DEPARTMENT OF JUSTICE
JUN 27 2013
STATE OF NEBRASKA

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AND FINANCE
JUN 27 2013
LINCOLN, NEBRASKA

13-001
NO.
STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

SUBJECT: Neb. Rev. Stat. § 8-157.01; Non-discriminatory Operation Of And Fees For Switches Used By Automatic Teller Machines And Other Equipment To Transmit Electronic Information For Financial Institutions In Nebraska.

REQUESTED BY: John Munn, Director
Nebraska Department of Banking and Finance

WRITTEN BY: Jon Bruning, Attorney General
Dale A. Comer, Assistant Attorney General

Neb. Rev. Stat. § 8-157.01 (2012) creates standards and rules for automatic teller machines ("ATMs"), point-of-sale ("POS") terminals, and other electronic transmissions by financial institutions in the State of Nebraska. Those electronic transmissions are accomplished through the use of "switches," and a "switch" is defined, under Neb. Rev. Stat. § 8-101 (14) (2012), as "any facility where electronic impulses or other indicia of a transaction originating at an automatic teller machine or point-of-sale terminal are received and are routed and transmitted to a financial institution, data processing center, or other switch, wherever located." Section 8-101(14) also provides that a "switch" may "be a data processing center." Section 8-157.01 requires the Department of Banking and Finance (the "Department") to approve the operation of any switch, and further requires that switches provide non-discriminatory access, operation and charges to financial institutions in the state. Issues have now arisen regarding the application of § 8-157.01 and its requirements for switches. As a result, you have requested our opinion with respect to several questions which are addressed below.

BACKGROUND

Section 8-157.01 had its origins in 1975 Neb. Laws LB 269. That bill first created a framework for banks in Nebraska to use ATMs and to allow bank customers to access their bank accounts by electronic means. LB 269 did not permit discrimination in access to any ATM or discrimination in the charges that a depositor's bank would pay for that access. With respect to switches, the intent of the bill was "that there be an equal opportunity to all Nebraska banks for the use of and access to a switch and that no discrimination shall exist or preferential treatment be given in either the operation of such switch or the charges for the use thereof." 1975 Neb. Laws LB 269, § 2.

As noted in your opinion request, electronic access for bank depositors to their accounts has grown exponentially since 1975. For example, depositors can now use debit cards for direct purchases from merchants, including the option of withdrawing cash from their bank account as a part of the purchase transaction. Since 1975, many options for switching electronic financial transactions have also become available to financial institutions operating ATMs and POS facilities. Nebraska Electronic Transactions System, Inc. ("NETS"), which is owned by the banks which use its services, is one of the entities in Nebraska which offers switching and processing for financial institutions.

On March 1, 2012, the Department issued Statement of Policy #33, "Electronic Terminal Access," ("SOP 33"), in order to notify financial institutions of their responsibilities under § 8-157.01, and also to provide notice to those entities offering switch services of the statutory requirement for Department approval. SOP 33 was subsequently revised by the Department to refer to an earlier opinion from this office pertaining to the use of ATMs, Op. Att'y Gen. No. 92124 (December 14, 1992). In reliance upon that opinion, the Department has approved switch applications from various entities which provide for fees which are not equal for all users. NETS has taken issue with the Department's approval of the switch applications in question, and that situation apparently precipitated your opinion request to this office. You have posed four questions to us.

Question 1. Has the evolution of electronic switching of financial transactions, and the creation of alternatives for switching of Nebraska electronic financial transactions, put the provisions of Neb. Rev. Stat. § 8-157.01 (Reissue 2012) in the position of a restraint of trade or the Department's administration of the statute in violation of the Commerce Clause of the United States Constitution?

Your initial question has two components. We will address each component separately.

Restraint of Trade

Your use of the phrase "restraint of trade" in Question 1 generally implicates issues involving anticompetitive behavior and application of the state and federal antitrust laws. For example, Section 1 of the federal Sherman Antitrust Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy *in restraint of trade or commerce.*" (Emphasis added.) Our state antitrust laws contain similar language.[1] Consequently, we must determine if the restrictions contained in the provisions of § 8-157.01 somehow violate the antitrust laws. From discussions with your staff, we understand that your concern in this regard involves the portion of § 8-157.01 which prohibits discrimination or preferential treatment in charges for the use of a switch.

