

**Date:** January 15, 1999.

**Summary Conclusion:** A provision of the New York State ATM Safety Act requiring “adequate lighting” is not preempted for federal savings associations. The lighting requirement is narrowly tailored to further a legitimate and vital state interest in the physical and personal safety of consumers using ATMs in the state, appears to have only an incidental effect on the ability of federal savings associations to provide financial services electronically or to protect their security and funds, and does not appear to be contrary to or in conflict with OTS’s Electronic Operations or Security Procedures rules.

**Subject:** Home Owners’ Loan Act/Savings Association Powers.



**Office of Thrift Supervision**  
Department of the Treasury

**P-99-2**

*Chief Counsel*

1700 G Street, N.W., Washington, DC 20552 • (202) 906-6251

January 15, 1999

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Re: New York State ATM Safety Act

Dear [ ]:

Thank you for your December 17, 1998 letter to [ ], in which you advised the Office of Thrift Supervision (“OTS”) that the New York State Banking Department is alleging that [ ] (the “Association”),<sup>1</sup> violated the New York State ATM Safety Act (the “Act”).<sup>2</sup> You further advise that a contested proceeding is scheduled between the Banking Department and the Association. The Banking Department alleges that the Association violated the requirement in § 75-c(2) of the Act to provide “adequate lighting” as defined in § 75.b(4) of the Act, at several of its automated teller machines (“ATMs”). Your letter and supporting materials, including the Association’s brief, indicate that the Association is asserting that the Act is preempted for federal savings associations. You have invited us to comment on the issue. In our view, the Act’s lighting requirement is not preempted for federal savings associations.

In its recently revised Electronic Operations rule, OTS authorized federal savings associations to use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an activity that is otherwise authorized for federal savings associations.<sup>3</sup> In the preamble

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<sup>1</sup> The Association is the surviving entity of a merger between it and [ ].

<sup>2</sup> Article II-AA of the New York State Banking Law.

<sup>3</sup> Electronic Operations, 63 Fed. Reg. 65,673, 65,682 (November 30, 1998) (promulgating 12 C.F.R. § 555.200).

to the Electronic Operations rule, OTS explained its approach to evaluating whether state laws pertaining to electronic operations are preempted. OTS's approach is consistent with its approach in other areas such as deposits and lending.<sup>4</sup> The preamble to the Electronic Operations rule points out that in these areas, "OTS has recognized that some types of state laws, under certain circumstances, generally will not be preempted."<sup>5</sup> Accordingly, "OTS will determine that a state law regulating electronic operations is not preempted if it furthers a vital state interest, and either has only an incidental effect on Federal savings associations' ability to provide financial services electronically or is not otherwise contrary to the purposes of OTS's rule."<sup>6</sup>

In its Security Procedures rule, OTS requires federal savings associations to designate a security officer and establish a security program with certain features.<sup>7</sup> The focus of this rule and the statute on which it is based,<sup>8</sup> is on protecting the security of federal savings associations and their funds. The security requirements in the Electronic Operations rule are also aimed at protecting the transactions and records of the Association, not the personal safety of consumers.<sup>9</sup>

In our view, the Act's lighting requirement is narrowly tailored to further a legitimate and vital state interest in the physical and personal safety of consumers using ATMs in the state. The lighting requirement would appear to have only an incidental effect on the ability of federal savings associations to provide financial services electronically or to protect their security and funds. The lighting requirement does not appear to be contrary to OTS's regulations, or to be in conflict with them. We, therefore, conclude that this provision of the Act is not preempted by federal law.

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<sup>4</sup> Id. at 65,681 (citing 12 C.F.R. §§ 557.13 and 560.2(c) (1998)).

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> 12 C.F.R. Part 568 (1998). OTS's Security Procedures rule requires federal savings associations to have a security program that includes, for example, a means of protecting cash and other liquid assets, tamper-resistant locks on exterior doors and windows, and an alarm system. 12 C.F.R. § 568.3 (1998).

<sup>8</sup> Section 3 of the Bank Protection Act of 1968, as amended, 12 U.S.C.A. § 1882 (West 1989).

<sup>9</sup> See 63 Fed. Reg. at 65,682-83 (promulgating 12 C.F.R. § 555.210).

OTS addresses specific provisions of state laws on a case-by-case basis as they are raised to the agency.<sup>10</sup> Accordingly, this opinion does not address any other provisions of the Act, since only alleged violations of the “adequate lighting” requirement are at issue in the proceeding.<sup>11</sup>

As you may know, OTS has plenary and exclusive jurisdiction to regulate the operations of federal savings associations, including the exclusive authority to take enforcement action.<sup>12</sup> Nevertheless, in this circumstance, where the specific requirement at issue does not directly involve a banking function, but rather lighting designed to ensure the physical safety of consumers in the state, OTS will not object to the Banking Department’s taking action to secure compliance.

We trust that this is responsive to your inquiry. Please feel free to contact Deborah Dakin, Deputy Chief Counsel, at (202) 906-6445, or me if you have any further questions.

Very truly yours,

  
Carolyn J. Brick  
Chief Counsel

cc: [ ]  
[ ]  
[ ]  
[ ], Regional Director  
[ ], Regional Counsel  
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<sup>10</sup> See id. at 65,681.

<sup>11</sup> This opinion also does not address the argument the Association makes in its brief that the lighting requirement is unconstitutionally vague.

<sup>12</sup> See OTS Mem. Chief Counsel (May 10, 1995) at 5 & n.19 (citing Conference of Federal Savings and Loan Associations v. Stein, 604 F.2d 1256 (9<sup>th</sup> Cir. 1979), aff’d mem., 445 U.S. 921 (1980)).