Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

March 6, 1997

Interpretive Letter #772
March 1997
12 U.S.C. 36(J)(6)

[ ]
[ ]
[ ]
[ ]
[ ]
[ ]

Dear [ ]:

This responds to your letter requesting that the Office of the Comptroller of the Currency ("OCC") confirm your interpretation of section 2204 of the Economic Growth and Regulatory Paperwork Reduction Act ("EGRPRA"), which became effective on September 30, 1996. Section 2204 of EGRPRA amends 12 U.S.C. § 36(j) by adding a new provision which excludes automated teller machines ("ATMs") and remote service units ("RSUs") from the definition of "branch" for purposes of 12 U.S.C. § 36.

You requested, first, that the OCC confirm that a national bank may establish ATMs without regard to state geographic restrictions as a result of EGRPRA. Second, you inquired whether an automated loan machine ("ALM") and a deposit drop box would be considered RSUs under the new statute.[1]

As discussed in detail below, because ATMs and RSUs are no longer "branches" for purposes of 12 U.S.C. § 36, the various branching restrictions imposed on national banks by, or through, section 36 are not applicable to ATMs and RSUs. We conclude that 12 U.S.C. § 24(Seventh) authorizes national banks to establish and operate ATMs without geographic restrictions. We do not address whether state law could have any affect on this authority, because it is not apparent which, if any, state laws present an actual conflict with national bank powers in this regard. We agree that an ALM of the type you described qualifies as an ATM or RSU under the new exception to the definition of a branch in 12 U.S.C. § 36(j). Finally, we conclude that a deposit drop box, as described herein, does not qualify as an ATM

[1] You also asked about the provisions of 12 C.F.R. § 5.31, which required a branch application, payment of a fee, and OCC approval for a national bank to establish a customer bank communication terminal ("CBCT"). As you noted in your letter, CBCT is synonymous with ATM. *Compare* 12 C.F.R. § 5.31 (definition of CBCT) *with* 12 C.F.R. § 25.12(d) (definition of ATM). I have attached a copy of OCC Bulletin 96-54, October 3, 1996, which I trust favorably answers your questions about § 5.31 and the fees.

or RSU under the revised section 36(j).

I. Discussion

A. Statutory "Branch" Definition

A "branch" is defined at 12 U.S.C. § 36(j) as including "any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(j) (West Supp. 1996). Section 2204(a) of EGRPRA added to this definition the proviso that: "[t]he term 'branch', as used in this section, does not include an automated teller machine or a remote service unit." P.L. 104-208.

Prior to EGRPRA, when a national bank sought to own and operate an ATM or CBCT, the bank needed OCC approval for the facility under 12 U.S.C. § 36. *See* Independent Bankers Ass'n of America v. Smith, 534 F.2d. 921 (D.C. Cir.) (finding that CBCTs are branches under § 36), *cert. denied*, 429 U.S. 862 (1976). The revision to section 36(j) now clearly provides that ATMs and RSUs are no longer subject to the branching restrictions and related approval requirements imposed by or through section 36.[2]

B. Geographic Restrictions on ATMs and RSUs

Since ATMs are no longer branches, you asked for confirmation that a national bank may establish ATMs without regard to state geographic restrictions. This raises two separate issues: (1) Do national banks have authority to establish ATMs, without geographic restriction, in a given state, and (2) do any state laws restrict that authority? As discussed below, we believe national banks have authority to operate ATMs (and RSUs) without geographic restriction. While we do not address whether state laws could restrict that authority because your letter identified no specific state laws which present an actual conflict with national bank powers, we note that the Supreme Court has repeatedly interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." Barnett Bank v. Nelson, 517 U.S. ___, 134 L. Ed. 2d 237, 245 (1996).

Clearly, national banks are authorized to take deposits, dispense withdrawals, and make loans. These activities are authorized by 12 U.S.C. § 24(Seventh) and identified by 12 U.S.C. § 36(j) as activities that characterize a banking facility as a branch (absent the exception from the branch definition). Furthermore, in Oklahoma ex rel. State Banking Board v. Bank of

---

[2] "[A]n 'ATM' or 'remote service unit' is not considered a 'branch' for purposes of federal bank branching laws and is therefore not subject to prior approval requirements or geographic restrictions." S. Rep. No. 185, 104th Cong., 2d Sess. 24 (1996).