Application of the antitrust laws to the actions of a State and its legislative body are governed by what is known as the State Action Exemption. The State Action Exemption had its genesis in *Parker v. Brown*, 317 U.S. 341 (1943), where the United States Supreme Court considered the antitrust liability of administrators who enforced a California statute which restricted competition among food producers in that state.[2] The Court stated:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the Legislature.

Id. at 351. Accordingly, the Sherman Act is a "prohibition of individual and not state action." *Id.* When a state imposes a trade restraint, it has "imposed the restraint as an act of government," and has not entered into a conspiracy in restraint of trade or established a monopoly. *Id.* at 352. Under the State Action Exemption, it is well established that antitrust law does not apply to states acting as sovereigns. *Jackson, Tenn. Hosp. Co., LLC v. West Tenn. Healthcare, Inc.*, 414 F.3d 608 (6th Cir. 2004).

Activities of the state legislature and of a state's highest court (when it performs legislative functions) qualify as the state acting in its sovereign capacity, and are generally immune from the antitrust laws. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Parker v. Brown, supra,*

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[1] For example, state statutes analogous to Section 1 of the Sherman Act are found at Neb. Rev. Stat. §§ 59-801 and 59-1603 (2010). Section 59-801 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy *in restraint of trade or commerce,* within this state." (Emphasis added.)

[2] Neb. Rev. Stat. § 59-829 (2010) requires the courts of this state to follow the construction given to the federal antitrust laws by federal courts when construing Nebraska statutes which contain the same or similar language to the federal law. Since the language of our state antitrust statutes generally tracks the federal statutes, federal case law has application with respect to those state statutes.

First American Title Co. of South Dakota v. South Dakota Land Title Association, 714 F.2d 1439 (8th Cir. 1983). Courts have also indicated that the State Action Doctrine applies to actions by officials in a state's executive branch. *Saunders v. Brown*, 504 F.3d 903 (9th Cir. 2007); *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir. 1999); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869 (9th Cir. 1987).

In the present instance, it appears to us that the Legislature, by enacting § 8-157.01, specifically directed that prices for switching services in Nebraska cannot be discriminatory or set in a manner that creates preferential treatment. As a result, the State has acted in its sovereign capacity with respect to those pricing directives, and § 8-157.01 cannot violate the antitrust laws based upon the State Action Exemption.

Commerce Clause

The Commerce Clause in the United States Constitution, Art. I, § 8, cl. 3, empowers Congress to "regulate Commerce . . . among the several states." Although that portion of the Constitution does not expressly restrain the states in any way, the United States Supreme Court has long held that there is a negative implication implicit in that constitutional language which limits the rights of the states to regulate interstate commerce. *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008); *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007). The limitation based upon the negative implications of the Commerce Clause is called the Dormant Commerce Clause. *Waste Connections of Nebraska, Inc. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005). Under the Dormant Commerce Clause, a court first asks if a state statute discriminates on its face against interstate commerce. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007). If so, it is virtually *per se* invalid. *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008). If not, then the law will be upheld unless the burden imposed by the statute is clearly excessive in relation to the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). State laws frequently survive scrutiny under the second test. *Department of Revenue of Kentucky v. Davis*, 553 U.S. 328 (2008).

In the present case, it does not appear to us that the language of § 8-157.01 or the language of the Department's policies in this area discriminate in any way, on their face, against interstate commerce. Therefore, the constitutionality of those materials must be determined by weighing any burden which they impose upon interstate commerce against the local policy benefits which they create. The purpose of the original bill which became § 8-157.01 was "to provide an equal opportunity for every state and national bank in Nebraska, regardless of size or location to, if they so desire, compete for funds in an electronic banking environment." Introducer's Statement of Intent on LB 269, 84th Neb. Leg., 1st Sess. 1 (March 10, 1975). By all accounts, that purpose has been well served over time, with a concomitant benefit to the industry and to consumers who have had increased access to an ever wider array of services through ATMs and other electronic terminal processes. In contrast, when measured

against those significant local policy benefits, we are not entirely sure that any burden has been placed on interstate commerce by the statute and policies at issue. Therefore, we do not believe that the provisions of § 8-157.01 or the Department's administration of that statute, at least as we understand it, violate the Commerce Clause in the United States Constitution.

