
**Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency
Office of Thrift Supervision**

**Report to the Congress
on Review of Regulations Affecting
Online Delivery of Financial Products and Services**

November 2001

**BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
OFFICE OF THE COMPTROLLER OF THE CURRENCY
FEDERAL DEPOSIT INSURANCE CORPORATION
OFFICE OF THRIFT SUPERVISION**

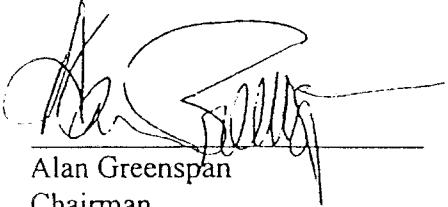
November 13, 2001

The Honorable Richard B. Cheney
President of the United States Senate
Washington, D.C. 20510

Dear Mr. President:

The Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision are submitting the enclosed joint report to Congress as required by Section 729 of the Gramm-Leach-Bliley Act of 1999. The report addresses banking regulations with respect to the online delivery of financial products and services and outlines those areas that the agencies plan to consider further for possible modifications.

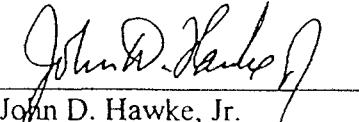
Sincerely,



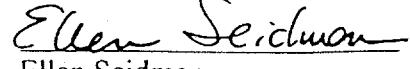
Alan Greenspan
Chairman
Board of Governors of the
Federal Reserve System



Donald E. Powell
Chairman
Federal Deposit Insurance Corporation



John D. Hawke, Jr.
Comptroller
Office of the Comptroller
of the Currency



Ellen Seidman
Director
Office of Thrift Supervision

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Submitted to the Congress pursuant to section 729 of the Gramm-Leach-Bliley Act

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Introduction

The Board of Governors of the Federal Reserve System (Board), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), and Office of Thrift Supervision (OTS) (collectively, the Agencies), jointly issue this report about banking regulations that affect the online delivery of financial products and services. The Agencies prepared the report pursuant to section 729 of the Gramm-Leach-Bliley Act (the GLB Act or Act).¹

The Agencies' report consists of several parts: Part I summarizes the statutory mandate and the methods the Agencies used to conduct the studies and prepare this report; Part II discusses the Agencies' review of the regulations that the Agencies must administer jointly; and Parts III – VI describe each Agency's review of the regulations that it solely administers.

Summary of Conclusions

This report concludes that the Agencies' regulations generally accommodate online banking and lending. The report outlines those few areas that the Agencies plan to consider further for possible modifications.

The Agencies will continue to monitor developments in banking practices and technology. The Agencies are committed to updating their respective regulations and guidance as the need arises, both individually and in conjunction with each other and the Federal Financial Institutions Examination Council (FFIEC). In doing so, the Agencies will continue to seek to minimize impediments to the electronic delivery of financial products and services even as other regulations may be required to ensure the lawful uses of those products or services, such as the provisions that will be implemented under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT). The Agencies will foster growth of these activities in a manner that is safe and sound and helps ensure consumer acceptance and protection.

¹ Pub. L. 106-102, 113 Stat. 1338, 1476 (1999).

Part I

Background and Methodology

A. Background

Section 729 of the GLB Act requires the Board, FDIC, OCC, and OTS to conduct a study of banking regulations regarding the delivery of financial products and services. Section 729 further requires the Agencies to report their recommendations on adapting existing legislative or regulatory requirements to online banking and lending.

Even prior to the enactment of section 729 of the GLB Act, each Agency had undertaken several initiatives to adapt its regulations to facilitate and support the online delivery of financial products and services. Moreover, following the Act, the Agencies jointly developed regulations and guidance that are designed to facilitate the electronic delivery of financial products and services. For example, the Agencies recently issued the Interagency Guidelines Establishing Standards for Safeguarding Customer Information, under section 501 of the Act, that accommodate the needs for financial institutions to adopt new electronic technologies to provide financial products and services to their customers.² In addition, through the FFIEC, the Agencies issued guidance on authentication in the electronic banking environment.³

Finally, on June 30, 2000, the President signed into law the Electronic Signatures in Global and National Commerce Act (E-Sign Act),⁴ which was designed to encourage the continued expansion of electronic commerce. The E-Sign Act generally provides that a record or signature will not be invalid solely because it is in electronic form, rather than in a paper or customarily handwritten form. In addition, the E-Sign Act provides that maintaining electronic records may satisfy record retention requirements, provided that those records meet certain conditions. The E-Sign Act also contains special rules applicable to some consumer disclosure requirements that permit the use of electronic records. The E-Sign Act is

² 66 Fed. Reg. 8616 (Feb. 1, 2001). These guidelines implement the requirements of section 501(b) of the GLB Act, 113 Stat. at 1436-37, *codified at* 15 U.S.C. § 6801.

³ Board of Governors' Division of Banking Supervision and Regulation, SR Letter 01-20 (SUP) (Aug. 15, 2001), FDIC FIL-69-2001 (Aug. 24, 2001), OCC Advisory Letter No. 2001-8 (July 30, 2001), OTS CEO Memorandum No. 143 (Aug. 8, 2001).

⁴ Pub. L. 106-229, 114 Stat. 464 (2000), *codified at* 15 U.S.C. § 7001 *et seq.*

enforceable by its own terms; implementing regulations are not required. In fulfilling their obligations under other statutes, including the promotion of safe and sound banking practices, the Agencies will act consistent with the terms and purposes of the E-Sign Act.

B. Methodology

To satisfy the requirements of section 729 of the Act, each Agency conducted a full review and analysis of its regulations that could affect the online delivery of financial services. Each of the Agencies separately reviewed its regulations and certain supervisory policies that relate to the delivery of financial products or services to assess their suitability for transactions that are conducted through electronic media. The Agencies jointly reviewed interagency regulations.

To assist this review, each Agency published in the *Federal Register* a request for comment on a wide range of issues that bear on delivering financial products and services over the Internet to assess whether any of its respective regulations should be amended to facilitate online banking and lending.⁵ In addition, the Agencies sought comment on how particular statutory provisions affect the online delivery of financial products and services.

After reviewing their respective regulations, the Agencies determined that the report should focus on those regulations (or other supervisory policies) that present issues with respect to the online delivery of financial products or services to individual or business customers. In this way, the Agencies have endeavored to tailor the report to address key issues, common problems raised by the comments, and other aspects of banking regulations with respect to the electronic delivery of financial products and services, instead of a wide-ranging examination of all of the Agencies' regulations. Furthermore, the Agencies determined that, absent any compelling issues raised by the comments, the report should not address other

⁵ 65 Fed. Reg. 4895 (Feb. 2, 2000) (OCC); 66 Fed. Reg. 27,912 (May 21, 2001) (Board); 66 Fed. Reg. 31,186 (June 11, 2001) (OTS); 66 Fed. Reg. 34,855 (July 2, 2001) (OCC); 66 Fed. Reg. 37,029 (July 16, 2001) (FDIC). The Appendix includes copies of the *Federal Register* publications. The Board also solicited comments relating to the section 729 study and report as part of its publication of interim final rules to establish uniform standards for the electronic delivery of disclosures to consumers under the consumer financial services regulations administered by the Board (Regulations B, E, M, Z and DD). 66 Fed. Reg. 17,779; 66 Fed. Reg. 17,786; 66 Fed. Reg. 17,322; 66 Fed. Reg. 17,329; 66 Fed. Reg. 17,795 (Mar. 30 and Apr. 4, 2001).

regulations, such as those that will be issued under the recently enacted USA PATRIOT ACT, that will be the subject of a future rulemaking proceeding.

