Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

June 27, 1997

Interpretive Letter #789
July 1997
12 U.S.C. 36J(6)
SBJSVFB

Mr. Richard Fulkerson

State Bank Commissioner
1560 Broadway, Suite 1175
Denver, Colorado 80202

Dear Mr. Fulkerson:

We recently became aware that on January 23, 1997, you wrote to [ ], Vice President and Senior Counsel, [*bank holding co.*], requesting that [ ] ("the Bank"), remove its name and logo from Bank-owned, off-site automated teller machines ("ATMs") that it operates in Colorado. You took the position that this was necessary to comply with Colorado State Banking Board Rule EFT-2, which implements a provision of Colorado's Bank Electronic Funds Act ("EFT Act"), Article 6.5 of Title 11, Colorado Revised Statutes. For the reasons set forth below, we conclude that portions of the EFT Act discussed herein are preempted by federal law and therefore cannot be applied to ATMs established by national banks.

Discussion

A. Statutory Framework

Relevant portions of the EFT Act provide as follows:

> (1)(a) Effective January 1, 1978, a Colorado bank may engage in banking transactions with its account holders through a communications facility and may own, establish, control, or use a communications facility under the authority of this article only if all of the following conditions are met:
>
> . . .
>
> (III) Each Colorado bank using a communications facility receives equal prominence in visual or oral data available to the public at or adjacent to the communications facility, and no advertising with regard to a communications facility used by a Colorado bank or its account holders suggests, implies, or claims exclusive control or use of such facility by any bank or its account holders.

> (IV) The communications facility and its operation meet all reasonable standards of privacy, communications integrity, and financial safety as may be imposed by rule, regulation, or order of the board . . . .
>
> (V) The board has received at least thirty days' advance written notice of any Colorado bank's intended use or establishment of a communications facility.
>
> (VI) The use of the communications facility has not been halted, prevented, or terminated by order of the board.
>
> (b) The provisions of subparagraphs (I) to (III) of paragraph (a) of this subsection (1) shall not apply to a communications facility located on the premises of a Colorado bank or its detached facility . . . .
>
> (2) The advance notice required by subparagraph (V) . . . shall contain a schedule of all charges and standards as required by subparagraph (II) . . . . In addition, the board shall receive at least thirty days' written advance notice of any proposed changes in any established schedule of charges. The board shall not have the power to review, approve, or disapprove standards or charges, except in connection with a hearing and decision in a dispute arising out of a complaint brought . . . by a Colorado bank user or potential user.

Colo. Rev. Stat. § 11-6.5-104 (1987).[1]

The EFT Act was enacted in 1977 in response to the decision in *Colorado v. First National Bank of Fort Collins*, 540 F.2d 497 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977), which held that ATMs were "branches" for purposes of the federal McFadden Act, 12 U.S.C. § 36. The State Board of Banking had previously determined that ATMs also were "branches" for purposes of state law. *Id.* at 498. At that time, Colorado did not permit any branching by state banks, except for the "detached facilities" referred to above. *Id.*; Colo. Rev. Stat. § 11-6-101(1) (1973). Since the McFadden Act limits branches of national banks to locations that are permissible within a state for state bank branches under state law, the result of these decisions was that the EFT Act was necessary to enable both state and national banks in Colorado to establish ATMs.

As noted above, the EFT Act requires bank operators of ATMs to comply with several conditions. Since ATMs were branches for purposes of federal law, these conditions were assumed to apply to ATMs established by national banks in Colorado. *See First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Among these conditions are the

---

[1] "Colorado bank" is defined as "any state bank or any national banking association having its principal office in this state," and an ATM would fit the statutory definition of a "communications facility." Colo. Rev. Stat. § 11-6.5-103 (1987). A "detached facility" under Colorado law is a staffed facility, offering limited services, that is located within 3000 feet of a bank's main office. *Id.* § 11-6-101(1) (Cum. Supp. 1995).

signage and advertising restrictions set forth in condition (III). However, an exception to this condition can be made under certain circumstances. You have taken the position that since an ATM fits the state statutory definition of a "branch,"[2] a Colorado bank may apply to your office, in the case of state banks, or the OCC, in the case of national banks, to have an unattended ATM designated as a branch. If such approval is obtained, and provided that the ATM is at a branch-permissible location, you will consider the ATM to be an on-premises facility that qualifies for the exemption from conditions (I) - (III) contained in paragraph (1)(b), *supra*.[3]

This interpretation was, perhaps, largely academic until recently, because intrastate branching in Colorado was severely restricted, and few ATMs of either state or national banks could qualify. However, unlimited statewide branching became effective on January 1 of this year. Colo. Rev. Stat. § 11-25-103(8)(b) (Cum. Supp. 1995). As a result, it appears that all Colorado ATMs now could qualify for this exception. Nevertheless, recent federal legislation apparently has caused you to conclude that this exception is not available to national banks.