Oklahoma, 409 F. Supp. 71, 90 (N.D. Okla. 1975), the district court specifically recognized the authority of national banks to operate ATMs pursuant to section 24(Seventh).[3]

Authority under section 24(Seventh) has long allowed national banks to provide banking services at non-branch locations, limited geographically only by restrictions on branching.[4] *See, e.g.*, Merchant's Bank v. State Bank, 10 Wall. 604 (1871) (upholding off-site certification of checks); Independent Bankers Ass'n of New York v. Marine Midland Bank, N.A., 757 F.2d 453 (2d Cir. 1985) (upholding OCC regulation, 12 C.F.R. § 5.31, authorizing non-established CBCTs), *cert. denied*, 476 U.S. 1186 (1986). Similarly, the OCC has consistently recognized the ability of national banks to perform authorized activities and functions via electronic means and facilities.[5] As a result of EGRPRA, Conress clearly provided that this authority to establish ATMs (and RSUs) is no longer subject to geographic restrictions.[6]

C. Status of ALMs

In amending section 36, EGRPRA removed two types of banking facilities -- ATMs and RSUs -- from the definition of a branch. In order for these terms to have been included in the previous definition of branch in the first place, and inherent in the new provision excluding them from the "branch" definition, is the assumption and recognition that ATMs and RSUs necessarily must have had the capacity to engage in the core banking functions -- taking deposits, dispensing withdrawals, lending money -- because, as described above, section 36(j) defined branches by the presence of these functions. The interagency definition of ATM, developed to implement the Community Reinvestment Act ("CRA"), also reflects this

---

[3] *See also* Letter of Frank Maguire, Acting Senior Deputy Comptroller for Corporate Policy & Economic Analysis, Oct. 16, 1992 (unpublished) (electronic check cashing facility authorized under § 24(Seventh)); OCC Interpretive Letter No. 705, Oct. 25, 1995, *to be reprinted in* Fed. Banking L. Rep. (CCH) ¶ 81,020 (operation of ATMs authorized by § 24(Seventh)); Letter of Robert B. Serino, Deputy Chief Counsel, Nov. 9, 1992 (unpublished) (same).

[4] The restriction in 12 U.S.C. § 81 ("The general business of each national banking association shall be transacted" at the bank's main office or branches) does not implicate ATMs or RSUs precisely because they are not branches. Section 81 is properly interpreted *in pari materia* with 12 U.S.C. § 36. *See* Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987). *See also* OCC Interpretive Letter No. 634, reprinted in [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,518. Indeed, it makes little sense to argue that Congress meant to free national banks from the burden of branch applications under § 36 for ATMs and RSUs by leaving § 81 to *disallow* ATMs and RSUs anywhere but at branches.

[5] *See, e.g.*, 61 Fed. Reg. 4849 (1996) (to be codified at 12 C.F.R. § 7.1019) ("A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver.").

[6] Notably, Congress rejected the House of Representatives' version of the legislation, which would have preserved the geographic branching restrictions on ATMs and RSUs. *See* H. Rep. No. 193, 104th Cong., 2d Sess. 31 (1996).

emphasis on the core banking functions: "Automated teller machine (ATM) means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank at which deposits are received, cash dispe[n]sed, or money lent." 60 Fed. Reg. 22156 (1995); *id.* at 22179 (OCC definition, codified at 12 C.F.R. § 25.12); *see also id.* at 22190 (Federal Reserve Board definition, codified at 12 C.F.R. § 228.12(d)).

Similarly, the FDIC promulgated a functionally equivalent definition in its CRA regulation: "Remote Service Facility (RSF) means an automated, unstaffed banking facility owned or operated by, or operated exclusively for, the bank, such as an automated teller machine, cash dispensing machine, point-of-sale terminal, or other remote electronic facility, at which deposits are received, cash dispe[n]sed, or money lent." 60 Fed. Reg. at 22201 (codified at 12 C.F.R. § 345.12). *See also* 12 C.F.R. § 303.0(b)(23) (defining RSF similarly in regulation relating to corporate applications and other matters for state banks).