Part II

Jointly Administered Regulations

A. Appraisal Standards for Federally Related Transactions

Under title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 3331 *et seq.*, the Agencies promulgated regulations that provide protection for federal financial and public policy interests in real estate-related transactions by requiring appraisers to perform written real estate appraisals in accordance with uniform standards.⁶ For the sake of simplicity in this report, we refer to the rule as the “Appraisal Rule.” Under the rule, appraisers must demonstrate competency and their professional conduct must be subject to effective supervision. The Appraisal Rule applies to all federally related transactions entered into by the Agencies or by institutions regulated by the Agencies. The Appraisal Rule generally:

- Identifies the real estate-related financial transactions that require the services of an appraiser;
- Prescribes the categories of federally related transactions that a State certified appraiser must appraise and the categories a State licensed appraiser must appraise; and
- Prescribes minimum standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of the Agencies.

1. Analysis

Some commenters recommended that the Agencies exempt from the written appraisal requirement loans processed using an automated underwriting system selected pursuant to an institution’s required board-approved real estate lending policy. Commenters also asserted that the \$250,000 threshold for requiring the use of state licensed or certified appraisals is outmoded. However, under existing rules, any loan underwritten to standards established by Fannie Mae and Freddie Mac is exempt. Moreover, a commenter who has studied the industry commented

⁶ 12 C.F.R. parts 34 (OCC), 225 (subpart G) (Board), 323 (FDIC), and 564 (OTS).

that simply switching from a paper-based format to an automated, paperless one would not solve all appraisal issues about whether the current system of appraisals is the optimal one.

2. Conclusion

The Agencies have not identified any provisions of the Appraisal Rule that impede online banking or that need amendment to facilitate online banking.

B. Community Reinvestment

In 1977, Congress enacted the Community Reinvestment Act (CRA), 12 U.S.C. § 2901 *et seq.*, to encourage federally insured banks and thrifts to help meet the credit needs of their entire communities, including low- and moderate-income neighborhoods, consistent with safe and sound banking practices. The Agencies' joint rule implements the CRA.⁷

1. Analysis

In connection with this study and report, a few commenters noted that the CRA regulations have implications for online banking and lending. For example, one commenter observed that geographical proximity to a financial institution's service facility, such as an institution's branch, may not serve as an appropriate criterion for evaluating whether the institution is able to serve the credit needs of a particular group of consumers.

On July 19, 2001, the Agencies issued a Joint Advance Notice of Proposed Rulemaking (ANPR) as part of their review of the CRA regulations.⁸ The Agencies sought public comment on a wide range of issues concerning the CRA, including suggestions for revising the CRA regulations and on other steps the Agencies might undertake instead of, or in addition to, revising the regulations. One of the issues discussed in the Joint ANPR is how to define the assessment areas.

The CRA regulations provide that an assessment area is the geographic area in which the Agencies evaluate an institution's record of meeting the credit needs of

⁷ See 12 C.F.R. parts 25 (OCC), 228 (Board), 345 (FDIC), and 563e (OTS).

⁸ 66 Fed. Reg. 37,602.

its community under the CRA. An institution's assessment area generally consists of one or more metropolitan statistical areas or one or more contiguous political subdivisions, and includes geographies where the institution has its main office, branches, and deposit-taking ATMs, as well as surrounding geographies where the institution has originated or purchased a substantial portion of its loans. Through the Joint ANPR, the Agencies sought comment on whether the assessment area provisions provide a reasonable and sufficient standard for designating the communities within which the institution's activities will be evaluated during an examination. The Agencies noted that members of the public have questioned the continued appropriateness of delineating geographically defined assessment areas in light of the increasing use of channels such as the Internet to serve widely dispersed markets and to gather deposits and deliver products and services without using deposit-taking branches or ATMs.

2. Conclusion

The Agencies are addressing CRA issues, including the appropriate standards for defining assessment areas, in the separate CRA rulemaking. Accordingly, the Agencies make no recommendation about regulatory or legislative changes to the CRA in this report. Such recommendations, if any, may emerge as a result of the CRA rulemaking.

C. Consumer Protections for Depository Institution Sales of Insurance

Section 305 of the GLB Act generally requires the Agencies to prescribe customer protection regulations that govern the retail sales practices of any insurance product by a depository institution or any person engaged in insurance sales at an office of or on behalf of the institution. The Agencies implemented section 305 of the GLB Act through regulations that were jointly developed and issued in consultation with the National Association of Insurance Commissioners (NAIC).⁹ The Agencies' respective rules are substantively identical; for the sake of simplicity in this report, we refer to the rule as the "Insurance Rule."

⁹ 65 Fed. Reg. 75,821 (Dec. 4, 2000). The Agencies' rules are codified at 12 C.F.R. parts 14 (OCC), 208 (subpart H) (Board), 343 (FDIC), and 536 (OTS) respectively.

1. Analysis

The Insurance Rule prohibits any institution, or anyone acting on its behalf (a “covered person”), from engaging in any practice that could mislead someone or otherwise cause a reasonable person to reach an erroneous belief about:

- The uninsured nature of any insurance product or annuity;
- The investment risk associated with certain products; and
- The fact that the approval of a credit extension cannot be conditioned on the purchase of an insurance product or annuity from the financial institution, and that the consumer is free to purchase the insurance product or annuity from another source.

The Insurance Rule requires that the covered person provide appropriate insurance disclosures before the completion of the initial sale of an insurance product or annuity to the consumer, as well as a credit disclosure at the time the consumer applies for an extension of credit in connection with which insurance is solicited, offered, or sold. The covered person must obtain from the consumer a written acknowledgment of receipt of the disclosures at the time the consumer receives the disclosures or before the initial purchase of an insurance product or annuity by the consumer. Disclosures must be made orally and in writing, except that oral disclosures are not required for applications received or sales conducted by mail. Similarly, any disclosures provided by electronic media do not have to be provided orally.

The rule specifically authorizes the covered person to provide disclosures electronically, subject to the requirements of section 101(c) of the E-Sign Act, if the consumer affirmatively consents and the covered person makes the disclosures in a format that allows the consumer to retain the disclosures or obtain them later.

2. Conclusion

The Agencies believe that no change to the Insurance Rule is necessary to adapt its requirements to online banking and lending. In the notice of proposed rulemaking, the Agencies specifically invited comment on issues of sales, disclosure, and acknowledgment of receipt of disclosure by electronic means. After considering the comments submitted with respect to those issues, the Agencies addressed those issues in the Supplementary Material published with the final rule and in the rule

itself.¹⁰ The GLB Act mandates that the regulations include requirements to provide disclosures and obtain an acknowledgment by the consumer and permits the Agencies to adjust those requirements to suit transactions conducted in electronic media. The Agencies believe that, in accordance with the statute, the final rule contains appropriate adjustments to the disclosure and acknowledgment requirements to facilitate online banking and lending as discussed above.

D. Loans in Areas Having Special Flood Hazards

Pursuant to the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973, as amended, the Agencies promulgated regulations that prohibit financial institutions from making certain loans if the collateral is located in a special flood hazard area unless the collateral is covered by flood insurance.¹¹ The Agencies' regulations also prescribe requirements about how a financial institution must inform a borrower of the insurance requirement for the loan.