Although 12 U.S.C. § 36 incorporates certain state restrictions on establishment of bank branches, as discussed above, the definition of a national bank branch is governed by federal law. *First National Bank in Plant City v. Dickinson,* 396 U.S. 122 (1969). Legislation enacted by Congress last year exempted 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). As a result, ATMs established by national banks are no longer subject to licensing requirements or

---

[2] A "branch" is defined as "any branch bank, branch office, branch agency, additional office, or any branch place of business of a financial institution located in this state at which deposits are received, or checks paid, or money lent, or trust powers exercised." Colo. Rev. Stat. § 11-25-102(2) (Cum. Supp. 1995).

[3] Conditions (I) and (II) require that:

> (I) The communications facility is available to any Colorado bank for the use of its account holders.
>
> (II) Any Colorado bank whose account holders use the communications facility shall first have agreed with the person having control of the communications facility to meet necessary and reasonable technical standards and to pay charges for the use thereof; except that such standards and charges shall be fair, equitable, and nondiscriminatory among Colorado banks and such charges shall not exceed an equitable proportion of . . . the costs of establishing the communications facility . . . .

Although the on-premises exception applies to conditions (I) - (III), this opinion does not address conditions (I) or (II). Condition (I) may be moot for practical purposes, since the vast majority of banks are now members of ATM networks, and most bank-owned ATMs are available to customers of other banks in any event. We also do not address condition (II), since no national banks have raised it as an issue.

geographic restrictions. OCC Interpretive Letter No. 772, [Current] Fed. Banking L. Rep. (CCH) ¶ 81-136 (March 6, 1997).[4]

You have concluded that, because the OCC can no longer designate national bank ATMs as branches under *federal* law, your office cannot consider them to be branches under *state* law for purposes of the exemption in the EFT Act.[5] Since state bank ATMs may continue to be designated as "branches" for purposes of state law, the practical result is that, although there has been no change in the way national bank ATMs are being operated, the identification and advertising restrictions of condition (III) now apply *only* to unattended ATMs that are owned or rented by national banks. This series of events gives rise to questions of federal preemption.

B. Principles of Federal Preemption

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. This doctrine of federal preemption arises from the Constitution's supremacy clause, which provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, "[t]he constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void." *Cohen v. Virginia,* 19 U.S. (6 Wheat.) 264, 414 (1821) (Marshall, C.J.).

There are several ways in which federal preemption may arise. At times, Congress may expressly declare an intent to preempt state law. *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977). More often, Congressional intent must be inferred from a federal statute's structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973). For instance, a court may conclude that a scheme of federal regulation is so pervasive, or the federal interest in the subject is so dominant, that Congress intended to occupy the field and leave no room for state legislation. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947).

Preemption may also occur when state law is found to be in "irreconcilable conflict" with federal law. *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta,* 458 U.S. 141 (1982). Such a

---

[4] Section 2205 of EGRPRA also amended section 3(o) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(o), to exempt ATMs from the definition of "domestic branch." Accordingly, ATMs of state, nonmember banks no longer require approval as branches by the FDIC. The effect of this amendment on state branching laws is unclear.

[5] National banks are unable to obtain the regulatory branch certification required for the on-premises exemption due to the change in federal law. But for this requirement, national bank ATMs would be eligible for this exemption since, as you have concluded, state law defines "branches" in such a way that ATMs are included. Under these circumstances, it is arguable that national bank ATMs could still be considered to be branches for purposes of the state EFT Act, or that the exemption should apply to facilities that would be branches if they were operated by state banks.

conflict can occur when compliance with both state and federal statutes is a physical impossibility. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963). However, a conflict can also exist when a state law merely "stands 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). *See generally, Barnett Bank of Marion County v. Nelson,* 517 U.S. __, 116 S. Ct. 1103 (1996); *Fidelity Federal Savings & Loan Ass'n v. De la Cuesta,* 458 U.S. 141 (1982) (reviewing preemption doctrine).

The relationship of state law to national banks has been a recurring issue throughout the history of the national banking system. It is obvious that Congress has not occupied the field of banking so as to preclude state legislation, because the United States has a dual state-federal banking system. Although there are times when Congress expressly preempts state law, *e.g.,* 12 U.S.C. § 1842(d)(1) (interstate acquisitions by bank holding companies), they are the exception. In the banking context, preemption usually involves a conflict between state and federal law.

