

FORMAL OPINION

September 17, 1982

HONORABLE MICHAEL M. HORN
Commissioner of Banking
Department of Banking
36 West State Street
Trenton, New Jersey 08625

FORMAL OPINION NO. 6—1982

Dear Commissioner Horn:

You have asked for our advice as to whether there is any impediment to a bank or savings bank chartered under the laws of this State allowing customers of a banking institution chartered in another state or by the federal government to access their accounts in those banking institutions through automatic teller machines (ATM's) located at New Jersey banks or savings banks. It is our opinion that access by customers of a bank chartered in another state or by the federal government to their accounts in those banking institutions through an ATM located at New Jersey banks or savings banks is permissible where the ATM is established, operated and maintained by the New Jersey banking institution.

In order to place the legal issue into the proper context, it is appropriate to discuss the existing scheme for computer operated access in New Jersey and the manner by which access to accounts in foreign banking institutions would affect the existing scheme. We are informed that several New Jersey banks and savings banks are members of a computer support system known as the "Money Access Service." The banks and savings banks have purchased an ATM which is accessed by holders of cards designated as "money access cards." The cards are issued by the banks or savings banks after having determined the qualifications of those customers eligible to receive and use the cards, which prominently identify the New Jersey banking institution through which they were obtained. Further, we are told that each bank or savings bank may determine to exclude cardholders of one or more other banking institutions from having access to the terminal established by it and may terminate access even after it has been previously granted. Moreover, each banking institution retains the discretion to limit the type of banking transactions that the cardholders of other banking institutions may conduct at the terminal. As a general proposition, you have advised us that customers of banking institutions who participate in "Money Access Service" may make deposits, withdrawals, balance inquiries and, in that manner, access both time and demand accounts through the use of the ATM's located throughout the State.

Your specific inquiry is based on proposals made by those New Jersey financial institutions who presently are members of the Philadelphia National Bank's (PNB) "Money Access Service." It is contemplated that these New Jersey banking institutions would allow cardholders of financial institutions outside of New Jersey who participate in PNB's "Money Access Service" to have access to time and demand accounts in those out-of-state banking institutions. This would be done on the same terms and conditions presently in place for access by cardholders of New Jersey

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banking institutions who participate in the system, except that no acceptance of deposits is proposed. It is envisioned under this proposed scheme that a cash withdrawal made at an ATM is in effect a request to the out-of-state institution to wire funds to a customer at the ATM. The transaction is processed through the central MAC computer support system maintained by PNB in Pennsylvania. In the event the funds requested are available in the customer's account, approval for the disbursement of those funds is wired by the institution to the ATM for transmittal to the customer.

An analysis of whether this proposal is consistent with New Jersey banking law must commence with N.J.S.A. 17:9A-19L, which provides as follows:

Except as otherwise provided by law, no foreign bank as defined in section 315 [N.J.S.A. 17:9A-315], shall establish, operate or maintain in this State any full branch office, minibranch office or communication terminal branch office.

A foreign bank is defined by the banking laws to include banks organized under the laws of other states as well as nationally chartered banks having their principal offices in other states. N.J.S.A. 17:9A-315. A "branch office" is generally defined to include any office, unit or terminal at which any business that may be conducted in a principal office of a bank or savings bank may be transacted. N.J.S.A. 17:9A-1(14). A communication terminal branch office is defined as:

a branch office of a bank or savings bank which is either manned by a bona fide third party under contract to a bank or savings bank or unmanned and which consists of equipment, structure or systems, by means of which information relating to financial services rendered to the public is transmitted and through which transactions with banks and savings banks are consummated, either instantaneously or otherwise. [N.J.S.A. 17:9A-1(17).]