1. Analysis

The Agencies' flood insurance regulations expressly permit a financial institution to use a computerized or electronic flood hazard determination form. Similarly, an institution may deliver electronically the notice of changes in servicer to the insurance company issuing the flood insurance policy, if acceptable to the insurance company. However, the regulations require the institution to provide the borrower with a written, physical copy of the notice of special flood hazards.¹²

The Agencies note that the requirement to provide a written notice of special flood hazards to a borrower is affected by the E-Sign Act. That statute, by its own force, permits a financial institution to satisfy that notice requirement by providing the notice in electronic form in lieu of a physical, written copy. Before the financial institution may do so, it must comply with the provisions of section 101(c) of the E-Sign Act. Among other requirements, section 101(c) mandates that the

¹⁰ 65 Fed. Reg. at 75,827-29; *see, e.g.*, 12 C.F.R. § 14.40(c)(4).

¹¹ 42 U.S.C. § 4104a. The Agencies' regulations are codified at 12 C.F.R. parts 22 (OCC), 339 (FDIC) and 572 (OTS) and § 208.25 (Board), respectively.

¹² Notwithstanding this requirement with respect to the borrower, the lender may provide the servicer an electronic copy of the notice of special flood hazards.

consumer must have “affirmatively consented” to the use of an electronic record in lieu of a physical, written notice.

2. Conclusion

The Agencies have determined that, at this time, the flood insurance regulations do not impose any undue burden that limits a financial institution’s ability to provide loans or other financial products or services on line. Nevertheless, the Agencies may consider amending the interagency rule to clarify the conditions for providing an electronic, instead of written, notice of special flood hazards to a borrower.

E. **Management Official Interlocks**

The Agencies jointly implemented regulations under the Depository Institutions Management Interlocks Act. 12 U.S.C. § 3201 *et seq.* The Agencies’ respective rules are substantively identical; for the sake of simplicity in this report, we refer to the rule as the “Management Interlocks Rule.”¹³

1. Analysis

The Management Interlocks Rule generally prohibits a management official of a depository organization from serving as a management official of an unaffiliated depository organization if the depository organizations in question or its affiliate have offices in the same community or relevant metropolitan statistical area. *See, e.g.*, 12 C.F.R. § 212.3(a). The rule defines a “community” as “a city, town, or village, and contiguous and adjacent cities, towns, or villages.” *See, e.g.*, 12 C.F.R. § 212.2(c). Similarly, the rule defines a “relevant metropolitan statistical area” as a primary or consolidated metropolitan statistical area, as defined and applied by the Office of Management and Budget.

One commenter noted that the definitions of “community” and “relevant metropolitan statistical area” are predicated on conceptions of geography. The commenter suggested that the Agencies should consider revising these geographic limitations to suit financial institutions that deliver products and services through the Internet.

¹³ *See* 12 C.F.R. parts 26 (OCC), 212 (Board), 348 (FDIC), and 563f (OTS).

2. Conclusion

The Agencies recognize that the Management Interlocks Rule is based upon conceptions of geography, as mandated by the statute, that may not apply to financial institutions engaged in online banking and lending. Nevertheless, the Agencies believe that the geographic limitations have a minimal impact, if any, upon the online delivery of financial products and services. The Agencies believe that the Management Interlocks Rule sufficiently suits the purpose of preventing anti-competitive practices as determined by customary measures of banking products and services in a local market. Because an alternative analysis of the competitive effects of institutions that offer financial products and services over the Internet has not been developed, the Agencies believe that it would be premature to consider changes to the Management Interlocks Rule that would apply to a competitive environment that includes online banking and lending. Accordingly, the Agencies have determined that amendments to the statute or the rule would be unnecessary at this time.

F. **Privacy of Consumer Financial Information**

The Agencies implemented the privacy provisions of Subtitle A of Title V of the GLB Act through regulations that were jointly developed and issued in coordination with the National Credit Union Administration, the Federal Trade Commission, and the Securities and Exchange Commission. The Agencies' respective rules are substantively identical; for the sake of simplicity in this report, we refer to the rule as the "Privacy Rule."¹⁴

1. Analysis

The GLB Act generally requires a financial institution to provide notices to its consumers that describe its privacy policies and practices and, where applicable, allow a consumer to opt out of disclosures of nonpublic personal information to nonaffiliated third parties. The GLB Act requires that a financial institution provide notices "in writing or in electronic form or other form permitted by the regulations." *See, e.g.*, 15 U.S.C. § 6803(a). The Privacy Rule facilitates the electronic delivery of financial products and services by allowing a financial institution to deliver its notices online, provided that it satisfies certain conditions.

¹⁴ See 12 C.F.R. parts 40 (OCC), 216 (Board), 332 (FDIC), and 573 (OTS).

In particular, the Privacy Rule generally allows a financial institution to deliver the applicable notices electronically only if the consumer agrees.

The Agencies received several comments regarding the Privacy Rule; we address those issues below.

a. Providing “clear and conspicuous” notices over the Internet

Section 503 of the GLB Act (15 U.S.C. § 6803) requires a financial institution to deliver a notice of its privacy policies and practices to a consumer at the time of establishing a customer relationship and annually thereafter. The Privacy Rule refers to these notices as an “initial notice” and “annual notice,” respectively.

Section 502 (15 U.S.C. § 6802) generally prohibits a financial institution from disclosing nonpublic personal information about a consumer to any nonaffiliated third party unless the institution provides the consumer with an initial notice and a reasonable opportunity to opt out of that disclosure. The privacy regulation refers to the notice that describes the consumer’s right to opt out of disclosures to nonaffiliated third parties as an “opt out notice.”

The Privacy Rule mandates that the initial, annual, and opt out notices be “clear and conspicuous,” and defines that requirement as “reasonably understandable and designed to call attention to the nature and significance of the information in the notice.” This provision does not prescribe specific requirements for written or online notices. Rather, several examples illustrate how a financial institution may comply in various media, such as the use of a “plain-language heading to call attention to the notice” and the use of “distinctive type size, style, and graphic devices, such as shading or sidebars” when the notice is combined with other information. The rule also includes an example that is tailored to notices that a financial institution provides on its web site(s).¹⁵

¹⁵ Section ___.3(b)(2)(iii) of the Agencies’ Privacy Rule provides: “If you provide a notice on a web page, you design your notice to call attention to the nature and significance of the information in it if you use text or visual cues to encourage scrolling down the page if necessary to view the entire notice and ensure that other elements on the web site (such as text, graphics, hyperlinks, or sound) do not distract attention from the notice, and you either: (A) Place the notice on a screen that consumers frequently access, such as a page on which transactions are conducted; or (B) Place a link on a screen that consumers frequently access, such as a page on which transactions are conducted, that connects directly to the notice and is labeled appropriately to convey the importance, nature, and relevance of the notice.”

Several commenters urged the Agencies to modify the “clear and conspicuous” standard to accommodate the delivery of financial products and services via non-traditional computing devices, such as wireless handheld computers. Relative to standard desktop computers, handheld devices have smaller screens that require information to be displayed in smaller or altered formats. One commenter believed that the Agencies should clarify the Privacy Rule to state where notices are available to consumers via customary personal computers, a financial institution should not have to ensure that secondary access through wireless devices meets the same standard of “clear and conspicuous” as would apply to notices that are accessed via a personal computer.

As noted above, the Privacy Rule does not prescribe specific requirements for written or online notices. Nevertheless, the Agencies may consider providing guidance to illustrate how the standard of “clear and conspicuous” applies to delivering notices over smaller computing devices.

b. Applicability of the E-Sign Act

One commenter asked the Agencies to address whether the consumer consent provisions of the E-Sign Act apply to the notices required under the privacy provisions of the GLB Act. The commenter asserted that “[s]ome confusion” has arisen over whether an institution must comply with the E-Sign Act when it is required to provide a notice under the GLB Act and the Privacy Rule. The commenter urged the Agencies to amend the Privacy Rule to expressly state that the E-Sign Act does not apply to any notices required under the GLB Act that are delivered electronically in accordance with the Privacy Rule.

