INTERPRETIVE LETTER 10-03 (JULY 1, 2010)

BRANDING AGREEMENTS ARE PERMISSIBLE FOR STATE-CHARTERED BANKS FOR THE PURPOSE OF ADVERTISING ON NON-BANK OWNED ATMS.[1]

This is a response addressing the contract and advertising restrictions stated under the Illinois Banking Act and the Electronic Funds Transfer Act ("EFT Act"). For the reasons discussed below, it is the opinion of the Illinois Department of Financial and Professional Regulation – Division of Banking ("Division") that branding agreements[2] may be utilized to the extent discussed below.

INTRODUCTION

Illinois state-chartered banks are allowed to enter into and contract for advertising services in limited circumstances. The Illinois Banking Act (Act), 205 ILCS 5/1 *et seq*., grants powers to state-chartered banks, establishes permitted activities and investments, and establishes related limits. In interpreting the Act, the Division has found certain activities permissible when they are incidental to "general banking business."[3] An activity is incidental if "it is convenient or useful in connection with the performance of one of the Bank's established activities." The Division finds the ability to enter into a contract for the purpose of securing advertising services, including "branding agreements," is an activity incidental to the business of banking and is permissible, subject to all applicable laws.

Despite the permissibility of such action, the use of "branding agreements" may cause unintended consequences for state-chartered banks. Specifically, the use of "branding agreements" may cause confusion for customers and non-customers of a state-chartered bank.[4] Therefore, state-chartered banks must implement proper notice mechanisms to assure customers who use a branded terminal are doing so without expectation of the service and warranties they have grown accustomed. Signage indicating the ATM is not serviced or maintained by the bank must be clearly posted and in a conspicuous manner.

Moreover, a state-chartered bank who is a party to a "branding agreement" limits the ATM services it would otherwise be authorized to offer. The EFT Act prohibits the acceptance of deposits at ATM terminals not established or owned by a "financial institution" or an affiliate of a "financial institution."[5]

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[1] This response is meant solely as a general overview of the applicable law and should not be relied upon as legal advice or counsel.

[2] A "branding agreement" is an agreement between two parties whereby the parties agree to work together and cooperate to promote or sell an entity, product, or service.

[3] *See* Division Interpretive Letter No. 92-5 (May 14, 1992); Division Interpretive Letter No.96-6 (October 3, 1996); Division Interpretive Letter 92-16 (October 26, 1992); Division Interpretive Letter 86-2 (October 24, 1986)

[4] The Division has issued similar mandate when the use of a bank name may confuse customers. *See* Division Interpretive Letter 94-003 (March 14, 1994).

[5] *See* 205 ILCS 616/30 (B) states in part, "A person other than a financial institution or an affiliate of a financial institution may establish or own, in whole or in part, a cash-dispensing terminal…provided the terminal does not accept deposits of funds to an account…"

For purposes of the EFT Act, a "financial institution" means a bank, savings and loan or saving bank, or a credit union established under the laws of the United States, the State of Illinois, or any other state.[6] An "affiliate" means a person or entity that controls or is controlled by the financial institution.[7] Thus, a state-chartered bank having contracted with a third party to place the bank's name on an ATM terminal has not "established" it for purposes of the act, because to do so would require the bank to control the third-party establishing it, directly, or indirectly.[8] Absent control, the acceptance of deposits is prohibited at ATM's established by non-bank entities.[9]

IS A BRANDING AGREEMENT PERMISSIBLE UNDER ILLINOIS LAW?

The authority for state-chartered banks to establish and maintain ATMs is found in Section 5(17) of the Act, which incorporates by reference the Electronic Fund Transfer Act (EFT Act), 205 ILCS 616/1 et seq. The EFT Act establishes the technical and non-technical parameters necessary to "enable electronic fund transfer communications networks and financial institutions to meet the needs of commerce in a competitive environment and to provide reliable communications services."[10] The EFT Act does not specifically address whether an ATM can be subject to a "branding agreement."[11] Similarly, the EFT Act does not address the use and placement of a state-chartered bank's name and logo on a non-bank ATM. The EFT Act only prohibits any form of "proprietary advertising of products and services not offered at the terminal."[12] What constitutes a proprietary product or service is not defined. However, the Division views a "proprietary advertising product and service" as being synonymous with the definition of "alternate media" discussed and adopted by the Office of the Comptroller of the Currency (OCC) Interpretive Letter No. 718 (March 14, 1996).[13] Because the OCC's definition does not include a bank name and logo, and they are not products or services, they may be placed on a non-bank owned ATM terminal per agreement.[14]

