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NEB. STATE OF NEBRASKA
OFFICIAL
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DATE: December 14, 1992

SUBJECT: Fee Arrangements Regarding Use of Electronic Terminals (ATMs) By Financial Institutions

REQUESTED BY: James A. Hansen, Director
Department of Banking and Finance

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

You have requested the opinion of this Office regarding interpretation and application of the provisions of Neb. Rev. Stat. § 8-157.01 (Cum. Supp. 1992). Specifically, you inquire "whether Neb. Rev. Stat. § 8-157.01 (Reissue 1991) authorizes or disallows a two-tier pricing system for the use of ATMs when the reason for the two tiers is reasonably related to a factor outside the control of the establishing bank."

The question you have asked is due in part to an informal complaint filed with the Director of the Department of Banking and Finance. Briefly stated, the complaint alleges that a certain financial institution which has established an ATM (automatic teller machine) network discriminates against certain user financial institutions through a fee arrangement that is preferential to other user financial institutions. The respondent establishing institution maintains that fees charged to user institutions may differ and not be violative of the nondiscrimination provisions of Neb. Rev. Stat. § 8-157.01. From

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the materials you submitted, it appears that user institutions are assessed transaction fees at a lesser rate if the institutions are members of the proprietary network.

Discrimination by an establishing institution because of the cost of transaction fees or due to restricted access to customers of user institutions is prohibited. § 8-157.01 in relevant part states:

> (1) With the approval of the director, any financial institution may establish and maintain any number of electronic terminals or manned electronic terminals at which all banking transactions . . . may be conducted. . . . Such terminals shall be available on a non-discriminating basis for use by customers of any other financial institution becoming a user financial institution. It shall not be deemed discrimination if a terminal does not offer the same transaction services as other terminals.
>
> (2) Any financial institution may become a user financial institution by agreeing to pay the establishing institution its transaction fees. . . . The director shall refuse to approve the establishment of any electronic terminals unless such terminals will be available on a nondiscriminating basis through methods, fees, and processes that the establishing financial institution has provided for switching transactions. . . .
>
> (5) It is the intent that this section shall apply to financial institutions chartered by the State of Nebraska and all national institution associations the main chartered offices of which are located in the State of Nebraska, that there shall be equal opportunity to all Nebraska financial institutions 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. . . . Approval of such switch shall be given by the Director when he or she determines that its design and operation are such as to provide access thereto and use thereof by any Nebraska financial institution without discrimination as to access or cost of its use. . . .

We do not believe that a "two-tier" pricing system is expressly precluded by the statutory provisions governing the establishment and use of electronic terminals. The pricing system you have referenced appears to include fee arrangements which

assess differing amounts to user institutions for use of the establishing institution's electronic terminals. The governing statute does not define or delineate with any specificity the type of pricing or contractual arrangements which may be utilized by the establishing institution. Rather, § 8-157.01 generally provides for agreement by implication by use of the terminals and standardized agreements are authorized. While the statute does not address the type of contractual arrangements which may be utilized, it is clear that the arrangement or agreement for fees for use of the terminals may not be discriminatory to user institutions on the basis of cost or restricted use.

If the "two-tiered" pricing arrangement results in lesser fees charged to one class of user institutions than another for essentially the same service, a strong argument may be made that discrimination within the meaning of the statute has occurred. We have reviewed the decision of the district court in ***Application of Henderson State Bank***, No. 34020 (Lanc. County D.C. 1982) which applied the nondiscrimination provisions to fee arrangements of an establishing bank for use of its electronic terminals. The court generally found that user institutions were treated the same with respect to fees and concluded that discrimination did not occur.

Discrimination occurs when differing treatment is afforded members of the same class. ***Andrews v Union Sav. Bank***, 238 Iowa 481, 28 N.W.2d 37 (1947). In analogous rate cases, the courts have consistently determined that preferential treatment through differing rates charged to members of the same class is discriminatory. ***Application of Nebraska Limestone Producer's Ass'n.***, 168 Neb. 786, 97 N.W.2d 331 (1959). Further, carriers may not reduce rates to meet competition at one point to any particular person or locality. ***Howard McLean Co. v. Chicago, B.&Q. R. R. Co.***, 187 Neb. 30, 187 N.W.2d 300 (1971).

The question whether discrimination has occurred because of the fee arrangement of the establishing institution is highly factual. The differing fee arrangements for user institutions appears to be based on certain factors which include the way in which the transactions are processed. Whether this is sufficient reason for the disparate treatment accorded user institutions is dependent on cost factors from an operational viewpoint. Disparate fee arrangements would not be discriminatory if there is a reasonable relationship between the fees assessed and the transaction costs. From the materials submitted, there is not sufficient information to make the factual determination whether one class of user institution received preferential treatment on the basis of cost by virtue of being a member of the proprietary network of the establishing institution. It is our conclusion that

a "two tier pricing system" is permissible if the fee arrangements do not result in differing fees charged to user institutions for essentially the same services.

Sincerely yours,

DON STENBERG
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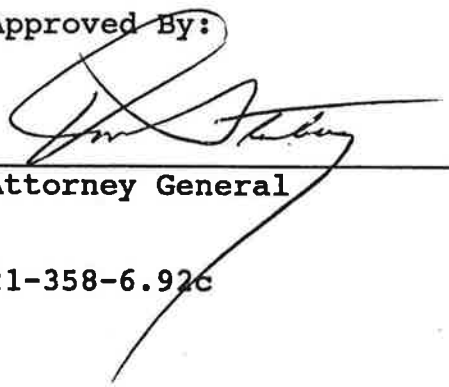
Approved By:



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