The provisions of the E-Sign Act that regulate disclosures to consumers apply “if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing.” 15 U.S.C. § 7001(c). After gathering more experience implementing the Privacy Rule, the Agencies will be prepared to assess whether any additional actions would be appropriate to clarify the applicability of the E-Sign Act to the privacy provisions of the GLB Act.

2. Conclusion

Based upon the review of the privacy provisions of the GLB Act and the Privacy Rule, and the comments submitted in connection with this study, the Agencies conclude that none of the provisions of the GLB Act or the regulation impose any

undue burden that limits a financial institution's ability to provide financial products or services on line. The Agencies may consider including additional examples or issuing other guidance that aims to clarify how a financial institution may satisfy its obligations under the Privacy Rule through various electronic media.

Part III

Regulations Administered by the Board of Governors of the Federal Reserve System

A. Electronic Delivery of Disclosures under Various Consumer Financial Services Regulations Administered by the Board

1. Overview

As early as the mid-1990s, the Board recognized the potential benefits of electronic commerce to both consumers and the financial services industry. In 1996, the Board amended Regulation E (Electronic Fund Transfers) to permit electronic authorizations for preauthorized debits from consumers' deposit and other asset accounts. Since that time, the Board has exercised its authority under the consumer financial services laws that it administers to permit electronic delivery of certain disclosures. For example, in 1997, the Board interpreted the written-disclosure requirement under Regulation CC (Expedited Funds Availability) to permit electronic disclosures, and interpreted Regulation Z (Truth in Lending) to permit the electronic delivery of periodic statements. In 1998, the Board issued an interim rule permitting all disclosures under Regulation E to be provided electronically and, in 1999, the Board issued an interim rule under Regulation DD (Truth in Savings) permitting deposit account disclosures on periodic statements to be provided electronically.

In August 1999, the Board issued proposed rules permitting electronic delivery of *all* disclosures (for example, via e-mail or at a web site) that under the Board's consumer financial services regulations are required to be in writing. The proposals required institutions to obtain consumers' consent to receive electronic disclosures by requiring a standardized consent form identifying the types of disclosures to be delivered electronically, how to access them, and other information deemed necessary for consumers to make informed decisions about electronic delivery.

The E-Sign Act, which became law in June 2000, established the legal validity and enforceability of electronic signatures, contracts, and other records (including consumer disclosures). The E-Sign Act superseded much of the Board's rulemakings but contained a consent requirement similar to that proposed by the Board. The E-Sign Act authorizes the electronic delivery of written records

required by law to be provided or made available to a consumer if an institution obtains the consumer's consent in accordance with the E-Sign Act's requirements.

In March 2001, the Board published interim final rules under Regulations B, E, M (Consumer Leasing), Z, and DD to incorporate the requirements of the E-Sign Act by reference. Under the interim final rules, financial institutions, creditors, lessors, and others may use electronic disclosures if they obtain consumers' consent in accordance with the requirements of section 101(c) of the E-Sign Act. The Board's interim final rules also establish uniform requirements for satisfying the timing and delivery requirements of the consumer financial services laws when electronic disclosures are used.

Under the interim final rules, electronic disclosures may be provided by e-mail or they can be made available at another location, such as an institution's web site. If a disclosure—such as an account statement or a notice of a change in account terms—is provided at a web site, an institution must notify the consumer of the disclosure's availability by e-mail. The disclosure must remain available for 90 days, not necessarily at the same location, to allow consumers adequate time to access and retain the information. In addition, when a disclosure sent by e-mail to a consumer is returned undelivered, the interim rule requires the institution to take reasonable steps to attempt redelivery using the information in its files. This requirement is satisfied if, for example, the institution sends the disclosure or notice to a different e-mail or postal address that the institution has on file.

2. Analysis

In connection with the March 2001 interim final rules, the Board also requested comment on whether other regulatory or legislative changes are needed to facilitate online banking and lending. Only a few comments were received on the study, which mostly focused on the Board's interim final rules. In May, the Board solicited comments specifically on the section 729 study. The Board received approximately twenty-five comment letters; most of the comments concerning the Board's consumer financial services regulations focused on the March 2001 interim final rules and mirrored the comments received earlier.

The Board's consumer financial services regulations generally require that institutions "send," "provide," or "deliver" disclosures to consumers as opposed to merely making the disclosures available. The requirement typically is satisfied by mailing disclosures to a postal address designated by the consumer. Where

disclosures are provided electronically, sending disclosures to a consumer's e-mail address would satisfy this requirement.

The Board has recognized, however, that because of security and privacy concerns associated with data transmissions, institutions may choose to make the disclosures available at their web sites, where consumers may retrieve them under secure conditions. The Board's rulemakings on electronic disclosures, therefore, have not required institutions to send the required disclosures by e-mail, but have also allowed institutions to make the disclosures available at another location, such as an Internet web site.

In allowing disclosures to be made available in this manner, the Board also considered whether additional rules might be necessary to ensure their effective delivery. For example, the Board believes that consumers should not be required to initiate a search of the web site of each financial institution with which an account is held to determine whether a disclosure has been made available. Consumers who receive disclosures by accessing an institution's web site should be alerted when the information is first available in order to ensure that they have the opportunity to access the information before it is removed.

Accordingly, to ensure effective delivery, when disclosures are not sent to the consumer's e-mail address, a notice alerting the consumer of the disclosures' availability must be sent to the consumer's e-mail address in a timely fashion. The consumer's e-mail address is defined as a location where the consumer can also receive messages from parties other than the institution.

a. Alert notices

Several commenters objected to the interim final rules' requirement that alert notices be sent to the consumer's e-mail address when disclosures are posted on a web site. Commenters that were opposed to the alert notice requirement asserted that some consumers do not have an e-mail address (and may not want to sign up for one, due to cost or other reasons), or they may have an e-mail address but prefer not to receive account information there. Commenters were also concerned that some consumers would not update their e-mail address on file with the institution when their address changes, causing problems with attempts to send disclosures or notices via e-mail. Some commenters thought that the costs of developing an e-mail system for alert notices could be prohibitive for certain institutions. Some large institutions, however, have stated that they already use e-mail to send notices and disclosures to consumers.

Several commenters believe the requirement for sending alert notices when disclosures are made available at a web site is inconsistent with the E-Sign Act because it imposes an additional requirement for using electronic disclosures. They also believe that alert notices are unnecessary where a consumer receives a disclosure at the time the consumer completes an online transaction such as consummating a loan or opening a credit card or deposit account.

b. Redelivery requirement

A related area of concern was the requirement to redeliver a disclosure sent to a consumer's e-mail that was returned undelivered. The institution must take reasonable steps to attempt redelivery using the information in its files. Some commenters believe that institutions should not be required to send disclosures to another address on file that has not been designated by the consumer for that purpose. These commenters also stated that if the only other address on file is a postal address, the interim rule would result in a requirement for paper disclosures, which they believe is inconsistent with the E-Sign Act.