Both of these definitions describe automated, unstaffed facilities that engage in one or more of the core banking functions. An ALM clearly qualifies under this standard. As described in your letter, certain banks are testing ALMs designed to take loan applications, process the application in about ten minutes, and if approved, either deposit the loan proceeds into the borrower's existing account or print out a check. An ALM would, therefore, be an automated, unstaffed facility that engages in the core banking activity of lending money.[7] Accordingly, we conclude that an ALM qualifies as an ATM or RSU in the revised section 36(j) and is therefore not a branch for purposes of the various branching restrictions imposed by and through 12 U.S.C. § 36.[8]

D. <u>Status of Deposit Drop Boxes</u>

You also inquired whether an unstaffed deposit drop-box would be considered an RSU under the amended section 36(j). Under the latest revisions to Part 5 of the OCC's regulations, finalized after passage of EGRPRA, deposit drop boxes are still generally considered branches under 12 U.S.C. § 36. *See* 61 Fed. Reg. 60342, 60371 (Nov. 27, 1996) (to be codified at 12 C.F.R. § 5.30(d)(1)(i)). In addition, the deposit drop boxes you propose would

---

[7] Most state definitions of automated, unstaffed banking facilities would seem to include ALMs as well. *See, e.g.*, Kan. Stat. Ann. § 9-1111(l) (1995) (authorizing "banking transactions"); Minn. Stat. §§ 50.245 and 47.61 (1996); Wis. Stat. Ann. § 214.01(sm) (1994); *cf.* N.J. Rev. Stat. § 17:12B-9 (1996) (silent on powers); S.D. Codified Laws Ann. § 51A-8-1 (1996) (silent on lending authority). Seven state codes do seem to deny the authority to operate ALMs, though of these seven, four are statutes that apply to the state's thrifts, not banks. *See* Tenn. Code Ann § 45-3-104(27) (1996) (thrifts); Va. Code Ann. §§ 6.1-194.29 and 6.1-194.29(b) (Michie 1996) (thrifts); Ind. Code § 28-4-3-2 (1996) (thrifts); La. Rev. Stat. Ann. § 6:742(h) (West 1996) (thrifts); Okla. Stat. tit. 6, § 102(L) (1996); Del. Code Ann. tit. 5, § 101(6) (1996); Mass. Gen. L. Ch. 167B, § 1 (1996).

[8] It should be noted that, pursuant to 12 C.F.R. § 25.41(c)(2) (1996), deposit-taking ATMs must be included in a bank's assessment area for purposes of CRA. Similarly, an ALM that takes deposits must be included in the CRA assessment area.

not fit under the definitions discussed above because they are not automated in any way, which is a common thread in the relevant federal definitions.

Prior to EGRPRA, a proposed revision to Part 5 would have excluded ATMs from the definition of branch if they were "generally available to customers of other banks," because shared ATMs would not create a competitive advantage due to customers having more convenient geographic access to banking services. *See* 61 Fed. Reg. at 60347. In light of EGRPRA, the OCC deleted the provision from the final Part 5, but the commentary noted that situations could arise where shared access to core banking services would not amount to branching. *Id.* It did not appear from your letter that the deposit drop boxes you propose would be shared with other banks; therefore, it would not be appropriate to except them from the definition of branch on that basis.

II. Conclusion

Based upon the foregoing analysis, we conclude that 12 U.S.C. § 24(Seventh) authorizes national banks to establish and operate ATMs and RSUs and that this authority is not subject to geographic restrictions and related approval requirements because ATMs and RSUs are excepted from the definition of a bank "branch" in 12 U.S.C. § 36(j). Further, we conclude that an ALM, of the type described herein, qualifies as an ATM or RSU for purposes of section 36(j). Finally, we conclude that deposit drop boxes do not qualify as an ATM or RSU under section 36(j). If you have any questions, you may contact Alan Burch, Attorney, Bank Activities and Structure, at (202) 874-5300.

Sincerely,

/s/

Julie L. Williams
Chief Counsel