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Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

October 15, 2001

Interpretive Letter #939
July 2002
12 USC 24(7)

Dear **[ ]**:

This responds to your letter of June 28, 2001, on behalf of **[ ]** ("the Bank"). In your letter, you request confirmation by the Office of the Comptroller of the Currency of your view that federal law preempts the laws of Massachusetts and Florida that purport to restrict or prohibit a national bank from establishing deposit-taking ATMs.[1] For the reasons discussed below, we conclude that federal law would preempt those state laws.

BACKGROUND

The Bank is considering establishing deposit-taking ATMs in a number of states, including Massachusetts and Florida. The Bank has no branches or offices in either state, but contemplates installing unmanned, deposit-taking ATMs in publicly accessible areas of buildings at which certain of its affiliates have operations. The Bank's customers will be able to access their accounts through the Bank's ATMs or ATMs owned and operated by other financial institutions in the networks, and customers of these other financial institutions will be able to access their accounts through the Bank's ATMs.

The Massachusetts Statute

Under Massachusetts law, an out-of-state bank may establish an ATM only if the laws of the state in which it has its main office would permit a bank with its main office in Massachusetts to establish an ATM in that state:

> No [non-Massachusetts] financial institution . . .shall purchase, establish, install, operate, lease or use individually or with any financial institution or organization

[1] As explained below, the issue presented by the Bank's request is essentially identical to the issue addressed in *Bank One v. Guttau*, 190 F.3d 844 (8th Cir. 1999). For that reason, the publication and comment requirements of 12 U.S.C. § 43 are not applicable to the Bank's request. *See* 12 U.S.C. § 43(c)(1). The OCC provided an opportunity for regulators in the affected states to comment, however, and this letter therefore takes into account comments on the Bank's request the OCC received from the Florida Division of Banking and Finance and the Massachusetts Office of Consumer Affairs.

> or share with any financial institution or organization any such electronic branch in the commonwealth *unless the financial institution . . . has its main office in one of the states of the United States, and the laws of such state expressly authorize, under conditions no more restrictive than those imposed by this chapter as determined by the commissioner, financial institutions or organizations organized under the laws of the commonwealth to purchase, establish, install, operate, lease, use or share electronic branches in such other state*; provided, however, that any such financial institution . . . shall have applied to and obtained approval of the commissioner prior to engaging in any activity pursuant to this section.

Mass. Gen. Laws Ann. Ch. 167B, §§ 1 and 3 (West 2001) (emphasis added). The Massachusetts Division of Banks enforces this reciprocity statute by requiring an out-of-state bank to "submit a completed application, along with a copy of the relevant statute from the state in which it has its main office, and an affidavit signed by such bank's counsel affirming that such statute would authorize a bank which has its main office in Massachusetts to establish an electronic branch within that state." Massachusetts Division of Banks Opinion 96-161.

According to your letter, you have been advised by staff at the Massachusetts Division of Banks that the Division would enforce the application and reciprocity requirements against a national bank that has its home office outside Massachusetts. The Bank's home state of New Jersey prohibits out-of-state financial institutions from establishing ATMs in New Jersey. It has no reciprocity exception to this prohibition. Thus, if the Massachusetts statute applied to the Bank, the Bank would be prohibited from establishing an ATM in Massachusetts.

The Florida Statute

Florida's "remote financial service units" statute prohibits an out-of-state bank from establishing and operating a deposit-taking ATM in Florida:

> *Any bank which is not authorized to do business in [Florida] or does not have its principal office and place of business in [Florida] is prohibited from using in [Florida] any remote financial service unit or any associated system by which a remote financial service unit is operated.* However, any bank which is not authorized to do business in [Florida] or does not have its principal office and place of business in [Florida] may use in [Florida] any remote financial service unit or any associated system within [Florida] by which such a remote service unit is operated if . . . such bank does not take deposits, either directly or indirectly, from any source whatsoever by use of the remote financial service unit or associated system.

