

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, C.C.B.
266-4511**

January 6, 2000

OPINION 00-001

TO: Ald. Matt Sloan, Dist. #13

FROM: Eunice Gibson, City Attorney

SUBJECT: **City Regulation of Automatic Teller Machine Fees**

By means of Resolution ID Number 26687, which will be considered later this month, you have asked my opinion as to whether or not the City of Madison has authority to regulate banking practices, specifically Automatic Teller Machines (ATM's) fees and fees on checks drawn off the same bank. In my opinion, the City lacks such authority and may not enforce such regulations.

I. Regulation of State Financial Institutions

National Banks are governed by federal legislation and administrative regulations. State banks, and other state-regulated financial institutions, such as credit unions and savings and loan associations, are governed by state law. State law will be discussed first.

In Wisconsin, the legislature has created a comprehensive regulatory scheme for financial institutions. The regulation of automatic teller machines is included in that scheme, although, for some reason, the various chapters refer to ATM's by different terms.

In Ch.221, Wis. Stats., which regulates banks, an ATM is a "customer bank communications terminal." See Sec. 221.0303, Wis. Stats. This section establishes certain requirements for banks which operate and acquire ATM's and authorizes the Department of Financial Institutions to impose additional rules. Sec. 221.0303(2) Wis. Stats. requires banks to make their ATM's available for use "on a nondiscriminatory basis" by any state or national bank and "by all customers designated by a bank using the terminal." Id.

The statute further requires state banks to make their ATM's available "on a nondiscriminatory basis," for use by any credit union, savings and loan association, or savings bank which requests to share its use, subject to the Department's regulations. Id. Finally, the statute regulates use of information transmitted to and from the ATM or "customer bank communications terminal." Sec. 221.0303(4) Wis. Stats.

Chapter 186, Wis. Stats., contains a comprehensive system of regulations for credit

unions. Sec. 186.113 (15) Wis. Stats. refers to ATM's as "remote terminals" instead of "customer bank communication terminals," but otherwise, its requirements are similar to those contained in Sec. 221.0303, Wis. Stats. for banks.

Ch. 215, Wis. Stats. contains a comprehensive system of regulations for savings and loan associations. Sec. 215.13(46) refers to ATM's as "remote service units" instead of "remote terminals" or "customer bank communications terminals," but otherwise its requirements are similar to those contained in Secs. 221.0303 and 186.113(15), Wis. Stats.

In a case decided in 1984, the Wisconsin Supreme Court invalidated a portion of Madison's Equal Opportunities Ordinance which attempted to regulate discrimination by a savings and loan association in the granting of credit. See Anchor Savings & Loan Association v. Equal Opportunities Commission et al., 120 Wis. 2d 391, 355 N.W. 2d 234 (1984). Madison defended its ordinance unsuccessfully by relying on the concept of municipal home rule.

The Anchor court analyzed the two sources of municipal home rule in Wisconsin: the state constitution and the statutes. It pointed out that, since the granting of credit was a matter of statewide concern, the home rule provision in the state constitution would not apply. To support that conclusion, it cited earlier cases which hold that "the constitutional authority of cities only extends to local affairs and does not cover matters of statewide concern." 120 Wis. 2d at 395. Thus, in the granting of credit, if any municipal regulatory authority exists, it must be found in the statutes. Sec. 62.11(5), Wis. Stats., is the "municipal home rule statute." This statute does not extend to every situation, however. When a city's statutory home rule authority is challenged, the court must make the following determinations:

- (1) whether the legislature has expressly withdrawn the power of municipalities to act;
- (2) whether the ordinance logically conflicts with the state legislation;
- (3) whether the ordinance defeats the purpose of the state legislation; or
- (4) whether the ordinance goes against the spirit of the state legislation. 120 Wis. 2d at 397. (Citations omitted.)

In considering the prohibition in Madison's Equal Opportunities Ordinance against discrimination in the granting of credit, the court made a careful examination of state laws regulating the granting of credit. It held that

"The regulation and control of Anchor's lending practices has been preempted by the state of Wisconsin in Ch.214, Stats., by establishing a comprehensive and all-encompassing scheme regarding savings and loan association practices, and therefore the Madison EOC was without authority to review the refusal of Anchor to grant a loan to Roy U. Schenk on the basis of marital status discrimination. The application of the ordinance to Anchor's credit practice was contrary to the spirit of the state's structure of all aspects of credit and lending by savings and loan associations and was without authority and in conflict with the state comprehensive plan." 120 Wis. 2d. at 401.

To examine the authority of the City to regulate ATM charges, we must do as the Supreme Court did: analyze the state's regulatory scheme, to determine whether any of

the four factors above are applicable.

As required by the Legislature, the Department of Financial Institutions has adopted “joint rules” regarding ATM’s. The Rules are found at DFI-Bkg 14, DFI-CU 63, DFI-SB 12, and DFI-SL 12, Wis. Adm. Code. These rules are comprehensive and govern the use of ATM’s by all state-regulated financial institutions.

For example, institutions which operate ATM’s must make them available on a nondiscriminatory basis to the following institutions and their designated customers: (1) any financial institution that has its home office in Wisconsin; (2) any other savings and loan association, bank or credit union which is qualified to do business in Wisconsin and has the written consent of the savings and loan association, bank or credit union that has its home office in this state and is using the terminal. See DFI-Bkg 14.04, DFI-CU 63.04, DFI-SB 12.04, and DFI SL 12.04, Wis. Adm. Code.