Other commenters expressed the view that the burden should rest with the consumer to ensure that the institution has the consumer's correct e-mail address and that financial institutions should be allowed to rely on procedures that allow consumers to provide the updated address information. At a minimum, commenters urged the Board to clarify that financial institutions may make a second attempt to deliver the disclosure to the same e-mail address because the e-mail service could have been temporarily unavailable.

c. "Reasonable demonstration"

The Board's interim final rules permit financial institutions to deliver disclosures electronically, provided that the consumer consents in accordance with the E-Sign Act's requirements. Under the E-Sign Act, the consumer must consent electronically, or confirm his or her consent electronically, in a manner that "reasonably demonstrates" that the consumer can access the electronic record in the format used by the institution. One commenter requested that the Board provide additional clarification of the E-Sign Act's "reasonable demonstration" requirement. The commenter believes that the need to ensure that the consumer can access electronic disclosures should not create undue burdens that might discourage consumers from obtaining financial products and services online. Another commenter observed that the requirement for consumers to reasonably demonstrate that they have the ability to access the disclosures is counter to the E-

Sign Act's premise that electronic and paper disclosures should be treated the same. Accordingly, this commenter suggested that the Congress delete this requirement.

d. Preemption

Several commenters urged the Board to confirm that financial institutions that comply with the E-Sign Act do not need to comply with additional or different requirements imposed under state law when providing electronic disclosures under the Board's consumer financial services regulations. Commenters also asked the Board to clarify that where the Board has determined that the E-Sign Act's consumer consent provision (§ 101(c)) does not apply to certain disclosures (*e.g.*, disclosures in connection with advertisements, or credit and charge card applications and solicitations), state law may not require consumer consent with respect to those disclosures. They believe that uniform federal law would promote electronic commerce.

One commenter noted that section 102(a) of the E-Sign Act grants limited authority to states, with respect to their own laws, to enact their own electronic writing and signature requirements under certain conditions. This commenter believes that this authority could result in state law requirements that create significant impediments for institutions that conduct electronic transactions in multiple states that have varying writing and signature requirements.

3. Conclusion

In general, comments received on the section 729 study have raised the same issues that were raised in connection with the March 2001 interim final rules and request for comment. The Board lifted the October 1, 2001 mandatory effective date for compliance with the interim final rules in response to comments received on the March 2001 rules stating that additional time was needed to make operational changes. Furthermore, the Board may consider adjustments to the rules to provide additional flexibility. Financial institutions may continue to provide electronic disclosures under their existing policies and practices (in accordance with the E-Sign Act), or they may follow the interim final rules until permanent final rules are issued.

With respect to the preemption issues raised, the Board believes that it is premature to make any recommendation concerning whether Federal law should preempt State law in these areas.

B. Regulation B (Equal Credit Opportunity) and Regulation C (Home Mortgage Disclosure)

1. Overview

Regulation B prohibits discrimination in any aspect of a credit transaction on the basis of national origin, marital status, religion, gender, color, age, race, receipt of public assistance funds, and exercise of any right under the Consumer Credit Protection Act.

Regulation C requires mortgage lenders in metropolitan areas to disclose to the public data about home purchase and home improvement loans (including refinancings) that lenders originate or purchase and about the disposition of applications for such loans. Lenders collect and report data about each application or loan, each applicant or borrower (including national origin or race, gender, and annual income), and each property (including occupancy status and location).

2. Analysis

Section 202.13 of Regulation B generally requires a creditor that receives an application for credit for the purchase or refinancing of a consumer's primary residence to collect as part of the application certain information about the applicant (*e.g.*, national origin or race, marital status, and gender). Similarly, section 203.4 of Regulation C generally requires financial institutions to collect data about the national origin, gender, and race of applicants for home purchase and home improvement loans. The commentaries for both regulations provide that if an application is taken over the phone, creditors need not collect monitoring information under Regulations B and C. If an application is taken by mail, the creditor must request the information, but the applicant need not provide it. One commenter noted that if online credit applications are treated like mail or telephone applications, then information about applicant characteristics may not be reported and thus it will be more difficult to identify discriminatory lending practices.

The collection of monitoring information is essential in enhancing the transparency of creditor lending practices. As more applications are being taken by telephone, by mail, and over the Internet, however, less information about applicant characteristics is being provided by consumers, while at the same time, lenders cannot make visual observations. In August 1999, as part of a comprehensive review of Regulation B, the Board proposed to treat online credit applications similarly to applications taken by mail. Therefore, a creditor would have to request

monitoring information on the online application form, but if the consumer chose not to provide the information, the creditor would not be required to make an additional request to the applicant. (This interpretation is consistent with the current interpretation under Regulation C.) No final action has been taken on this rulemaking.

3. Conclusion

The Board will monitor developments in online credit applications for both Regulations B and C reporting requirements and will consider adjustments to the rules where appropriate.

C. **Regulation E (Electronic Fund Transfer Act), Regulation Z (Truth in Lending Act), and Regulation DD (Truth in Savings Act)**

1. Overview

Regulation E establishes rules about the disclosure of terms and conditions of electronic fund transfer (EFT) services; limitations on a consumer's liability for unauthorized use of debit cards; restrictions on the unsolicited issuance of debit cards; documentation of EFTs by means of receipts and periodic account activity statements; and procedures for error resolution. The regulation covers transactions at automated teller machines, point-of-sale terminals in stores, telephone bill-payment plans, and preauthorized transfers to and from a customer's account, such as direct deposit of salary and social security benefits.

Regulation Z promotes the informed use of consumer credit by requiring disclosures about its terms and cost. The regulation also gives consumers the right to cancel certain credit transactions that involve a lien on a consumer's principal dwelling, regulates certain credit card practices, and provides a means for fair and timely resolution of credit billing disputes.

Regulation DD requires institutions to disclose yields, fees, and other terms concerning deposit accounts to consumers at account opening, upon request, when changes in terms occur, and in periodic statements. The regulation also covers advertising for deposit accounts and prohibits certain methods of calculating interest.

2. Analysis

In responding to the Board's request for comment on whether additional legislative or regulatory changes are needed to further facilitate the electronic delivery of consumer financial services, many commenters raised issues that apply to more than one regulation. For example, many commenters addressed requirements for periodic statements and advertising under Regulations Z and DD. To streamline the discussion on issues that apply to multiple regulations, the discussion of Regulations E, Z, and DD has been consolidated in this subsection. Where appropriate, comments received on issues that are unique to a specific regulation are also addressed.

a. Periodic statements under Regulations E, Z and DD

The Board specifically solicited comment on whether the rules for periodic account activity statements on deposit and credit accounts should be modified for online banking and lending. Several commenters stated that it was not necessary at this time to modify the rules for periodic statements to specifically apply to the electronic environment. One commenter noted that periodic statements perform multiple functions in addition to providing transaction summaries which are typically available online. This commenter stated, for example, that it would be difficult to manage the error resolution process under Regulations E and Z without actual statement cycle dates and beginning and ending balances. In addition, it would be unclear how an annual percentage yield earned under Regulation DD could be calculated if beginning and ending balances were not provided on a statement cycle basis.

In contrast, a few commenters urged the Board to modify or eliminate the rules for periodic statements when institutions provide transaction information on a daily basis. These commenters believed that the value of providing disclosures based on a particular "statement period" or beginning and ending dates is questionable when customers can view their account and transaction history online at any time.

Other commenters suggested that it would be appropriate to permit financial institutions to deliver modified periodic statements electronically that provide links or access instructions to disclosures that are continuously available. For example, to comply with periodic statement requirements under Regulations E and Z, a financial institution could provide links to error resolution disclosures that are posted on a continuous basis on a web site. Similarly, a link between a daily transaction summary and the periodic statement could be used. In addition, one

commenter recommended that consumers should have a legal right to waive delivery of periodic statements if they already have this information available in their online banking history.

Two commenters argued that the Board's periodic statement requirements under Regulation E are hindering the development of certain electronic products and services such as stored-value cards, account aggregation services, and electronic/Internet cash exchange. In particular, these commenters argue that the periodic statement requirements in connection with these services presented unnecessary technical and compliance burdens that have slowed the development and maintenance of these emerging products and services.