Fla. Stat. Ann. § 658.65 (West 2000) (emphasis added). Although the term "remote financial service unit" is not defined in the Florida statutes or regulations, staff at the Florida Banking Department have opined that the term includes an ATM. According to your letter, Department staff also interpret the phrase "authorized to do business" to mean, in the context of an out-of-state bank, a bank that has established a branch in

Florida pursuant to Florida's branching laws.[2] Thus, if applied to the Bank, the Florida law would prohibit the Bank from establishing deposit-taking ATMs in Florida unless the Bank first establishes a branch there.

ANALYSIS

Permissibility of the activity

The threshold question in any preemption analysis is whether the activities in question are permissible for a national bank under federal law. If they are not, then there is no preemption issue.

National banks are authorized to establish and operate ATMs.[3] The banking services provided through ATMs represent long-established banking activities: receiving deposits, disbursing cash from bank accounts, and extending credit in the form of cash advances. Each of these activities lies at the heart of national bank authority under 12 U.S.C. 24(Seventh), whether as part of the enumerated national bank power to receive deposits, as part of the authority to engage in the "business of banking," or as an activity incidental to permissible banking activity.[4] As the OCC has expressly reaffirmed in a recently adopted regulation, 12 C.F.R. § 7.4003,[5] the power to deploy and operate ATMs is implicit in the National Bank Act's authorization of national banks to receive deposits, make loans and carry on the "business of banking." ATMs and other electronic media simply represent a different means of exercising established banking powers. 12 C.F.R. § 7.1019.

Moreover, a national bank's authority to establish and operate ATMs is unaffected by the federal branching law. Congress has specifically directed that state law will apply, in certain respects, to a national bank's authority to branch interstate. The McFadden Act, as amended, provides that national banks may establish "branches" only to the extent that state law authorizes state banks to establish branches.[6] However, the McFadden Act, as revised, expressly excludes ATMs from the definition of "branch,"

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[2] In his letter responding to the OCC's request for Florida's comments on the Bank's preemption request, Richard T. Donelan, Jr., the Chief Counsel of the Florida Division of Banking and Finance, did not address this staff interpretation of the Florida statute. Mr. Donelan did, however, confirm that Florida "provides criminal penalties for the taking of deposits by financial institutions that are not authorized to do business in Florida. . . ."

[3] 12 C.F.R. § 7.4003.

[4] The powers clause of section 24(Seventh) provides that a national bank may "exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking . . . ." 12 U.S.C. § 24(Seventh). *See NationsBank v. Variable Annuity Life Ins. Corp.*, 513 U.S. 251 (1995) (the "business of banking" is not limited to the list of powers enumerated in section 24(Seventh)).

[5] 64 Fed. Reg. 60092 (Nov. 4, 1999).

[6] *See* 12 U.S.C. §§ 36(c)-(g).

thereby removing national bank ATMs from the reach of state-law-based restrictions.[7] Accordingly, § 7.4003 of the OCC's rules provides that an ATM is not a branch "and is not subject to state geographic or operational restrictions or licensing laws."

Based on this analysis, it is clear that the Bank's proposed activities through ATMs in Massachusetts and Florida are permissible under well-settled federal authority.

Preemptive effect of federal law

In our opinion, federal law preempts the Massachusetts and Florida statutes that purport to restrict or prohibit a national bank's authority to establish ATMs in those states, because the statutes conflict with federal law authorizing the Bank to engage in the activities in question and with the OCC's exclusive visitorial powers over national banks. These points are addressed in more detail below, following a brief summary of the law governing preemption and the OCC's visitorial powers.

