Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Interpretive Letter #821
March 1998
12 U.S. C. 36(J)6
SBJSVFA

February 17, 1998

Hon. John P. Burke
Banking Commissioner
State of Connecticut
Department of Banking
260 Constitution Plaza
Hartford, Connecticut 06103

Re: Connecticut General Statutes § 36a-158

Dear Mr. Burke:

It has come to our attention that your office recently wrote to Bank One, N.A., Columbus, Ohio ("the Bank") concerning a "satellite device"[1] that the Bank[2] has installed in a retail store in the Brass Mill Center Mall in Waterbury, Connecticut. You cited Connecticut General Statutes § 36a-158 ("section 36a-158"), which limits the ability of out-of-state banks to establish or use automated teller machines ("ATMs") in Connecticut, and requested the Bank to advise you of its legal authority to establish satellite devices in Connecticut. According to your letter, if the Bank is found to be in violation of state law, it could be subject to a cease and desist order, as well as civil penalties. This raises the issue of whether the provision of state law that you cited is applicable to the Bank's operation of ATMs in Connecticut.

For the reasons discussed below, it is our opinion that the Bank has not violated section 36a-158 because the Bank's ATM falls within an exception provided in the statute for out-of-state banks that are authorized by federal law to accept deposits in Connecticut. However, if Connecticut determines that the exception does not apply, we conclude that section 36a-158 is preempted by federal law and cannot be applied to the Bank.[3]

Discussion

[1] Under Connecticut law, a "satellite device" is an off-premises automated teller machine. Conn. Gen. Stat. Ann. § 36a-2(50) (West 1996).

[2] It is our understanding that this ATM is actually owned by Bank One Utah, N.A., an affiliate of the Bank.

[3] Our conclusion pertains solely to the application of section 36a-158 to ATMs operated by national banks.

A. The Bank's ATM Does Not Violate State Law

The National Bank Act authorizes national banks to receive deposits, make loans, and engage in other activities that are incidental to the business of banking. 12 U.S.C. § 24(Seventh). Since an ATM is an instrumentality for performing such functions, the establishment of ATMs by national banks is authorized by section 24(Seventh). The OCC has discussed this authority on a number of occasions.[4] Similarly, the OCC has consistently recognized the ability of national banks to perform authorized activities and functions via electronic means and facilities.[5]

Moreover, it is well settled that national banks may conduct business without geographic restrictions unless Congress provides otherwise. *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629 (7th Cir. 1995); *Independent Insurance Agents of America, Inc. v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993); *Shawmut Bank Connecticut v. Googins*, 965 F. Supp. 304 (D. Conn. 1997). As discussed below, Congress has not imposed any geographic restrictions on national bank ATMs. Similarly, there is no provision of federal law that gives states general authority to subject national bank activities to geographic or other restrictions. The establishment of branches is one of the few exceptions to this rule. But, while 12 U.S.C. § 36 incorporates certain state geographic restrictions on the establishment of national bank branches, the definition of a national bank "branch" is governed by federal law. *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969).

ATMs established by national banks were, until recently, considered to be branches and were subject to locational restrictions. However, in 1996, Congress expressly excluded ATMs from the definition of a "branch" under 12 U.S.C. § 36. Economic Growth and Regulatory Paperwork Reduction Act of 1996 ("EGRPRA"), Pub. L. No. 104-208, § 2205, 1996 U.S.C.C.A.N. (110 Stat.) 3009, 3009 [1188], *codified at* 12 U.S.C. § 36(j). The legislative history of EGRPRA makes clear that Congress specifically foresaw and desired that this change would lead to the removal of geographic restrictions on ATMs. The Senate Report on the legislation could hardly be more clear in its explanation: "[A]n 'ATM' or 'remote service unit' is not considered a 'branch' for purposes of federal bank branching laws and is therefore not subject to prior approval requirements or *geographic restrictions*." S. Rep. No. 185,

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[4] *See, e.g.*, OCC Interpretive Letter No. 789, [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-216 (June 27, 1997); OCC Interpretive Letter No. 772, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-136 (Mar. 6, 1997); OCC Interpretive Letter No. 705, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-020 (Oct. 25, 1995); letter of Robert B. Serino, Deputy Chief Counsel, Nov. 9, 1992 (unpublished).

