

TESTIMONY IN SUPPORT OF ASSEMBLY BILL 351
(Assemblywoman Carlton)

Hearing April 13, 2011

TO: Committee on Commerce and Labor
Assembly of the State of Nevada

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AB 351 a critical piece of legislation to enable the acceptance of credit and debit cards by taxicab and limousine operators in Nevada. The Taxicab Authority already has determined it is in the best interests of the traveling public for taxicab operators do this, and the TA has taken the necessary step of authorizing operators to collect a small transaction fee on each card transaction. These efforts will be thwarted unless AB 351 is passed as amended, since fare-regulated operators will not be able to accept credit and debit cards if they cannot recover the cost of doing so.

Effect of AB 351

AB 351 does three things:

First, it authorizes the Nevada Transportation Authority and Taxicab Authority to enable taxicab and limousine operators to accept credit cards and debit cards.

Second, it authorizes the NTA and TA to set a transaction fee that taxicab and limousine operators may charge on each credit and debit card transaction to help the operator recover the costs of accepting card payments.

Third, it prohibits credit card companies from prohibiting the collection of the transaction fee set by the NTA or TA.

The legislation will be useless without this latter component, as included in the proposed amendment to the bill. That is because the private contractual rules of the credit card networks purport to impose a "no-surcharge" rule prohibiting merchants from collecting a transaction fee from customers who pay by credit or debit card instead of cash.

Why AB 351 Makes Sense

There are many compelling public policy considerations and legitimate Nevada state interests that argue in favor of AB 351:

- Taxicab and limousine fares are tightly regulated so that an operator cannot simply raise its prices like other merchants to cover the costs of accepting credit cards. Operators will pay merchant fees to the credit card companies on each card transaction, and also will have to incur substantial additional costs relative to other merchants, since equipment needs to be installed and maintained in each and every vehicle and is subject to extraordinary wear and tear. No operator will make this commitment if it cannot recover the costs incurred.

- Even if the NTA or TA were to approve a general fare increase aimed at allowing operators to recover credit card costs and fees (much like an approved fuel surcharge), that action would miss the mark since the fee increase would fall on cash-paying customers as well as credit card users. It is entirely reasonable that the NTA and TA would find such a plan to be inequitable.
- The TA and NTA are entrusted with the mission of governing the Nevada taxicab and limousine industry in the public interest, and they have plenary authority to approve all amounts an operator charges to its passengers. The findings by these agencies in this area should be afforded substantial deference.
- Accepting credit cards will improve passenger convenience and safety, especially for the large majority of passengers who are business travelers or tourists. Credit card bills provide an automatic expense receipt for business travelers, and all passengers will have less need to carry cash. That will tend to make passengers less attractive targets of crime.
- Accepting credit cards will tend to reduce the number of robberies and violent crimes perpetrated against drivers, since they will carry smaller and smaller amounts of cash as payment by card becomes more prevalent in this traditionally cash-only business.
- Credit card company rules already allow a merchant to offer a discount for cash purchases--the mirror image equivalent of a surcharge. So there should be nothing objectionable to the credit card network in principle when a taxicab or limousine operator receives a slightly higher amount for accepting payment by credit card.
- Although the TA and NTA theoretically could achieve much of the same result as this legislation by structuring a cash-discount system or a voucher system (if not in violation of credit card rules), there is no good reason to require the public agencies to jump through these hoops. Practically speaking, it would be very difficult for the NTA or TA to establish a two-tier cash-discount fare system due to the complexity of the required in-taxi metering equipment. Similarly, it is not in the public interest to formalize the artificiality of a voucher system and the added cost of third-party fees that would come along with it.

AB 351 imposes a very narrow and very necessary exception to the enforcement of the private credit card company rules, which exception will be applicable to a single, highly-regulated industry whose merchants have no other way to recover the cost of accepting credit and debit cards. Customers will be fully protected from excessive fees, because the amount of any credit card transaction fee will need to be approved by the TA or NTA as being in the best interest of the traveling public. AB 351 is an important piece of legislation whose time has long since come.

Background on Card Transactions and the No-Surcharge Rule

A little background is helpful, given the complexity of the credit card industry. There are two distinct sides of a credit or debit card transaction--the cardholder side and the merchant side. On the cardholder side, an "issuing bank" issues the credit card to the cardholder. On the merchant side, an "acquiring bank" or its affiliate enters into an agreement with a merchant to enable the merchant to accept credit and debit cards. Under that agreement, the merchant pays fees to the

acquiring bank on each credit and debit card transaction. The two sides of the transaction are connected through a credit card network such as Visa or MasterCard.

AB 351 is directed only to the merchant side of the equation. We are not dealing at all with the issuer side of things where there is a myriad of state and federal regulation and messy questions of federal preemption. In short, there is no federal regulation or agency addressing the private no-surcharge rule, and there hasn't been any for over 25 years. Thus, it is fine that amended AB 351, which is limited to transactions taking place in Nevada, will apply to both out-of-state and in-state credit card companies alike. It is worth noting that the no-surcharge rule is under relentless antitrust attack from litigation by the Department of Justice and 18 state attorneys general, and also from ongoing private litigation by hundreds of retailers nationwide. These efforts have forced the credit card networks to abandon some of their other anti-competitive "merchant restraints." The no-surcharge rule is undoubtedly next, but that is beyond the scope of this discussion.

It suffices here to state that the primary effect of the no-surcharge rule is that cash customers are forced to subsidize credit card users, as merchants must raise the price that everyone pays to help recover the cost. This subsidy effect is heightened in the case of premium and rewards cards since the merchant pays much higher fees to the acquiring bank, but again cannot recover any transaction fee from the card-paying customer. Most of the merchant fee is passed through to the cardholder's issuing bank in what is called an "interchange fee." In 2009, approximately 62 billion dollars in interchange fees were paid by U.S. merchants, plus billions more in so-called "swipe fees" that are split between the acquiring banks and the credit card networks themselves. Close to half of all interchange fees go to funding the generous rewards programs offered by issuing banks to their best customers. To put this in perspective, the amount of the merchant fees paid in 2006 by U.S. merchants was larger than the entire biotech industry, music industry, microchip industry, electronic game industry, Hollywood box office sales, or worldwide venture capital investments.

In the general retail setting, some argue weakly that any merchant surcharge amounts to a "hidden fee" or some kind of "deception." I and many others would argue exactly the opposite--that it is the no-surcharge rule that amounts to a giant hidden fee to the public. In any event, in the unique circumstances of taxicab and limousine service, the "merchant" does not place price tags on goods, or advertise or otherwise compete on price like other retailers. In Nevada, the price is set by the TA and NTA, and passengers do not shop around--nor do they even know the price when they make their decision to "buy" by stepping into a taxicab. Further, the TA is requiring that the amount of the transaction fee be posted on the outside of the taxicab. Thus, there is no chance for a passenger to feel he or she is led to believe the price is one amount, only to get to the check-out counter and find the price is higher when paid by credit card. In other words, the primary public policy argument raised against surcharges generally is non-existent in the specific case of the taxicab industry in Nevada, and so the NTA and TA can rightly disregard any such concern in deciding whether to allow operators to charge a transaction fee.

There is no lack of support for the proposition that the private no-surcharge rule is both anti-competitive and anti-consumer protection. Banning the no-surcharge rule would stop credit card companies from forcing merchants to hide merchant fees from the consumer and would lower retail prices across the board. But, AB 351 does not seek to strike down the no-surcharge rule in Nevada. Instead, AB 351 simply allows the NTA and TA to make a very limited exception as a judgment within their core public function of regulating the amounts charged in taxicabs and limousines.