Since an ATM may either constitute a "branch office" or a "communication terminal branch office" of a foreign banking institution, it is apparent that such a foreign banking institution may not establish, operate or maintain that facility in this jurisdiction. Although there is no definitive legislative history as to the import of the statutory prohibition, words and phrases in a statute should be given their generally accepted meaning unless some special or different meaning is expressly indicated. *Scatuorchio v. Jersey City Incinerator*, 14 N.J. 72, 87 (1953); *Abbotts Dairies, Inc. v. Armstrong*, 14 N.J. 319 (1954); *Grogan v. DeSapio*, 11 N.J. 308, 323 (1953). The term "establish" is commonly defined to mean "to bring into being on a firm or permanent basis" or "to install or settle in a position, place or business." The word "maintain" is defined as "to keep in existence or continuance" or "to provide for the upkeep and support of; carry the expenses of." The word "operate" is generally defined to mean "to be or keep in operation." *Random House College Dictionary*, Revised Edition (1980). Consequently, the statutory prohibition is designed to prohibit

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those foreign banking institutions from taking steps to "establish, operate or maintain in this State" any branch office or terminal branch office.

However, it is noteworthy that the instant proposal does not suggest a foreign bank would either establish, operate or maintain a branch office or a communication terminal branch office in this jurisdiction. Banks and savings banks chartered under the laws of this State have installed the ATM's presently located and currently in use in this jurisdiction. These facilities have been installed with the approval of the Commissioner of Banking pursuant to N.J.S.A. 17:9A-20(c). Moreover, we have been informed that banks and savings banks chartered under the laws of this State have determined the physical location of the ATM, the type and model of the ATM and that no other financial institution, including any foreign banking institution, participated in any manner with the decision to install the ATM nor shared in the cost of the establishment and maintenance of the ATM. Further, we have been informed under the terms of the proposal the banks or savings banks chartered in this State will bear the entire cost and expense of supporting and assisting the ATM. No other institution nor PNB will share in the profits or control of the facility. The foreign financial institution will pay a transaction fee to the New Jersey institution operating the ATM for each transaction but the foreign banking institution will have no employees maintaining the ATM nor will it maintain any office in connection with the operation of the ATM in this State. We are further informed that the daily operation of the ATM remains at the discretion of the New Jersey financial institution under the supervision of the Commissioner of Banking. For example, New Jersey financial institutions will retain the discretion to determine whether cardholders of foreign banking institutions will have access to the ATM, whether to terminate such access, and whether to expand or restrict the scope and degree of banking services to be provided.

It is clear from this factual description of the proposal that the foreign banking institutions participating in the computer support system known as "Money Access Service" will neither establish, maintain nor operate a branch office or communication terminal branch office in this jurisdiction.¹ The branch office or the communication terminal branch office will retain their character in all particulars as branches of a New Jersey financial institution under the supervision of the Commissioner of Banking and subject to the laws of this jurisdiction.²

Moreover, this conclusion is supported by a significant opinion issued by the U.S. Comptroller of the Currency interpreting the McFadden Act, 12 U.S.C. §36, to permit national banks to utilize an ATM across state lines where the ATM has been established by a bank headquartered in

1. Parenthetically, any notion that a principal-agent relation exists between the out-of-State institution and New Jersey institution is not supportable. Among the essential characteristics of a principal-agent relation is the right of a principal to control the conduct of the agent with respect to matters entrusted to him. *Restatement (Second) of Agency* §14 (1957). As more fully spelled out above, there is no control or supervision exercised by an out-of-State banking institution over the ATM's solely established, operated and maintained by the New Jersey institutions.

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another state if (1) the compensation for its use is on a transactional fee basis and (2) such use does not give to national banks a competitive advantage over state banks situated in those states. *Comptroller's Letter Opinion* No. 153, (July 1980) CCH Fed. Banking Law Rep. §§85,234-85,235. The Comptroller based his opinion on the holding of the court in *Independent Bankers Ass'n of America v. Smith*, 534 F. 2d 921 (D.C. Cir. 1976) *cert. den.* 429 U.S. 862 (1976), that:

any facility which performs the traditional bank functions of receiving or disbursing funds is a 'branch' within the meaning of [12 U.S.C. §36(f)] if (1) the facility is *established (i.e., owned or rented)* by the bank, and (2) it offers the bank's customers a convenience that gives the bank a competitive advantage over other banks (national or state). [Emphasis added.] [534 F. 2d at 951.]