The Electronic Fund Transfer Act (EFTA) requires the Board in issuing regulations to take into account, and allow for, the continuing evolution of electronic banking services and the technology used in such services. The Board is aware that the application of certain provisions of the EFTA and Regulation E, including the requirement to provide periodic account activity statements, could impose significant compliance costs and impact the development of electronic payment products, such as stored-value cards. The Board has modified Regulation E periodic statement and other requirements to accommodate the development of specific EFT services, such as electronic benefit transfer accounts.

The Board does not believe that there is a need to modify the general statutory requirements under Regulations E, Z, and DD concerning disclosures in periodic statements at this time. The daily transaction summaries that consumers may access online are not adequate substitutes for the periodic statements required by statute. These disclosure statements provide uniform information to consumers about the overall costs of credit, EFT services, or interest earned on an account for a particular period and thus allows consumers to evaluate, for example, whether a particular credit card or deposit account continues to suit their financial needs.

In recent rulemakings, the Board has provided guidance on the electronic delivery of periodic statements. The Board will provide additional guidance in this area as necessary and provide additional flexibility as warranted.

b. Error resolution and preauthorized transfers under Regulation E

Commenters addressed issues concerning error resolution and liability for unauthorized transfers. The EFTA and section 205.11 of Regulation E sets out detailed error-resolution procedures. Several commenters observed that any new

kinds of statements and electronic methods of delivering statements might require an adjustment to the error resolution timing requirements. For example, one commenter suggested that for online banking, it may be appropriate to begin the time period by which a consumer would be required to notify his or her financial institution of a billing error or unauthorized transfer after some reasonable period of time in which the consumer would be expected to view his or her daily online statements.

Section 205.10(b) of Regulation E requires a consumer's financial institution or payee to provide advance notice to the consumer whenever a preauthorized EFT from the consumer's account will vary in amount from the previous transfer under the same authorization or from the preauthorized amount. The consumer may have the option, however, of receiving notice only when a transfer falls outside an agreed-upon range or when a transfer differs from the most recent transfer by more than an agreed-upon amount.

One commenter believes that this notice requirement may impede electronic initiatives. The commenter asks the Board to consider revising the rule to allow institutions to debit a consumer's account based on a computable amount or percentage, as opposed to a specific dollar amount or range of dollar amounts, or by reference to the entire balance or the total amount currently due.

The Board believes that the rule currently provides sufficient flexibility for financial institutions. The Board has not observed a significant compliance problem to date with the current provisions of the rule, but will consider this issue as part of a future review of the regulation.

c. Issues that apply to Regulation Z

1) "Clear and conspicuous" and format requirements for electronic credit card solicitations

Section 226.5a of Regulation Z requires credit card issuers to provide clear and conspicuous disclosures of the terms of the credit account on or with a card solicitation or application. Some commenters observed that it was unclear how to meet certain of the provision's format requirements in an electronic environment. In particular, section 226.5a(b)(1) requires the annual percentage rate for purchases to be disclosed in at least 18-point type to the consumer. These commenters noted that because creditors have no control over how disclosures will appear on the consumer's computer screen, they should not have a duty to ensure that a

consumer views the disclosures in the context of the format and type size requirements.

The Board has addressed this concern in a prior rulemaking. See 65 Fed. Reg. at 58,906 (Oct. 3, 2000). The Board's official staff commentary to Regulation Z generally provides that disclosures transmitted electronically satisfy the clear and conspicuous standard based on the form in which the disclosures are provided. Thus, a creditor may satisfy the clear and conspicuous standard by displaying the disclosures in a credit card solicitation at its web site in a large type size, regardless of the size of the device used by a consumer to view the disclosures.

2) Prompt crediting of payments

Section 226.10 of Regulation Z requires a creditor to credit a payment to a consumer's account as of the date of receipt. The rule permits a creditor to specify the requirements for making payments, including setting a cut-off hour for payments to be considered received on a particular day. Given the emerging technologies for processing electronic payments, the Board may in the future consider whether adjustments to the rule for crediting payments are necessary.

3) Advertising

Regulations Z and DD contain provisions that ensure that advertisements are not misleading or inaccurate, with regard to the account terms actually offered by the institution. For example, the regulations specify that if an advertisement contains certain account terms, then the advertisement must also include other specified terms. There are special rules permitting abbreviated disclosures for broadcast media advertisements to account for time and space restrictions.

Some commenters urged the Board to extend the rules for broadcast media advertising to Internet advertisements. Several commenters cautioned against applying the advertising requirements to disclosures accessed by hand-held wireless devices because of the potential cost and the difficulty in presenting the disclosures in an easy to read format. One commenter believes that because Internet technology allows institutions to provide a wealth of information to consumers, the Board should amend its advertising regulations to require institutions to provide more information about terms in advertisements.

More generally, one commenter urged the Board to publish a compliance guide containing the rules for electronic advertising that would apply to all the consumer financial services regulations administered by the Board.

The Board has considered certain aspects of electronic advertisements in connection with its interim final rules on electronic delivery of disclosures. For example, the Board has previously determined that rules for broadcast media advertisements in Regulation DD do not apply to web sites. 66 Fed. Reg. 17,795 (Apr. 4, 2001). Nevertheless, additional guidance on aspects of electronic advertisements not covered in the proposals may be appropriate for future regulatory reviews. For disclosures provided on hand-held wireless devices, however, the Board notes that it would be difficult to streamline the required disclosures for such devices without diminishing the effectiveness of the disclosures.

D. Regulation D (Reserve Requirements of Depository Institutions)

1. Overview

Regulation D implements section 19 of the Federal Reserve Act.¹⁶ Regulation D generally requires depository institutions to distinguish between “transaction accounts” and “savings deposits” and to maintain reserves against transaction accounts. Reserve requirements aid in the conduct of open market operations for monetary policy purposes by helping to ensure a stable, predictable demand for reserves, thereby increasing the Board’s control over short-term interest rates. Regulation D also defines “demand deposit” for the purposes of the prohibition of paying interest on demand deposits under Regulation Q.

2. Analysis

Regulation D requires depository institutions to hold reserves against their transaction accounts, generally defined as accounts from which the depositor is permitted to make payments or transfers to third parties.

Depository institutions are not required to hold reserves against savings deposits. Regulation D defines a “savings deposit,” in part, as a deposit or account from which the depositor is limited to no more than six preauthorized, automatic, or telephonic transfers or withdrawals, or combination thereof, per calendar month or

¹⁶ 12 CFR part 204; 12 U.S.C. § 461.

statement cycle. In addition, the regulation provides that “no more than three of the six such transfers may be made by check, draft, debit card, or similar order made by the depositor and payable to third parties.”

Regulation D permits unlimited transfers or withdrawals from savings deposits when such transfers or withdrawals are made by mail, messenger, automated teller machine, in person, or by telephone (via check mailed to the depositor).¹⁷

Commenters noted that the regulation limits the number of transactions from a savings account that a customer may initiate online because this exception applies only to postal, ATM, or physical means of transfer or withdrawal rather than electronic means, such as a transfer or withdrawal initiated through a bank’s web site. One commenter explained that customers who maintain the bulk of their funds in savings accounts are constrained by Regulation D from making online transfers to transaction accounts to cover possible overdrafts or meeting other unexpected expenses paid to third parties from the transaction accounts.

3. Conclusion

The Board recognizes that Regulation D imposes limitations on the extent to which depositors may make transfers or withdrawals from their savings accounts using online services. To implement section 19 of the Federal Reserve Act, however, the Board must distinguish between transaction accounts and savings accounts. It has made this distinction based on the ease with which the depositor may transfer funds to third parties. The Board recognizes that depository institutions are generally able to offer more attractive interest rates to consumers on savings accounts than on transaction accounts because depository institutions do not have to maintain reserves on savings accounts. (Currently, business customers that are not eligible for NOW accounts are not able to obtain interest-bearing transaction accounts.)