Preemption and visitorial powers. 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.[8] Federal authority over national banks stems from several constitutional sources, including the Necessary and Proper Clause and the Commerce Clause of the United States Constitution.[9]

The United States Supreme Court has identified several bases for federal preemption of state law. First, Congress may expressly state that it intends to preempt state law.[10] Second, a federal statute may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[11] Third, the state law may conflict with a federal law.[12] In *Barnett Bank* v. *Nelson*,[13] the Supreme Court elaborated on this third test:

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[7] *See* Economic Growth and Regulatory Paperwork Reduction Act, Pub. L. No. 104-208, § 2205(a), 110 Stat. 3009-405 (Sept. 30, 1996); *see also Bank One, Utah v. Guttau*, 190 F.3d 844 (8th Cir. 1999), *cert. denied sub nom., Foster v. Bank One, Utah*, 120 S. Ct. 1718 (2000) (Iowa location, registration, and advertising restrictions on national bank ATMs preempted).

[8] U.S. Const. art. VI, cl. 2 (the Supremacy Clause); *Cohen* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821) (Marshall, C.J.).

[9] U.S. Const. art. I, § 8, cl.3, cl. 18; *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

[10] *E.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977).

[11] *Rice* v. *Norman Williams* Co., 458 U.S. 654, 659 (1982).

[12] *See, e.g., Franklin National Bank*, 347 U.S. 373 (1954); *Davis* v *Elmira Savings Bank*, 161 U.S. 275 (1896).

[13] 517 U.S. 25, 31 (1996).

> Federal law may be in "irreconcilable conflict" with state law. *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142-143 (1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

The Court in *Barnett* went on to state that --

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases [*i.e.*, national bank preemption cases] take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where ... doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[14]

A conflict between a state law and federal law need not be complete in order for federal law to have preemptive effect. Where a federal grant of authority is unrestricted, for example, state law that attempts to place limits on the scope and exercise of that authority will be preempted.[15] Thus, federal law preempts not only state laws that purport to prohibit a national bank from engaging in an activity permissible under federal law but also state laws that condition or confine the exercise by a national bank of its express or incidental powers. As the Court stated in *Barnett*,

> . . . where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the Federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done *by express language* in several other instances."[16]

Moreover, the preemption may arise because of a conflict between a state law and a federal regulation. As stated by the Supreme Court in *Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*[17]*:*

> Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are

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[14] *Barnett*, 517 U.S. at 33.

[15] *See, e.g.*, *New York Bankers Association, Inc.* v. *Levin*, 999 F. Supp. 716 (W.D.N.Y. 1998).

[16] *Barnett*, 517 U.S. at 34 (citations omitted; emphasis in original).

[17] 458 U.S. 141 (1982).

> subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. * * * A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive.

458 U.S. at 153-154 (citations omitted).

Congress vested the OCC with the authority to determine whether a national bank is engaging in permissible activities. Under 12 U.S.C. § 484 and other federal statutes,[18] the OCC has exclusive visitorial powers over national banks except as otherwise expressly provided by federal law.[19] These powers include the right to examine a bank, inspect a bank's books and records, regulate and supervise activities authorized or permitted pursuant to federal banking law, and enforce compliance with any applicable federal or state laws concerning those activities.[20]

Application of federal law to state statutes. If applied to the Bank, the state laws at issue would prohibit the Bank from establishing ATMs in Massachusetts and Florida, respectively. Given that the Bank's home state has no provision in its banking laws that would satisfy the Massachusetts reciprocity requirement, the laws of Massachusetts would, if applied to the Bank, preclude it from establishing ATMs in that state. Similarly, the Bank does not have its principal place of business in Florida and is not "authorized to do business" as the Florida Banking Department interprets that term. Thus, the Florida law would prohibit the Bank from establishing deposit-taking ATMs in that state.

In *Guttau*, the United States Court of Appeals for the Eighth Circuit considered similar state restrictions imposed in Iowa on a national bank's authority to deploy and operate ATMs. In that case, a national bank operated several ATMs in Iowa but maintained no branches in that state and sought to enjoin the enforcement of Iowa's ATM restrictions. Iowa prohibited the operation of an ATM by any bank without an office in Iowa, required ATM operators to apply for state approval, and prohibited the display of financial institution advertising upon ATM terminals. The Court of Appeals held that the Iowa restrictions were preempted by the National Bank Act:

> Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa [law] that would prevent or

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[18] S*ee, e.g.*, 12 U.S.C. §§ 93, 481, and 1818.