The Comptroller, focusing on the above-quoted language, noted that utilizing ATM's on some basis other than ownership or rent, e.g., on a transactional fee basis, would not constitute branch banking under federal law and, therefore, would be permissible even on an interstate basis.

A resolution of this question, however, does not put the matter to rest. N.J.S.A. 17:9A-316B provides that a foreign bank may transact business in this State only as executor or as testamentary trustee or guardian. Thus, foreign banks are generally prohibited from transacting business in this State. The issue of a foreign bank transacting business in this jurisdiction has never been addressed by the New Jersey courts (other than in the context of a foreign bank acting as an executor or testamentary trustee under a will). However, the meaning of a statutory prohibition

2. It should be noted that under the McFadden Act, 12 U.S.C. §36, a national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches at any point within the state in which the association is situated, if such establishment and operation are at the time authorized to state banks by the statute law of the state in question. 12 U.S.C. §36(c). Thus, the branching laws applicable to national banks incorporate the state branching laws of the state in which the national bank is located. Nonetheless, it is well settled that what constitutes a national bank "branch" is a threshold question of federal law to be determined without resort to state law. *First Nat. Bk. in Plant City v. Dickerson*, 396 U.S. 122, 133-134 (1969); *Independent Bankers Ass'n. of America v. Smith*, 534 F. 2d 921, 933 (D.C. Cir. 1976) *cert. den.* 429 U.S. 862 (1976). In this regard, the court in *Independent Bankers Ass'n of America v. Smith, supra*, held that under 12 U.S.C. §36(f), an automatic teller machine (also known as a "customer-bank communication terminal") established and operated by a national bank is a branch of that bank since it is a facility where deposits are received, checks are paid and money is lent. 534 F. 2d at 938-948. *Accord Colorado ex rel. Banking Board v. First National Bank of Fort Collins*, 540 F. 2d 497 (10 Cir. 1976); *Illinois ex rel. Lignouil v. Continental Illinois National Bank*, 536 F. 2d 176 (7th Cir. 1976) *cert. den.* 429 U.S. 871 (1976); *Missouri ex rel. Kosterman v. First National Bank in St. Louis*, 538 F. 2d 219 (8th Cir. 1976) *cert. den.* 429 U.S. 941 (1976). As a branch, a national bank could not lawfully install an ATM in a state other than the one in which its principal office is situated, unless authorized by the law of the state in which the ATM is to be located. 12 U.S.C. §36(c).