For more than 125 years, the Supreme Court has consistently held that state law may not impair the ability of national banks to exercise powers granted to them under Federal law. In one of the earliest national bank cases, *First National Bank of Louisville v. Kentucky,* 76 U.S. (9 Wall.) 353 (1870), the Court was asked to decide whether a state statute imposing a tax on shares of bank stock applied to the stock of national banks. Explaining the relationship between national banks and state law, the Court declared that national banks are not wholly withdrawn from the operation of state law, but "are only exempted from State legislation so far as that legislation may *interfere* with or *impair* their efficiency in performing the functions by which they are designed to serve that government." *Id.* at 361-62 (emphasis added). Finding that the tax did not hinder the bank in performing its duties, the Court held that the state statute was not preempted.

The Court reiterated this principle a few years later:

> We have more than once held in this court that the national banks organized under the Acts of Congress are subject to state legislation, except where such legislation is in *conflict* with an Act of Congress, or where it tends to *impair* the utility of such banks as instrumentalities of the United States, or *interferes* with the purposes of their creation.

Waite v. Dowley, 94 U.S. 527, 533 (1877) (emphasis added). Again the Court declined to preempt, finding no conflict with federal law.

In 1896, the Court made one of the most well-known statements concerning the status of national banks and the supremacy of federal law. The issue before the Court was whether a state law giving preference to savings banks that were depositors in insolvent banks applied to insolvent national banks. In finding that the law was preempted because it conflicted with the National Bank Act's requirement that claimants of insolvent national banks be treated equally, the Court held:

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties, or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly *conflicts* with the laws of the United States, and either *frustrates* the purpose of the national legislation, or *impairs* the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sustained by the repeated adjudications of this court.

Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896) (emphasis added). The Court repeated this language in several subsequent cases. *McClellan v. Chipman*, 164 U.S. 347, 357 (1896) (state law prohibiting conveyance of real estate prior to insolvency not preempted); *Owensboro National Bank v. Owensboro,* 173 U.S. 664, 667-68 (1899) (state tax on national banks preempted); *Easton v. Iowa,* 188 U.S. 220, 238 (1903) (state law prohibiting insolvent national banks from receiving deposits preempted); *First National Bank of San Jose v. California*, 262 U.S. 366, 369 (1923) (state escheat law preempted).

Davis v. Elmira Savings Bank also recognized that one way in which the purposes of the National Bank Act could be frustrated, and the efficiency of national banks impaired, would be if state law had a disparate or discriminatory effect on national banks. Thus, the Court observed that it was recognized that national banks are subject to "general and undiscriminating" state laws that do not conflict with federal law. 161 U.S. at 290. *Accord, First National Bank of Bay City v. Fellows,* 244 U.S. 416, 426 (1917). In finding a state escheat law not to be preempted, the Court noted that "national banks are subject to state laws unless those laws *infringe* the national banking laws or impose an undue *burden* on the performance of the banks' functions." *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944) (emphasis added). Most recently, in *Barnett Bank of Marion County v. Nelson,* the Court used similar language, noting that both enumerated and incidental powers of national banks ordinarily preempt contrary state law, but that state law may apply as long as it does not *prevent* or significantly *interfere* with a national bank's exercise of its powers.[6] 517 U.S. at __, 116 S.Ct. at 1108-09 (emphasis added). *See also Atherton v. Federal Deposit Insurance Corp.*, __ U.S. __, 136 L. Ed. 2d 656 (1997) (citing cases in which state law was held to apply to national banks).

In reviewing these decisions, a recurrent theme is apparent. The Court has repeatedly used words and phrases such as "impair," "interfere with," "conflict with," "frustrate," "infringe," and "burden" to describe the effect of state laws that it has found to be preempted with respect to national banks. The lesson to be derived is that state laws apply to national banks only if they do not conflict with federal law, which includes impairing or interfering with the powers granted to national banks by federal law. At times, the Court has used the opposite wording, that is, state

---

[6] In *Barnett,* the Court found that a state statute prohibiting certain financial institutions from acting as insurance agents was preempted by 12 U.S.C. § 92, which permits any national bank located in a place of less than 5,000 population to engage in this activity.

laws apply to national banks unless they impair or interfere with the exercise of the banks' powers. However, it is clear that these two formulations are like two sides of the same coin, and say the same thing.