[19] *Guthrie* v. *Harkness*, 199 U.S. 148 (1905); *Bank One Texas, N.A.* v. *Patterson, No.* 3:93-CV-1081-G (N.D. Tex. Sept. 9, 1994), *aff'd* 68 F.3d 469 (5th Cir. 1995).

[20] 12 C.F.R. § 7.4000(a)(2). *See also First National Bank of Youngstown* v. *Hughes*, 6 F. 737, 740-41 (1881).

> significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.[21]

Like the state laws at issue in *Guttau*, the Massachusetts and Florida laws in question here would prohibit the Bank's exercise of its permissible federal powers. For this reason, it is our opinion that the state laws are preempted by federal law.[22]

Nor would the Massachusetts or Florida statutes at issue be immune from preemption under the Electronic Funds Transfer Act[23] ("EFTA"). The EFTA allows states to retain control over electronic transfers:

> This subchapter does not annul, alter, or affect the laws of any State relating to electronic funds transfers, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.[24]

However, as explained by the court in *Guttau*,

> this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks. State regulation of national banks is proper where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 116 S. Ct. at 1109. Congress has made clear in the [National Bank Act] its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that

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[21] *Id*. at 850; s*ee also Metrobank, N.A., et al. v. Foster*, No. 4-01-CV-10226, order at 12, n.7 (S.D. Iowa Aug. 21, 2001) (*Guttau* persuasive in determining that it is appropriate for the District Court to address similar question of whether Iowa prohibition on ATM fees is preempted).

[22] *See Barnett*, 517 U.S. at 34; 12 C.F.R. § 7.4003. Even if the Bank were able to satisfy the requirements imposed by Massachusetts and Florida, the barriers to entry presented by these states' laws would constitute an impermissible exercise of visitorial powers over the Bank. As explained above, Congress intended to permit national banks to receive deposits and to have "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24(Seventh). Federal regulations expressly interpret this grant to include the authority to use ATMs. 12 C.F.R. § 7.4003. Massachusetts provides that an out-of-state bank, including a national bank, must "have applied to and obtained approval of the commissioner prior to" establishing an ATM. Similarly, the Florida statute requires an out-of-state bank, including a national bank, to become "authorized" by the Banking Department before establishing a deposit-taking ATM in Florida. A state requirement that a national bank obtain state approval or license to exercise a power authorized under Federal law is an assertion by the state that it has supervisory or regulatory authority over national banks. This is in direct conflict with the Federal law providing that the OCC has exclusive visitorial powers over national banks except as otherwise provided by Federal law. 12 U.S.C. § 484; 12 C.F.R. § 7.4000. A state law that purports to vest this authority in a state is preempted.

[23] 15 U.S.C. §§ 1693-1693r.

[24] 15 U.S.C. § 1693q.

would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.[25]

Thus, the preemption analysis articulated above is unaffected by a state's EFTA.

CONCLUSION

Because ATMs are not branches under 12 U.S.C. § 36(j), state law geographic restrictions are inapplicable to ATMs. Congress has placed no other restrictions upon ATMs in the National Bank Act, and, therefore, a state may not prevent, restrict, or condition a national bank's authority to establish ATMs. Accordingly, we conclude that the Massachusetts reciprocity statute and the Florida prohibition on the establishment of deposit-taking ATMs by out-of-state banks are preempted by federal law.

Sincerely,

-signed-

Julie. L. Williams
First Senior Deputy Comptroller and Chief Counsel

cc: Richard T. Donelan, Jr.
Chief Banking Counsel
Office of Comptroller
Florida Department of Banking and Finance

Thomas J. Curry
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[25] *Guttau*, 190 F. 3d at 850.