service charge.

1995 House Bill 1120, codified as N.D.C.C. § 54-06-08.2, provides:

A state agency, board, or commission, the judicial branch, or any political subdivision may accept payment by credit card of any fee, interest, penalty, tax, or other payment that is due or collectible by the agency, board, or commission. To assess and account for the credit card interchange to the respective state agency, board, or commission, the Bank of North Dakota is the processing depository for credit card transactions of state agencies, boards, or commissions. The judicial branch may accept payment by credit card for any fees, costs, or other assessments required or imposed under state law or court rule.

In your letter you explain that you believe the above procedure does not violate section 54-06-08.2 because the Highway Patrol does not add an additional charge for acceptance of payment by credit card. As originally introduced, 1995 House Bill 1120 provided that "[a]dditional charge may not be made for acceptance of payment by credit card." This sentence was subsequently deleted by amendment in light of testimony that it would be a violation of law for a handling fee to be added because a credit card was used to make a payment. See 1995 Senate Standing Committee Minutes HB 1120. Thus, as codified, section 54-06-08.2 does not prohibit an additional charge for acceptance of payment by credit card. However, even if such a prohibition did exist in

Colonel James M. Hughes  
November 30, 1995  
Page 2

section 54-06-08.2, the above procedure would not appear to violate the prohibition because the Highway Patrol will be paid only the actual permit fee.

The specific language of N.D.C.C. § 54-06-08.2 does raise another concern, however. Section 54-06-08.2 provides that the Bank of North Dakota is the processing depository for a state agency which accepts payment by credit card. The procedure explained in your letter does not use the Bank of North Dakota as the processing depository. Thus, it must be determined whether, under the procedure explained in your letter, the Highway Patrol is actually accepting payment by credit card.

Under the procedures you outline, the service company that provides the Highway Patrol the credit card scanner and instant check printer is actually accepting payment for the permit fee and its service charge by credit card. The service company is then paying the permit fee to the Highway Patrol by check. Thus, it is the service company that is accepting payment by credit card, not the Highway Patrol. This is evidenced by the fact that the Highway Patrol will not have an agreement with a bank that is a member of a credit card system, but will only deposit checks for permit fees with the Bank of North Dakota in the usual fashion.

There are typically four parties to a credit card transaction. Milton R. Schroeder, The Law and Regulation of Financial Institutions, Vol. 1 at 17-31 (1995). These parties are the card-issuing bank, the cardholder or customer, the merchant or establishment that accepts the credit card as payment, and a bank that is a member of the credit card system that receives credit card slips from the merchant. Id. The first party, the card-issuing bank, enters into an agreement with the cardholder regarding the terms under which the cardholder may use the credit card. The merchant or establishment that accepts the credit card must also have entered into an agreement with a bank that is a member of the credit card system. Under this agreement, the merchant deposits with the bank the sales slips generated by the use of the card and receives from the bank the appropriate credit at the agreed-upon discounted price. The bank is then responsible for obtaining collection of the slips pursuant to the procedures established by the credit card system.

The Highway Patrol will not have an agreement with a bank that is a member of the credit card system. Apparently, the service company does. Because the Highway Patrol will not have an agreement with a bank that is a member of the credit card system, it will not actually receive payment by credit card and then submit the receipt to the bank. The Highway Patrol will actually receive payment by check, not credit

Colonel James M. Hughes  
November 30, 1995  
Page 3

card. The requirements of N.D.C.C. § 54-06-08.2, therefore, do not apply.

Therefore, it is my opinion that, under the limited procedures described in this letter, the Highway Patrol is not required to use the Bank of North Dakota as a processing depository for credit card transactions because the Highway Patrol is receiving payment by check, not by credit card. Although I have determined that as long as the Highway Patrol actually receives a check payable at any bank in payment of the permit fee from the service company, the procedure is not statutorily prohibited, another issue should be considered before entering such a contract. State resources (including state employee time and effort) apparently would be utilized to benefit one private service company. While the procedure proposed would benefit the regulated community (the truckers), it does not have any apparent benefit to the Highway Patrol. Therefore, the use of state resources for one exclusive provider is likely to raise questions. Other possible solutions would include putting out a request for proposals for the provision of such a service and then selecting one or more companies to provide the service or having the truckers themselves use the scanner to input their credit card numbers so state employees are not being used to generate income for a private business.

In researching the question you presented, your staff obtained a copy of a proposed contract with a service company for our review. Even though I have determined the basic procedures you contemplate will comply with the law, it is imperative that you consult with the assistant attorney general assigned to advise your agency before you enter into any such contract. The draft contract form provided may contain provisions different than those you contemplated, and it does contain questionable provisions on indemnification and confidentiality.

Sincerely,

Heidi Heitkamp  
ATTORNEY GENERAL

dab/tmb

COLONEL JAMES M HUGHES  
NORTH DAKOTA HIGHWAY PATROL  
600 EAST BOULEVARD AVENUE  
BISMARCK ND 58505-0240