[5] *See, e.g.*, OCC Interpretive Ruling 7.1019, 12 C.F.R. § 7.1019) ("A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver."). *See also* Letter of Frank Maguire, Acting Senior Deputy Comptroller for Corporate Policy & Economic Analysis, Oct. 16, 1992 (unpublished) (electronic check cashing facility authorized under section 24(Seventh)).

104th Cong., 2d Sess. 24 (1995) (emphasis added). Moreover, Congress rejected the House of Representatives' version of the legislation, which would have preserved existing geographic restrictions on ATMs and remote service units. *See* H. Rep. No. 193, 104th Cong., 2d Sess. 31 (1995).

As a result of EGRPRA, ATMs established by national banks, including those that accept deposits, are no longer branches under federal law and thus are not subject to state geographic restrictions on branches.[6] 12 U.S.C. § 36(j); OCC Interpretive Letter No. 772, *supra* note 4; *see Independent Bankers Ass'n of New York v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985), *cert. denied*, 476 U.S. 1186 (1986) (ATMs that are not "branches" under federal law are not subject to state geographic restrictions). This has brought national bank ATMs into harmony with ATMs (or "remote service units") of federal thrifts, which also are not branches and are not subject to geographic restrictions. 12 C.F.R. § 545.141.

This change has been beneficial to both the banking industry and consumers because it eliminates unnecessary regulatory burdens while enhancing customer access to banking facilities. As the court in *NBD Bank* noted, the ability to engage in transactions with customers on a widespread geographic basis "facilitate[s] commerce, increase[s] competition to the benefit of consumers, and help[s] banks diversify their portfolios (reducing the risk of failure)." 67 F.3d at 631.

The provision of Connecticut law under discussion provides as follows:

> (a) Except as provided in subsection (b) of this section, no out-of-state bank or out-of-state credit union may directly or indirectly establish or use an automated teller machine or point of sale terminal in this state. *This prohibition does not apply to an out-of-state bank* or out-of-state credit union *that is authorized under* the laws of this state or *federal law to accept deposits within this state*.

Conn. Gen. Stat. Ann. § 36a-158 (West 1996) (emphasis added).[7] Subsection (b) permits out-of-state banks to use (but not own) ATMs subject to certain restrictions including, *inter alia*, that deposits cannot be accepted unless the out-of-state bank or an affiliate of the bank is

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[6] I note that Connecticut likewise does not consider satellite devices, *i.e.*, off-premises ATMs, to be branches. Conn. Gen. Stat. Ann. § 36a-157 (West 1996).

[7] To properly understand the statute, a chain of definitions must be followed. Under Connecticut law, an "out-of-state bank" means any institution that engages in the business of banking, but does not include a "bank." A "bank" means a "Connecticut bank" or a "federal bank." A "Connecticut bank" means a "bank" or other enumerated types of financial institutions that are chartered and organized under the laws of Connecticut, while a "federal bank" means a national bank or federal thrift having its principal office in Connecticut. *See generally* Conn. Gen. Stat. Ann. § 36a-2 (West 1996). Thus, for purposes of section 36a-158, the Bank, which is a national bank with its principal office in Ohio, is an "out-of-state bank." As discussed earlier, *supra* note 1, under state law, ATMs include satellite devices.

authorized under state or federal law to accept deposits in Connecticut.