Question 2. Opinion #92124 allows tiered pricing in transactions governed by Neb. Rev. Stat. § 8-157.01 (Reissue 2012). What factors are relevant when determining whether a non-equal, tiered pricing system for a switch transaction is non-discriminatory?[3]

For reasons that will become apparent, we will begin our response to your second question with a discussion regarding the history and specific language of § 8-157.01, along with a review of our Opinion No. 92124.

Language and History of § 8-157.01

As noted above, § 8-157.01 initially came about as a result of 1975 Neb. Laws LB 269. That bill added a new Subsection 3 to Neb. Rev. Stat. § 8-157[4] which provided that banks in Nebraska could establish any number of electronic satellite facilities at which all banking transactions could be conducted, and that such facilities must be available "on a nondiscriminating basis for use by the customers of any other bank becoming a user bank." [5] *Id.* § 2. That same section provided that any bank could become a user bank by agreeing to pay the establishing bank its "pro rata transaction and other costs, including a reasonable return on capital expenditures incurred in establishing and maintaining such facilities." *Id.* § 2. LB 269 also added a new Subsection 6 to § 8-157 which provided that it was Legislature's intent that "there be an

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[3] In your opinion request letter, you told us that if we answered your first question in the affirmative, there was no need to address your remaining questions. However, since we answered your initial question in the negative, we will proceed with a response to your remaining questions.

[4] In 1975, the Legislature inserted language pertaining to ATMs into § 8-157. That language was subsequently moved to a new statute, § 8-157.01, in 1987. *See* 1987 Neb. Laws LB 615.

[5] Under § 8-157.01(15)(g), a financial institution with a main chartered office or approved branch located in Nebraska which establishes and owns an ATM is referred to as an "establishing financial institution." Section 8-157.01 (15)(l) further provides that a "user financial institution" is any financial institution which desires to avail itself of and provide its customers with ATM or POS services. The customers of a user financial institution use their ATM cards to perform electronic transactions in ATMs belonging to a different establishing financial institution.

equal opportunity to all Nebraska banks for the use of and access to a switch and that no discrimination shall exist or preferential treatment be given in either the operation of such switch or the charges for use thereof." *Id.* § 2.

The language in LB 269 which added a new Subsection 3 to Neb. Rev. Stat. § 157 has been amended in several respects since 1975. For example, the language providing that banks could become a user bank of an ATM upon payment of pro rata transaction and other costs was amended out of the statute in 1985,[6] and the current statute provides that financial institutions may become user financial institutions "by agreeing to pay the establishing financial institution its automatic teller machine usage fee." In 1993, an exemption was also added which provided that "it shall not be deemed discrimination if an automatic teller machine does not offer the same transaction services as other automatic teller machines or if there are no fees charged between affiliate financial institutions for the use of automatic teller machines." [7] In contrast, the separate language in LB 269 pertaining to discrimination and switches has remained essentially the same for almost forty years.

Several conclusions can be drawn from the language and history of § 8-157.01. First, the language pertaining to discrimination with respect to switches is contained in a different statutory section than the language pertaining to discrimination in the availability of ATMs, and the language in the two sections is different. Second, the language pertaining to discrimination with respect to switches is broader and more emphatic than the language pertaining to discrimination in the availability of ATMs, and the switching language specifically references costs. Finally, the Legislature has amended the language pertaining to the availability to ATMs over the years including the addition of exemptions, while the language pertaining to discrimination and switches has remained essentially unchanged.