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against foreign corporations transacting business in this jurisdiction has been addressed by the courts in many different contexts. It is generally recognized that the phrase "transacting business" is a term not susceptible of precise definition and that each case must be dealt with on its own circumstances. See *Materials Research Corp. v. Metron*, 64 N.J. 74, 79 (1973). Common indicia of "transacting business" include the physical presence of a foreign corporation in the State through the holding or leasing of office space, employment of personnel paid by the foreign corporation and located in the state, a significant percentage of business volume in the state compared to the corporation's overall transactions as well as the authority of employees in the state to consummate transactions without confirmation by the foreign corporation's home office. See *United States Time Corp. v. Grand Union*, 64 N.J. Super. 39 (Ch. Div. 1960) (where Connecticut corporation had no office or telephone listings in New Jersey, employed two salesmen who did not reside in New Jersey and whose orders were subject to acceptance at corporation's home office, where New Jersey sales represented some 2 percent of total volume of business, corporation was not "doing business" in the State, and hence was not required to comply with regulatory provisions of New Jersey Corporation Act in order to maintain suit); *Eli Lilly & Co. v. Sav-On Drugs, Inc.*, 57 N.J. Super. 291 (Ch. Div. 1959), *aff'd* 31 N.J. 591 (1960), *aff'd* 366 U.S. 276, (1961) (where Indiana corporation maintained an office in New Jersey, reimbursed its district manager for all expenses incident to maintenance and operation of the office, paid salary of secretary in the office and paid the salary of 18 detail men working in the State under the supervision of the district manager, the corporation was "doing business" in the State and was required to have registered under Corporation Act in order to maintain suit); *Materials Research Corp. v. Metron*, *supra* (where foreign corporation maintained no office in New Jersey, act of foreign corporation's sales engineer in soliciting orders in New Jersey which were subject to acceptance by home office in New York did not warrant conclusion that corporation was "transacting business" in New Jersey so as to require it to file a certificate of authority before maintaining action in State). See also *Taub v. Colonial Coated Textile Corp.* 54 A.D. 660, 387 N.Y.S. 2d 869 (1976) (where bank organized under laws of foreign country maintains no office, agent or branch in New York and only conducts its business in New York through New York correspondent bank, it is not "doing business" in New York for purposes of long-arm jurisdiction statute); *Bank of America v. Whitney Central Bank*, 261 U.S. 171, 173, (1922) (where a foreign bank has no place of business in New York and no employees or offices there, it was not "transacting business" in New York for purposes of federal jurisdiction when its New York business was conducted by New York banks on a correspondent basis).

It is at once obvious that the instant proposal differs in a material degree from those instances where the courts have determined a foreign corporation has transacted business in this jurisdiction. It bears repeating that the banking transaction will originate in an ATM established, maintained and operated by a New Jersey financial institution consistent with the laws of this State. Further, we are informed that these interstate transactions will not represent a major portion of the foreign bank's overall

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business. Moreover, the consummation of the transaction by the New Jersey bank or savings bank is subject to the receipt of instructions by the New Jersey institution from the foreign bank's home offices. It is contemplated that the foreign institution will not employ any personnel in this State in conjunction with the ATM, nor will it maintain any office or other form of tangible presence in New Jersey. For these reasons, it is our view that under the specific facts outlined in the proposal, PNB or other foreign state chartered banking institution or national bank would not be "transacting business" in this State within the meaning of the prohibition set forth in N.J.S.A. 17:9A-316.

For these reasons, it is our opinion that there is no statutory impediment to a bank or savings bank chartered under the laws of this State allowing customers of a banking institution chartered in another state or by the federal government to access their accounts in those banking institutions through automatic teller machines established, operated and maintained by the New Jersey banking institutions under the supervision of the Commissioner of Banking.³

Very truly yours,
IRWIN I. KIMMELMAN
Attorney General

3. It should be noted that the Commissioner has pervasive powers to limit or control the extent to which state-chartered banks permit access by foreign bank customers to ATM's located at branch offices established and maintained by the New Jersey institutions. These powers are derived not only from the Commissioner's authority to adopt regulations concerning the operation of communication terminal branch offices, N.J.S.A. 17:9A-20G, but also from his general supervisory powers over banks and savings banks as contained in N.J.S.A. 17:9A-266 *et seq.*

November 10, 1982

HONORABLE JAMES J. BARRY, JR.
Director, Division of Consumer Affairs
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 7—1982

Dear Director Barry:

You have asked for an opinion as to whether individual Retirement Accounts (IRA), Keogh Plans, Simplified Employee Pension Plans, and bank deposit accounts are consumer contracts within the meaning of the Plain Language Law. For the following reasons, you are advised that all language contained in documents required to open and maintain an IRA account providing professional investment and management services for a fee or a Keogh Plan for self-employed individuals should conform with the "plain language" requirements of the Law, with the exception of language contained or copied from an Internal Revenue Service (IRS) model account form.