

October 3, 2008

Sharon H. Sjostrom, Esq,
Blalack and Williams, P.C.
1420 W. Mockingbird, Suite 640
Dallas, TX 75247

Re: Permissible arrangements involving ATM providers.

Dear Ms. Sjostrom:

You have asked if an arrangement between your client, a federal credit union (FCU), and a third party owner of ATMs in which the FCU provides cash to stock the ATMs is permissible under the FCU's express or incidental powers. Based on the information you provided and our review of the proposed contract governing the relationship, we conclude this is not a permissible activity. While an FCU may provide ATM services to its members, the arrangement appears to be in the nature of an impermissible business service provided to the third party and only incidentally focused on assuring member access to the ATMs.

The contract recites that the third party owns and maintains a network of ATMs in various retail establishments and other public access areas throughout the United States. The FCU would agree to provide the cash necessary to supply the ATMs. In exchange, the third party would pay the FCU a fee for the use of the funds until they are withdrawn by consumers from the ATM and credited back to the FCU.¹ The FCU has the contractual right to approve the locations covered by the contract, and you have indicated the ATMs for which the FCU will provide funds are located "in the general area of the credit union in several counties." You also indicate, however, at least some ATMs are located a significant distance from the nearest FCU branch. The ATMs are accessible to the general public, although you have represented that the FCU is allowed to place signage on each machine indicating it is the FCU's. In addition, you have advised that a notice on the ATM screen indicates the FCU's members can use the ATMs without charge. The FCU lists the ATM locations on its website and on a brochure and specifies that members may access them without charge.

You suggest the arrangement is a permissible exercise of the FCU's incidental powers. Alternatively, you suggest the arrangement is authorized as a marketing activity, and you also suggest the arrangement is consistent with recent legislative and regulatory initiatives designed to enhance credit union outreach to persons outside the financial mainstream.

¹ Funds used to supply the ATMs would be run through a correspondent account set up at another institution in the name of the FCU. Once a consumer withdraws money from the ATM, the consumer's account at his financial institution would be debited and the FCU's correspondent account would be credited via an ACH transfer.

FCUs may provide ATM services to their members; NCUA's incidental powers regulation specifically recognizes this activity as permissible. 12 C.F.R. §721.3(c). An FCU may buy or lease ATMs, may participate in cooperative networks with other credit unions to expand surcharge-free access for members, may use credit union service organizations (CUSOs) to own or manage ATM operations, 12 C.F.R. §712.5(d)(1), and may hire an independent service operator (ISO) to provide ATM services for their members.

We do not believe the arrangement you have described fits any of these categories. The contract between the FCU and the third party provides no ownership or leasehold interest in the ATMs for the FCU. The FCU is not making an investment to assure ATM services for its members. The primary focus of the arrangement is not service to the FCU's members, with incidental non-member access and usage. We note, in this respect, nothing in the contract describes the right of the FCU to place signage on the ATMs or the rights of the FCU's members to access the machines without charge.

There is no indication the third party is maintaining a cooperative network in which several financial institutions are participating and to which the FCU is seeking access. Instead, the FCU is providing an essential component to enable the third party to operate its business – supplying cash – for which the FCU is receiving compensation and with respect to which its members incidentally benefit. If, as we assume, the third party is not an FCU member, the FCU would be providing a financial service to a nonmember for a fee and this is impermissible. With limited exceptions not pertinent to this matter, FCUs may only provide services to members.

We have also considered if the arrangement can be characterized as a hiring of an ISO to provide ATM services to the FCU's members. If that were the arrangement, the agreement would provide for the FCU to pay the third party in exchange for services to the FCU's members. There is, however, no such fee in this case. Even though the FCU's members would enjoy free access to the ATMs, that is not the equivalent of a payment to the third party in exchange for management and administration of an ATM service for the members. Similar reasoning negates the argument that the arrangement is supportable as a marketing program. Instead, the payment arrangements support the conclusion that this is a business relationship rather than a marketing plan or the hiring of an ISO. The third party is paying the FCU for the use of FCU funds, and there is no indication the rate being charged is linked in some fashion to the level of service to the FCU's members.

We think the arrangement is distinguishable from cases, like the ones to which you have referred, in which a credit union has joined a pre-existing network of ATMs. A credit union in that position is typically required to allow non-member access and use as a necessary incident of participation. Similarly, an FCU

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offering a VISA card program for its members may be required to provide cash disbursement services to nonmember cardholders. In this case, there is no network and no program sponsored by the FCU primarily for the benefit of its members. These ATMs are all located in places initially determined by the third party owner and some of them, as much as an hour's drive from the nearest branch of the credit union, will almost certainly be used predominantly by individuals who are not members of the FCU.

Even if the third party were a member, we would find the provision of cash for its ATM operations to be impermissible. You have not argued the arrangement in this case constitutes a member business loan and we do not think the contract would support that characterization. The contract describes the payment required of the third party as a "fee" in consideration of the FCU's providing the cash, as opposed to interest on a loan. Moreover, the contract specifies the FCU is at all times the sole owner of the cash used to stock the ATMs and provides the FCU with the right to require the return of the cash from any ATM at any time. These terms are inconsistent with a loan of money.

Finally, we have considered your argument that this arrangement is supported by the rationale underlying the enactment by Congress in 2006 of the Financial Services Regulatory Relief Act (FSRRA); Pub. L. No. 109-351, §§502-503; 120 Stat. 1966 (2006). FSRRA amended §107(12) of the FCU Act to permit FCUs to provide certain financial services to persons within their fields of membership. Legislative history of FSRRA indicates that Congress intended to allow FCUs "to sell negotiable checks, money orders, and other similar transfer instruments, including international and domestic electronic fund transfers, to anyone eligible for membership, regardless of their membership status." S. Rpt. 109-256, p. 5; H. Rpt. 109-356 Part 1, p. 63. We do not interpret FSRRA as authorizing a wholesale expansion of FCU participation in ATM arrangements without regard to considerations of membership.

You may address any questions concerning this matter to Staff Attorney Ross Kendall or me.

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

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