

August 7, 1997

Via Fax and US Mail

Bank

Re: WV Law on ATMs and POS Terminals

Dear Ms. :

I am writing in regards to your inquiry on West Virginia law affecting the establishment of automated teller machines (ATMs) and point of sale (POS) terminals in this state, and in particular the details of what constitutes "operation" of an ATM by a bank.

As amended, W. Va. Code § 31A-8-12b permits non-bank companies to own and operate POS terminals in West Virginia. The law did not change the requirement, though, that only banks or credit unions may "*operate*" ATMs or Automatic Loan Machines (ALMs). Please note that cash dispensing machines accessing bank accounts are viewed as ATMs by this Division. Originally the law required the bank to be located in West Virginia. This section was recently changed for purposes of parity to allow out-of-state state banks not having branches in this state to place and operate ATMs to the same extent provided by applicable federal law to national banks. This amendment took effect on June 9, 1997.

As you may be aware, based on a change in federal law exempting ATMs from the definition of a branch for a national bank, an interpretive letter has been issued by the OCC (Interpretive Letter No. 772, issued March 6, 1997). This letter asserts that national bank ATM terminals are no longer subject to geographical restrictions. However, since no court has yet to rule on the matter, it remains unclear whether the change actually preempts state law. So long as Bank limits its operations to cash dispensing ATMs, takes no deposits through the devices, nor uses the terminals as an ALM, this office is presently willing to assume the OCC's claim of federal preemption for cash dispensing ATM functions will be upheld. Contrary future court rulings could, though, result in Bank having to make alternative arrangements.

In this regard therefore, it must be noted that if the federal preemption claim is challenged and denied by the courts, this office has not by its present policy precluded any of its rights to later enforce applicable state laws restricting the operation of ATMs. Further, to the extent that Bank violates the conditions of this letter, this office reserves the right to bring action and challenge any claimed preemption. Lastly, the bank needs to be aware that this letter cannot bind others nor prevent them from bringing action challenging the preemption.

To prevent non-banks from operating a POS terminal as a cash dispensing ATM please note that subsection (e) to W. Va. Code § 31A-8-12b requires that the primary purpose of the POS terminal be to transfer funds incident to a sale, and that subsection (f), as amended, prohibits such terminals from being used to engage in the business of banking. The latter subsection further provides that the distribution of \$50 or more in cash in excess of the sale through a POS will be presumed to constitute engaging in the business of banking.

Under the amended language, persons other than a bank or credit union may own or lease an ATM terminal. However, a bank or credit union must be responsible for operating the ATM. The position of the Commissioner is that the term **“operate”** as used in W. Va. Code § 31A-8-12b(d) **means that: (i) the bank or credit union must be responsible for oversight of the ATM’s operation; (ii) the ATM must clearly display the name of the responsible depository institution; and (iii) the institution must treat the ATM as its own for purposes of its customers’ transactions, i.e., no fees not otherwise assessed its customers for use of the institution’s leased or owned ATM terminals may be levied.** The statute clearly requires that “[a]ll transactions initiated through a customer bank communication terminal shall be subject to verification by the banking institution.” Although the bank or credit union may out-source servicing and transaction processing of the ATM to third parties, it is ultimately the responsibility of the bank or credit union operating the terminal to ensure the proper functioning of the terminal and its transactions, and to resolve user complaints or errors.

So that we may keep track of the location and operator of ATMs in this state, please provide this office with notice of the address of all locations in West Virginia at which Bank places its ATM terminals. In addition, please provide us with the name, telephone and address of the proper bank official to whom we may refer questions or complaints regarding the terminals.

Page 3

Enclosed for your review is a copy of W. Va. Code § 31A-8-12b as amended, together with the rules pertaining to the mandatory sharing of off-site customer bank communication terminals. If you have any questions, please contact me.

Sincerely,

Timothy C. Winslow  
General Counsel

Enclosure