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[6] *See* 205 ILCS 616/10 (West 2010). For purposes of the instant correspondence, the term "financial institution" when used will refer to State of Illinois chartered commercial banks, collectively "banks."

[7] Id.

[8] Compare to Division Interpretive Letter 85-4 (April 26, 1985) "…the bank in question could not be deemed to have established the ATMs in question because the bank does not own or lease the ATMs."

[9] A note on customer usage surcharges. Surcharges may be levied on customers for use of an ATM. Surcharges are authorized by 205 ILCS 616/50 (e) and (j).

[10] *See* 205 ILCS 616/5 (b) (Thomas Reuters 2010).

[11] Pursuant to 205 ILCS 616/55 (Thomas Reuters 2010), State of Illinois financial institutions must comply with the requirements of 15 U.S.C. 1693 *et seq*. Consequently, issuers of ATM's must also adhere to the requirements of Regulation E [12 C.F.R. § 205, *et seq*.] – the federal regulation implementing 15 U.S.C. 1693 *et seq*. Federal statute and federal regulation do not address "branding agreements."

[12] See 205 ILCS 616/50 (B).

[13] "…the term alternate media include[s] any medium of value, receipt or document that is no coin or currency [such as] (1) public transportation tickets, (2) event an attraction tickets, (3) gift certificates, (4) prepaid phone cards, and (5) similar forms of alternate media such as promotional and advertising materials, electronic benefits transfer ("EBT") script, and credit and debit cards…that the Banks may…dispense."

[14] *Compare and contrast* Division Interpretive Letter 94-002 (January 28, 1994): The Division previously questioned whether the EFT Act's prohibition against proprietary advertising on an ATM "…serve[d] a significant purpose," discussing former Section 8-103(B). After January 1, 1996 the statutory prohibition was repealed and replaced by 205 ILCS 616/5 et seq.

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MAY THE ATM ADVERTISE FINANCIAL PRODUCTS OR SERVICES?

Advertisements for proprietary products and services can be made to customers of an advertising bank in limited circumstances. Section 50 (d) of the EFT Act allows an advertising bank to advertise its products and services on a terminal screen to customers who are account holders of the bank. Customers who do not hold an account at the advertising bank may not be solicited. [205 ILCS 616/50 (d)] In any event, section 50 (b) prohibits any form of solicitation to any customer that does not use an advertising bank issued access device[15] when using an ATM.

Additionally, receipts may bear the name and logo of the bank that is not the issuer of the ATM. Section 50(f) of the EFT Act requires receipts to include certain account and transaction information, but is silent as to what other items an ATM operator may choose to include on a receipt.[16] The Division finds including the name of the advertising bank on the receipt is permissible under the EFT Act, so long as all other mandatory items are clearly and conspicuously included. The inclusion of coupons, promotional offers and other like advertisements may be used, but usage is subject to Regulation E.[17]

Conclusion

It is permissible for state-chartered banks to enter into branding agreements for the purpose of advertising on non-bank owned ATM's. However, the parameters of said agreements are governed by state and federal law. Due care should be exercised before entering such an agreement and a bank's federal regulator should be notified before establishing such an agreement.

[15] *See* 205 ILCS 616/10: "Access device" means a card, code, or other means of access to an account, or any combination thereof, that may be used by a customer to initiate an electronic fund transfer."
[16] *See also* Regulation E [12 C.F.R. §205.9 (Thomson Reuters 2010)].
[17] *See* 12 CFR 205.9: Receipts at Electronic Terminals; Periodic Statements. (Current through January 1, 2010). Text from the Code of Federal Regulations: Available from the Government Printing Office www.gpo.gov (Accessed on June 1, 2010).