Your letter to the Bank appears to suggest that section 36a-158 precludes the Bank from establishing and operating ATMs in Connecticut. However, the Bank's establishment of ATMs in Connecticut pursuant to federal law is not necessarily inconsistent with state law. Section 36a-158 permits out-of-state banks to establish ATMs if they are "authorized under. . . federal law to accept deposits within this state." Since ATMs are instrumentalities that may be used to accept deposits, and national banks are authorized by federal law to establish them without geographic restrictions, federal law *does* authorize the Bank to accept deposits in Connecticut. Thus, it would appear that the statutory exception for federal law is applicable.

If this interpretation is not accepted, then the issue becomes whether there is a conflict between the Connecticut statute and the authority of national banks under federal law to establish ATMs, and whether section 36a-158 is preempted by federal law.

B. Federal Preemption

It is a fundamental principle of our Constitutional system that when the federal government acts within the sphere of authority conferred upon it by the Constitution, federal law is paramount over, and may preempt, state law. U.S. Const. art. VI, cl. 2; *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821) (Marshall, C.J.).

There are several ways in which federal preemption may arise. However, in the banking context, preemption usually involves a conflict between state and federal law. In a long line of cases, the Supreme Court has consistently held that state laws that conflict with federal law by preventing or impairing the ability of national banks to exercise powers granted to them under federal law are preempted. *See, e.g., Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896); *Farmers & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33-35 (1875); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982) (same principle applied to federal savings and loan associations). The Court has recently reiterated this message, noting that the history of the National Bank Act "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County v. Nelson*, 517 U.S. __, 134 L. Ed. 2d 237, 245 (1996) ("*Barnett*").

As discussed earlier, national banks are authorized under federal law, specifically 12 U.S.C. § 24(Seventh), to establish and operate ATMs. Since the passage of EGRPRA, this federal authority is no longer limited by state geographic restrictions formerly incorporated into 12 U.S.C. § 36. Where Congress has not expressly conditioned a national bank power upon a grant of state permission, ordinarily, no such condition applies. *Barnett*, 517 U.S. at __, 134 L. Ed. 2d at 246; *see Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954) (Court found "no indication" that Congress intended to make national banks subject to local

restrictions).

If the "authorized under federal law" exception is not applicable, then section 36a-158 purports to limit the federally authorized power to establish and operate ATMs to national banks that have a main office, or at least one branch, in Connecticut. Since the Bank does not satisfy these requirements, the state law would completely prevent the Bank's exercise of its power under 12 U.S.C. § 24(Seventh) to establish and operate ATMs in Connecticut. Section 36a-158 therefore conflicts with federal law, and consequently, in our opinion, it is preempted with respect to national banks.[8]

Conclusion

Section 36a-158 can be read in such a way that the Bank's satellite device or ATM, referenced in your letter, is consistent with state law. That is, since the Bank's ATM is authorized under federal law, the Bank is an out-of-state bank that is authorized by federal law to accept deposits in Connecticut, thus qualifying for the exception provided in paragraph (a) for such institutions. Alternatively, section 36a-158 directly conflicts with the authority of national banks under 12 U.S.C. § 24(Seventh) to establish ATMs without geographic restriction, and is therefore preempted by federal law with respect to national banks. Accordingly, the Connecticut statute may not be applied to prevent the Bank's establishment and operation of ATMs in Connecticut.

Sincerely,

/s/

Julie L. Williams
Chief Counsel

[8] Since the Connecticut statute is plainly and exclusively directed against institutions from other states, it would appear that it also violates the Commerce Clause of the Constitution, which limits the power of states to erect barriers against interstate trade. U.S. Const. art. I, § 8, cl. 3; *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). Since the statute is not authorized under any federal law that would shelter it from Commerce Clause scrutiny, such overtly discriminatory legislation is invalid under well-established Commerce Clause principles. *See generally* OCC Corp. Dec. 95-05, Part III-B, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 90,474 (March 8, 1995) (Bank Midwest Decision). By its action in EGRPRA of removing national bank ATMs from state geographic restrictions, Congress has made such restrictions subject to ordinary Commerce Clause analysis.