The administrative rules define prohibited discrimination. Fees charged to a financial institution for the use of the terminal by the institution or its customers must be “equitably apportioned” and must “reasonably reflect the cost of the services actually provided.” DFI-Bkg 14.05(1), DFI-CU 63.05 (1), DFI-SB 12.05 (1), and DFI-SL 12.05 (1), Wis. Adm. Code.

The rules regulate customer services, also. Specifically, they permit an institution which uses ATM’s to choose which of the functions performed by the terminal it will make available to its customers. DFI-Bkg 14.05 (2), DFI-CU 63.05 (2), DFI-SB 12.05 (2), and DFI-SL 12.05 (2) Wis. Adm. Code. The rules also require periodic disclosure statements to customers, particularized documentation of transactions, written disclosure of services and charges, including applicable limitations on the customer’s liability for unauthorized access, identification of available transactions, charges to the customer, and limitation on the number of transactions permitted during a period of time. DFI-Bkg 14.08, DFI-CU 63.08, DFI-SB 12.08, and DFI-SL 12.08, Wis. Adm. Code.

Finally, financial institutions which operate ATM’s must satisfy the regulating agency that they have imposed certain security and confidentiality precautions. DFI-Bkg 14.06, DFI-CU 63.06, DFI-SB 12.06, and DFI-SL 12.06, Wis. Adm. Code.

With this picture of the state’s regulation of the use by financial institutions of ATM’s, we can apply the four factors identified by the court in Anchor Savings and Loan v. Equal Opportunities Commission, supra. to an ordinance which would “(ban) ATM fees and fees on checks drawn off the same bank...” and which would “...(direct) all City departments which negotiate contracts with financial institutions regarding placement of ATM machines on city property to negotiate future contracts with no extra ATM fees...”

First, the legislature has not expressly withdrawn the power of municipalities to act. The statutes regulating the use of ATM’s do not mention municipal regulation.

It appears, however, that such an ordinance would “logically conflict,” “defeat the purpose,” and “go against the spirit” of the state legislation. The legislature has made very clear that, with respect to ATM’s, financial institutions are to be treated uniformly. For example, the statutory language governing ATM’s for credit unions, banks, and savings and loan associations is very similar. See Secs. 186.113 (15), 215.13 (46) and 221.0303, Wis. Stats. The administrative rules governing ATM’s have been promulgated as “joint rules” by the

Administrator of the Division of Banking, the Office of the Commissioner of Savings and Loan and the Commissioner of Credit Unions. See DFI-Bkg 14.02, DFI-CU 63.01, DFI-SB12.01, and DFI-SL 12.01, Wis. Adm. Code.

If cities were to regulate ATM use, the rules would not be uniform. There might be as many different rules as there are cities which have chosen to adopt regulations. Such a lack of uniformity would “logically conflict,” “defeat the purpose,” and “go against the spirit” of the state’s regulatory scheme.

Next, the state has adopted specific regulations related to fees. See DFI-Bkg 14.05, DFI-CU 63.05, DFI-SB 12.05 and DFI-SL 12.05, Wis. Adm. Code. A municipal ordinance banning certain fees, and requiring the city departments to negotiate fees would result in a prohibition by the City of fees which the state rules permit. This would “logically conflict,” “defeat the purpose,” and “go against the spirit,” of the state’s regulations. I do not think a Wisconsin court would permit a city to impose such regulations.

II. Regulation of National Banks

Recently, two California cities and the states of Connecticut and Iowa have had federal courts strike down their attempts to regulate use of ATM’s by national banks. In all three cases, the Comptroller of the Currency, the federal official responsible for regulation of national banks, has argued that his agency is the only one permitted by federal law to regulate in this area. In all three cases, federal courts agreed.

In First Union National Bank v. Burke, 48 F. Supp. 2d 132 (D. Conn. 1999) the Connecticut Banking Commissioner had issued cease and desist orders against in-state branches of national banks, requiring that they cease imposing an ATM surcharge on non-depository customers. The Comptroller of the Currency intervened, arguing that federal legislation preempted the field and that the State of Connecticut lacked regulatory authority. The federal district court enjoined the Connecticut banking commissioner from asserting enforcement jurisdiction. 48 F. Supp. 2d at 148,149.

A federal appeals court reached the same conclusion in Bank One, Utah v. Guttau, 190 F3d 844, 1999 W L 681652 (8th Cir. 1999). An Iowa statute placed certain restrictions on ATM’s, including restrictions on fees that could be charged. A lower court had upheld the statute. The U.S. Court of Appeals for the 8th Circuit reversed that ruling. It held that the Iowa law was pre-empted by Section 36 of the National Bank Act. This Section was amended by Congress in 1996, and the Court of Appeals held that the amendment demonstrated the intent of Congress not to permit any state regulation of national bank ATM’s. 190 F 3d at 848.

Thus, when the cities of San Francisco and Santa Monica adopted regulatory ordinances and the ordinances were challenged, the federal court in the Northern District of California looked to the recent federal precedents in Iowa and Connecticut. It agreed that national banks are not subject to state or local regulation. Bank of America, N.A.; Wells Fargo Bank, N.A. and California Bankers Association v. City and County of San Francisco, California, et al and City of Santa Monica, California, et al, Case No. C99 4817 VRW, (N.D.Cal.) December, 1999.

While San Francisco and Santa Monica are appealing the district court’s decision, the

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Iowa and Connecticut precedents would support a prediction that their appeal will not succeed. Thus, both state and federal rulings indicate that a city ordinance regulating ATM fees would not survive a legal challenge.

Eunice Gibson
City Attorney

CAPTION: Municipalities are not authorized to regulate ATM fees charged by state or national financial institutions.

EG:CAM/nje
cc: Mayor
City Clerk