The Board believes that the interest-rate differential between transaction accounts and savings accounts could be reduced by legislation that would permit the payment of interest on reserve and clearing balances held by depository institutions at Federal Reserve Banks. The Board has long supported such a change. In addition, the Board has also long advocated repeal of the prohibition against payment of interest on demand deposits, which would permit businesses to obtain interest-bearing transaction accounts. Legislation is currently pending before the Congress that would accomplish both of these changes.

¹⁷ 12 C.F.R. § 204.2(d)(2).

E. Regulations T and U (Securities Margin Lending)

1. Overview

Regulations T and U implement section 7 of the Securities Exchange Act of 1934.¹⁸ Regulation T applies to extensions of credit by brokers and dealers. Regulation U applies to persons other than brokers and dealers who extend credit for the purpose of buying or carrying margin stock if the credit is secured directly or indirectly by margin stock. The regulations impose, among other obligations, initial margin requirements and payment rules on certain securities transactions.

2. Analysis

Regulation T provides, in general, that every extension of credit shall be deemed to be purpose credit unless the creditor “accepts in good faith from the customer a written statement that it is not purpose credit.”¹⁹ Presently, the Board requires a creditor to collect (and validate) a purpose statement (form T-4).

Regulation U similarly requires a lender that extends credit secured by margin stock to collect and validate a purpose statement. Presently, the Board requires a creditor to file a purpose statement (form U-1 or G-3). Unlike Regulation T, which requires a “written statement,” Regulation U does not specify how that statement must be executed.

3. Conclusion

The Board may consider amendments to Regulation T and U to clarify the purpose statement requirements of the respective regulations under the E-Sign Act.

F. Regulation CC (Availability of Funds and Collection of Checks)

1. Overview

Regulation CC implements the Expedited Funds Availability Act.²⁰ Regulation CC requires a bank to make funds deposited into transaction accounts available for

¹⁸ 12 C.F.R. parts 220 and 221; 15 U.S.C. § 78g.

¹⁹ 12 C.F.R. § 220.6(e)(2).

²⁰ 12 C.F.R. part 229; 12 U.S.C. §§ 4001-10.

withdrawal in accordance with prescribed schedules. The regulation also sets forth rules that govern the collection and return of checks by banks, same-day settlement for certain checks, and liability of banks for failure to comply with its provisions.

In the request for comment, the Board noted that laws or regulations that contain concepts of time may not be relevant in an online environment. The Board asked whether the provisions of Regulation CC that define a “banking day” are appropriate in the context of a customer that opened an account and performs all banking functions online.

2. Analysis

a. Schedule of funds availability and the definition of “banking day”

Regulation CC generally requires funds deposited or received for deposit to be available on specified business days after the “banking day” on which the funds are deposited or received. The term “banking day” is defined as that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking functions.²¹ Several commenters agreed with the Board’s suggestion that the term “banking day” may be incompatible with services that may be obtained electronically at any time and on any day. One commenter contended that traditional accounting principles, including definitions of time, may require modification as financial institutions develop continuous processing systems. Nevertheless, customers’ demands for services that would require such continuous processing systems have not emerged at this time. Because re-engineering computer systems to implement continuous processing will be costly, particularly in view of customers’ current expectations about banking services, commenters urged the Board to retain the regulatory provisions that define time. Commenters explained that the definition of “banking day” allows institutions to schedule certain banking functions, such as batch processing of ACH transactions, in a manner that efficiently uses their available resources.

b. Disclosure requirements

Regulation CC contains several provisions that require depository institutions to provide notices to their customers. For example, section 229.16 requires a bank to provide a notice that describes the bank’s policy as to when funds deposited in an

²¹ 12 C.F.R. § 229.2(f).

account are available for withdrawal. Under the general requirements, contained in section 229.15, a bank must provide most notices in writing and in a form that the customer may keep. The commentary to section 229.15 explains that a bank “satisfies the written-disclosure requirement by sending an electronic disclosure that displays the text and is in a form that the customer may keep, if the customer agrees to such means of disclosure.”²² Other notice requirements, such as the notice to a customer when the bank receives a returned check or a notice of nonpayment of a check under section 229.33(d), do not specify the form of the notice.

3. Conclusion

The Board believes that changes to the regulatory definition of “banking day” are not appropriate at this time. Although certain online banking services may be available outside the hours of a normal banking day, most banks are generally not open to the public for carrying on substantially all of their banking functions on a 24-hour basis. Furthermore, most banks have not upgraded to continuous processing systems that would accommodate a more expansive definition of “banking day.” Accordingly, the Board concludes that, at this time, such an amendment is not warranted. The Board will continue to monitor developments in banking practices and technology that may affect such issues. In addition, the Board may consider clarifications to Regulation CC or its commentary regarding the interaction of the regulation’s notice provisions and the E-Sign Act.

The report also summarizes the few suggestions of commenters that certain provisions of the Board’s consumer financial services regulations be modified to better accommodate online lending and banking. The report states that the Board will continue to provide compliance guidance and will consider additional flexibility in the rules as appropriate.

²² 12 C.F.R. part 229, App. E, at IX.A.1., FRRS 9-190.

Part IV

Regulations Administered by the Federal Deposit Insurance Corporation

As required by section 729 of the GLB Act, the FDIC has reviewed all of its regulations that could affect the online delivery of financial services to ensure that they do not impede online or other forms of electronic banking. As part of this review, on July 16, 2001, the FDIC published in the *Federal Register* a request for comment on how its banking regulations affect the online delivery of banking services. 66 Fed. Reg. 37,029. (See Appendix B.) The FDIC asked the public to respond to certain general questions:

- Are there specific regulations the FDIC should modify because they impede the use of a new technology that would allow financial institutions to offer improved products or services in a more efficient manner and at a lower cost?
- Are there areas where financial institutions would benefit from additional clarification of rules or guidance concerning the risks associated with electronic banking activities?
- Are there specific areas in which regulatory changes are needed to enhance consumer acceptance of, confidence in, or access to, electronic banking?

In addition, the FDIC specifically asked for comments on hyperlinking; whether certain terms in its regulations regarding physical location requirements, such as the definition of a bank “branch,” should be revised to deal with electronic banking; whether regulations involving appraisals should be amended to provide for the possibility of online appraisals; and whether the FDIC should promulgate regulations or publish guidance setting forth standards for the use of electronic signatures and records.

The FDIC received comments from 3 associations of financial services providers, 6 financial services firms, a firm that provides software to financial services firms, 3 individuals, and the Conference of State Bank Supervisors (CSBS). Some of the submissions also responded to requests for comment by the other Federal banking agencies, and addressed regulations that the other agencies have that the FDIC does not.

Most commenters cautioned the FDIC not to amend or issue new regulations until this developing area of financial activity has had more time to develop on its own. Only two commenters suggested changes to specific FDIC-only rules. One commenter suggested that the FDIC should amend part 303 of the FDIC's rules to exclude online banking services from the definition of "branch" in 12 C.F.R. § 303.41(a). CSBS recommended that the FDIC work on a joint interagency basis to clarify where a depository institution's Internet banking operations are located. CSBS believes that such an approach would maintain competitive equality among all depository institutions.

In addition, commenters suggested that guidance, or as one commenter termed it, "practical information resources," be issued in certain areas. Commenters cited, as examples of existing helpful guidance, the FDIC's June 4, 2001 Bank Technology Bulletin On Outsourcing (FIL-50-2001) and the FFIEC's July 30, 2001 guidance on Authentication in an Electronic Banking Environment (*see* FDIC FIL-69-2001, Aug. 24, 2001).