Op. Att'y Gen. No. 92124 (December 14, 1992)

Based upon information provided to us by your staff, it appears that one national bank in Nebraska filed an informal complaint with the Department in 1992 against another national bank in the state because the second bank charged the first bank a different fee for access to its ATM than it charged a financial institution within its

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[6] *See* 1985 Neb. Laws LB 625, § 1.

[7] *See* 1993 Neb. Laws LB 81, § 8.

proprietary network for the same access. The first bank alleged that such different user fees were discriminatory in violation of § 8-157.01.[8] The second bank responded by asserting that the different fees resulted from different costs for use of the ATM, since members of its proprietary network could access accounts without the use of a switch. As a result of the dispute, the Department requested an opinion from this office as to whether § 8-157.01 "authorizes or disallows a two-tier pricing system for the use of ATM's when the reason for the two tiers is reasonably related to a factor outside the control of the establishing bank."

In our Op. Att'y Gen. No. 92124 (December 14, 1992), we stated that a two-tier pricing system is not expressly precluded by the "statutory provisions governing the establishment and use of electronic terminals." *Id.* at 2. After stating that the question of whether discrimination has occurred under § 8-157.01 is highly factual in each case, we concluded that a two-tiered pricing statute "is permissible if the fee arrangements [of the establishing financial institution] do not result in differing fees charged to user institutions for essentially the same services." *Id.* at 3, 4.

Analysis of Question 2

At the outset, we believe that our Opinion No. 92124 has limited application to the questions presented in your current opinion request and matters involving switches. That earlier opinion was focused on issues involving discrimination in user fees between establishing financial institutions and user financial institutions rather than discrimination in fees for switches. Moreover, as noted above, the statutory language regarding discrimination in fees for switches is different from the other discriminatory language in the statute. It is more explicit, more emphatic, and includes specific provisions related to cost. That language regarding discrimination in switching fees has also remained essentially the same since 1975. Therefore, this opinion will separately analyze requirements for equality in switching fees under § 8-157.01.

The language from § 8-157.01 regarding discrimination in fees for switches which is at issue provides as follows:

> (10) All financial institutions shall be given an equal opportunity for the use of and access to a switch, and no discrimination shall exist *or preferential treatment be given* in either the operation of such switch *or the charges for*

[8] It is our understanding that several different fees may be implicated when a customer of a particular financial institution uses an ATM established by another financial institution to carry out a financial transaction. The customer may be charged a fee for use of the foreign ATM by his or her financial institution. The establishing bank which owns the ATM may also charge the user bank a fee for use of its ATM. Finally, to the extent that a switch (or switches) is involved in the transaction, the switch may charge a fee for electronically moving the transaction information from one financial institution to another.

> *use thereof.* The operation of such switch shall be with the approval of the director. Approval of such switch shall be given by the director when he or she determines that its design and operations are such as to provide access thereto and use thereof by any financial institution *without discrimination as to access or cost of its use.*

(emphasis added). In Nebraska, statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary *PSB Credit Services, Inc. v. Rich,* 251 Neb. 474, 558 N.W.2d 295 (1997). In addition, there is no need for statutory interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State ex rel. Amanda M. v. Justin T.,* 279 Neb. 273, 777 N.W. 2d 565 (2010). With those rules of statutory construction in mind, it seems to us that the language of Subsection 10 of § 8-157.01 is plain, direct and unambiguous. It provides that there shall be no discrimination or preferential treatment in the charges for the use of a switch, i.e., all financial institutions which use a particular switch transaction should be charged the same price for that switch transaction.

Even if the language of Subsection 10 of § 8-157.01 required construction, it is clear that a statute should be construed to "give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *Piska v. Nebraska Dep't. of Social Services*, 252 Neb. 589, 594, 567 N.W.2d 544, 547 (1997). And, when construing a statute, it is necessary to look to the purpose of the statute and to give it a reasonable construction which best achieves that purpose rather than a construction which would defeat it. *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002). In that regard, the original intent of § 8-157.01 was "to provide an equal opportunity for every state and national bank in Nebraska, regardless of size or location to, if they so desire, compete for funds in an electronic banking environment." Introducer's Statement of Intent on LB 269, 84th Neb. Leg., 1st Sess. 1 (March 10, 1975). Construing the language in § 8-157.01 pertaining to charges for switches so as to require that charges for a particular switch transaction should be the same for all financial institutions in Nebraska is obviously compatible with and supports that legislative purpose.