C. Application of Preemption Principles to the EFT Act

National banks have the power to receive deposits, make loans, and engage in other activities that are incidental to the business of banking pursuant to the National Bank Act, 12 U.S.C. § 24(Seventh). Since an ATM is an instrumentality for performing these functions, the establishment of ATMs by national banks is authorized by section 24(Seventh). *Oklahoma v. Bank of Oklahoma*, 409 F. Supp. 71 (N.D. Okla. 1975); OCC Interpretive Letter No. 772, *supra*.

Where Congress has not expressly conditioned a national bank power upon a grant of state permission, ordinarily, no such condition applies. State statutes that limit a national bank power conflict with federal law even if the federal law does not impose a requirement, but merely provides authority to act. *Barnett Bank of Marion County v. Nelson*, 517 U.S. at __, 116 S. Ct. at 1109; *Franklin National Bank v. New York*, 347 U.S. 373 (1954) (federal statute permitting, but not requiring, national banks to accept savings deposits); *see Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982) (same principle, applied to federal thrift institutions). That is the type of situation that exists here. Federal law does not require national banks to establish ATMs, but it does provide authority to do so if a bank chooses to exercise it. Nevertheless, the EFT Act attempts to condition the right of national banks to exercise this power upon compliance with state-imposed requirements.

In particular, condition (III) of the EFT Act permits a bank to display its own name as long as the names of all other banks whose customers may use the ATM are displayed with "equal prominence." However, this is not a feasible option due to the number of banks that would have to be listed. Thus, as a practical matter, and as your letter to Mr. Smith recognized, the law requires a national bank to remove its name or logo from its own off-premises ATMs. This prohibition of a very basic type of advertising is, in our opinion, a significant burden on a national bank's right to engage in the business of banking by means of an ATM, as authorized by the National Bank Act.

Condition (III) of the EFT Act is, in fact, exactly the type of state restriction that the Supreme Court, over 40 years ago, held to be preempted by the powers of national banks under the National Bank Act. In the *Franklin National Bank* case, the Court recognized that the ability to advertise was an incidental power of national banks and held that a state statute could not prohibit national banks from using the word "savings" in their advertising:

> Modern competition for business finds advertising one of the most usual and useful of weapons. . . . It would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it.

347 U.S. at 377-78. Accordingly, the OCC has considered state restrictions on the display of national banks' names in the past, and found them to be preempted. Letter of Eric Thompson, Director, Bank Activities and Structure Division, May 3, 1995 (unpublished).

Conditions (IV), (V), and (VI) of the EFT Act give the State Banking Board power to impose rules, regulations, or orders governing the operation of ATMs, require any Colorado bank to give advance notice of any intended use or establishment of an ATM and gives state regulators, at least by implication, the ability to "halt, prevent, or terminate" the use of an ATM by any Colorado bank. However, facilities of national banks are not subject to state approval. It has been recognized from the earliest days of the national banking system that states may exercise authority over national banks only to the extent that Congress permits. *Farmers' & Mechanics' National Bank v. Dearing*, 91 U.S. 29 (1875). *Accord, Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

These conditions appear to give the State visitorial[7] powers over national banks, at least with respect to ATMs. However, the OCC is the regulator of national banks and, unless otherwise expressly provided by federal law, has the sole visitorial and enforcement authority over them. OCC Interpretive Ruling 7.4000, 12 C.F.R. § 7.4000; *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). *See also* 12 U.S.C. §§ 93, 1818. Under federal law, states have no visitorial power over national banks, with a very limited exception relating to state escheat laws:

> (a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice [or Congress].
>
> (b) Notwithstanding subsection (a) . . . lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

12 U.S.C. § 484.

Conclusion

Applying the standards developed by the Supreme Court over the years, the EFT Act "interferes with" the Bank's exercise of its powers, *Waite v. Dowley, supra;* "infringes" upon the national banking laws, *Anderson National Bank v. Luckett, supra;* and "impairs the efficiency" of the

---

[7] "Visitation" is not limited to inspection of books and records, but includes any act of a superintending official to "inspect, regulate, or control the operations of a bank to enforce the bank's observance of the law." *First National Bank of Youngstown v. Hughes,* 6 F. 737, 740-41 (6th Cir. 1881), *appeal dismissed,* 106 U.S. 523 (1883).

Bank's functions that are authorized by 12 U.S.C. § 24(Seventh), *Davis v. Elmira Savings Bank*, *supra*. Therefore, in our opinion, the portions of the EFT Act discussed in this letter are preempted by federal law and cannot be applied to ATMs established by national banks.[8]

Sincerely,

/s/

Julie L. Williams
Chief Counsel

[8] However, the OCC would not object if national banks wish to voluntarily file the notification provided for in condition (V).