

INTERPRETIVE LETTER 2017-02 (SEPTEMBER 22, 2017)

STATE BANKS ARE AUTHORIZED TO ADVERTISE TO ANY ATM CUSTOMER

This is in response to your inquiry concerning the use of advertising on automatic teller machine (ATM) screens. Specifically, you are seeking permission for Illinois state chartered banks to advertise bank products and services to non-bank customers using the bank's ATM. For the reasons set forth herein, it is the opinion of the Illinois Department of Financial and Professional Regulation-Division of Banking ("Division") that Illinois chartered banks may use the "wild card" provision of the Illinois Banking Act 205 ILCS 5/5(11) to advertise bank products and services on ATM screens.

Illinois state chartered banks have been limited in their ATM screen advertising to account holding customers of their bank. The Illinois Electronic Funds Transfer Act (Illinois EFTA) provides that "...a terminal screen may bear proprietary advertising of products or services offered by a financial institution when a person uses an access device issued by that financial institution" 205 ILCS 616/50(d). Illinois EFTA defines "financial institution" as "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." 205 ILCS 616/10. "Access device" means a card, code, or other means of access to an account, or any combination thereof, that maybe used by a customer to initiate an electronic fund transfer" 205 ILCS 616/10.

The Illinois Banking Act's "wild card" provision authorizes Illinois-chartered banks to "do any act... that is at the time authorized or permitted to national banks by an Act of Congress." 205 ILCS 5/5-11. The purpose of the "wild card" provision is to establish parity between state and national banks so state banks can compete on a level playing field.

The National Bank Act authorizes national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. §24 Seventh. In *Franklin Nat. Bank of Franklin Square v. People of the State of New York*, 347 U.S. 373, the U.S. Supreme Court has held that advertising a bank's services is an incidental power necessary to carry on the business of banking, and therefore, a state law purporting to limit a national bank's advertisements of deposit products was preempted.

The federal Electronic Fund Transfer Act and National Banking Act do not specifically permit or limit national bank advertising on ATM screens. However, in the case of *Bank One, Utah v. Guttai*, 190 F3d 844,850 (8th Cir. 1999) the U.S. Eighth Circuit Court of Appeals has held that state laws restricting ATM advertisements by national banks are pre-empted by the National Banking Act. In addition, the Office of the Comptroller of the Currency has maintained that

state laws limiting ATM operations, such as a state law prohibiting banks from displaying their names on ATMs, are inapplicable to national banks. OCC Interpretive Letter #789 (June 27, 1997).

We conclude that, while there is no Act affirmatively permitting or limiting a national bank's ATM advertising, there is sufficient evidence that national banks may advertise their products and services on an ATM as an "incidental power to carry on the business of banking." Since a national bank is permitted to advertise their products and services to customers of their ATM, regardless of whether the user of the ATM is a customer of the bank, an Illinois state-chartered bank would, pursuant to the "wild card" provision of the Illinois Banking Act, be authorized to do the same. Accordingly, state chartered banks may advertise their products and services to any customer of their ATM.

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