Since we have concluded in this opinion that Subsection 10 of § 8-157.01 prohibits discrimination or preferential treatment in charges for the use of a switch and requires that all financial institutions which use a particular switch transaction should be charged the same price for that switch transaction, there is no need for us to determine what factors are relevant in ascertaining whether a non-equal, tiered pricing system for a switch transaction is non-discriminatory.

Question 3. Does the non-discriminatory fee structure listed in Neb. Rev. Stat. § 8-157.01 (Reissue 2012) require equal fees for all of a switch's transactions?

From discussions with your staff, we understand that it is possible for a switch to conduct different types of transactions based upon the amount of information needed to be transmitted through the switch electronically. For example, a simple cash withdrawal from an ATM might require the transmission of less information electronically than a transfer of funds within a specific financial institution. It seems to us that § 8-157.01 ultimately requires that all financial institutions must be charged the same price for a particular transaction by a switch. It does not require, however, that a switch must charge the same fee for all its transactions. Consequently, we conclude that § 8-157.01 does not require equal fees for all of a switch's transactions, so long as all financial institutions are charged the same price for a specific transaction.

Question 4. Can a group of financial institutions form an entity (subsidiary or otherwise) to provide switch or ATM services and charge fees for Nebraska electronic switch transactions among the group members as well as different fees to financial institutions outside of the group?

For the various reasons discussed above, we believe that Subsection 10 of § 8-157.01 requires that all financial institutions must be charged the same price for a particular transaction by a switch. Under those circumstances, that statute does not appear to permit a group of financial institutions to form an entity to provide switch or ATM services and then charge fees for Nebraska electronic switch transactions among group members which are different from the switch fees charged to Nebraska financial institutions outside the group.

We are aware that the final sentence of § 8-157.01 (1) provides that "[i]t shall not be deemed discrimination if . . . there are no fees charged between affiliate financial institutions for the use of automatic teller machines." Section 8-157.01 (15)(e) further provides that "[a]ffiliate financial institution means any financial institution which is a subsidiary of the same bank holding company." However, we do not believe that the language of § 8-157.01 (1) which permits affiliated financial institutions to discriminate as to user fees for ATMs permits similar discrimination for switch services. As discussed at length above, the statutory language regarding user fees for ATMs and switches is contained in two different sections of the statute, and the language regarding fees for switches is more emphatic than that pertaining to user fees. Moreover, the focus of the discrimination exemption language in § 8-157.01 (1) is clearly on user fees or fees "for the use of automatic teller machines" rather than fees for switches, and as we understand it, the entities operating switches are not normally financial institutions as that term is defined in § 8-157.01.

CONCLUSION

We do not believe that the provisions of § 8-157.01 constitute a restraint of trade or that the Department's administration of that statute violates the Dormant Commerce Clause. Beyond that, we have determined that while entities operating a switch can charge different prices for different switch transactions, all financial institutions which use a particular switch transaction should be charged the same price for that switch transaction. Finally, since all financial institutions using a particular switch transaction must be charged the same price, a group of financial institutions cannot form an entity to provide switch services and then charge its group members a different price for switch services than the prices for those services charged to non-members.

Sincerely yours,

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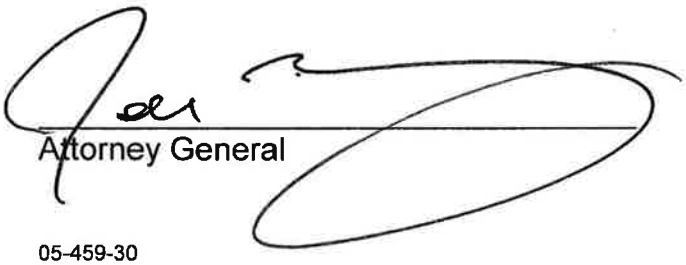

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