As commenters have suggested, electronic banking is a dynamic area that needs an opportunity to develop as much as possible without formal regulation. This has been a guiding principle in the FDIC's review of its regulations, and in the FDIC's approach to electronic banking, predating the enactment of the GLB Act. When the FDIC has been required to issue or amend regulations, the FDIC has tried to structure them so as to avoid obstacles to the growth of online and electronic banking. Otherwise, the FDIC has tried to foster online banking through the training of its own employees and, when necessary, by issuing non-regulation guidance. The purpose of such guidance is to ensure that electronic banking does not engender unreasonable risks without creating impediments to its development. The FDIC issued electronic banking examination procedures in January 1997 and implemented an electronic banking subject matter expert program in April 1997. The Division of Supervision created an Electronic Banking Branch to focus attention on electronic banking supervisory issues in September 2000. In addition, the FDIC has issued a variety of written guidance concerning risks and appropriate procedures for electronic banking. *See, e.g.*, FIL 81-2000, Risk Management of Technology Outsourcing (Nov. 29, 2000); FIL 77-2000, Bank Technology Bulletin, Internet Domain Names (Nov. 9, 2000); FIL 72-2000, Electronic Signatures in Global and National Commerce Act (Nov. 2, 2000); FIL 67-2000, Security Monitoring of Computer Networks (Oct. 3, 2000); FIL 63-2000, Online Banking (Sept. 21, 2000); FIL 131-97, Security Risks Associated with the Internet (Dec. 18, 1997).

The FDIC has not identified any of its rules that would, by its terms, impede online banking. When rulemaking is required, the FDIC will continue to craft rules to avoid unnecessarily impeding online banking, and in individual cases, such as the review of applications, the FDIC will attempt to find interpretations of its rules that will accommodate legitimate activities while fulfilling the rule's purpose. In addition, the FDIC will continue to issue guidance, individually or in conjunction with the other Federal banking agencies and the FFIEC, as necessary to foster online banking without interfering with its safe and sound growth.

Part V

Regulations Administered by the Office of the Comptroller of the Currency

Prior to enactment of section 729, the OCC had made a concerted effort to facilitate and support online delivery of financial services. Recognizing that uncertainty over permissible electronic bank activities could hinder the delivery of online financial services, the OCC sought to provide clear guidance on the scope of these activities through its decisions on bank licensing applications and its legal interpretive letters. The OCC has approved a number of activities involving innovative uses of new technology, including the establishment of transactional Web sites, virtual marketplaces, Internet access services, and electronic payment systems. The OCC has also permitted national banks to provide digital certification, electronic correspondent banking services, and electronic safekeeping. These opinions and decisions are summarized and are made available on the OCC web site.²³

Further, to ensure that electronic banking activities are conducted consistent with bank safety and soundness and to reduce uncertainty over supervisory expectations on the delivery of online financial services, OCC has issued guidance addressing supervisory issues relating to banks' use of technology.²⁴ With the other Federal banking agencies, the OCC recently issued guidelines prescribing information security standards that implement the requirements of the GLB Act²⁵ and guidance on authentication in the electronic banking environment.²⁶ The OCC also issued a comprehensive handbook on Internet banking that discusses business and technical issues associated with providing banking services via the World Wide Web, the risks presented by these activities, and the OCC's procedures for Internet-related

²³ The OCC established a web site that contains information relating to electronic banking activities. See www.occ.treas.gov/netbank/netbank.htm (Electronic Banking web site). The site includes a listing of opinions, approval letters, supervisory guidance, and other issuances on this subject and provides links to the documents listed.

²⁴ See, e.g., OCC Bulletin 98-3, Technology Risk Management – Guidance for Bankers and Examiners (Feb. 4, 1998).

²⁵ 66 Fed. Reg. 8616 (Feb. 1, 2001) (information security guidelines issued jointly by the OCC, the Board, the FDIC, and OTS). These guidelines implement the requirements of section 501(b) of the GLB Act, 113 Stat. at 1436-37 codified at 15 U.S.C. 6801.

²⁶ OCC Advisory Letter No. 2001-8 (July 30, 2001).

examinations.²⁷ In addition, the OCC issued “The Internet and the National Bank Charter,” as part of the Comptroller’s Corporate Manual (Jan. 2001) and guidance on weblinking activities and aggregation activities.²⁸ These and other issuances, including Internet-related regulatory updates, are available on OCC’s Electronic Banking web site.

Finally, the OCC has conducted a comprehensive review of the OCC’s regulations with a view toward removing impediments to national banks’ use of technology. In an advance notice of proposed rulemaking (ANPR) published on February 2, 2000,²⁹ the OCC invited public comment on issues involving Internet banking and other uses of electronic technology. (*See Appendix C.*) Specifically, the ANPR focused on three issues:

- How should the OCC adapt its regulations and supervisory policies to facilitate national banks’ use of electronic technology consistent with bank safety and soundness?;
- What statutes can the OCC interpret more flexibly to accommodate new technologies?; and
- How can the OCC enhance the operational flexibility of banks engaging in electronic banking consistent with bank safety and soundness?³⁰

The OCC received 16 comments on the ANPR, including 7 from banks, 6 from trade associations, 2 from individuals, and 1 from a company that provides information processing management, outsourcing services, and application software to banks. The commenters strongly supported the OCC’s initiative, emphasizing that outdated and inflexible regulations are one of the largest obstacles banks face as they attempt to adopt new technologies. The comments offered suggestions in each of the three areas identified in the ANPR and raised a variety of additional issues.

²⁷ Comptroller’s Handbook, Other Income Producing Activities: Internet Banking (Oct. 1999).

²⁸ “Weblinking,” OCC Bulletin 2001-31 (July 3, 2001) and “Bank-Provided Account Aggregation Services,” OCC Bulletin 2001-12 (Feb. 28, 2001).

²⁹ 65 Fed. Reg. 4895 (Feb. 2, 2000).

³⁰ The ANPR also solicited suggestions that would be helpful in formulating recommendations for legislative action or for actions that may be appropriately undertaken on an interagency basis.

After reviewing these comments, the OCC developed a proposed rule to update its regulations to reflect national banks' use of new technology. On July 2, 2001 the OCC published in the *Federal Register* a notice of proposed rulemaking (NPRM) that would provide simpler and clearer guidance for national banks using electronic and developing technologies to conduct their activities and, also, would codify positions that the OCC has taken previously in published interpretive letters to national banks.³¹ (See Appendix C.) The NPRM also solicited additional suggestions under section 729 either for legislative action or for actions that may be appropriately undertaken on an interagency basis.

The proposed rule would create a new subpart E to part 7 of the OCC's regulations to house these and other OCC provisions related to the conduct of national bank activities through electronic means. Among its most significant provisions, the proposed rule would:

- Codify recent OCC interpretative letters approving the use of the finder authority by national banks to engage in several new activities made possible by technological developments. The proposed regulation includes examples, both in the electronic banking context and in the non-electronic banking context, illustrating the range of finder activities that the OCC has authorized.
- Set forth the factors the OCC considers in determining whether an electronic activity is part of, or incidental to, the business of banking. These factors are based on OCC and Federal judicial precedent and will provide better guidance to national banks seeking to engage in new electronic activities.
- Clarify that State law applies to a national bank's conduct of activities electronically only to the same extent it would apply if the activity were conducted through traditional means.
- Codify OCC interpretations that permit national banks as part of a digital signature transaction to act as a certification authority that issues certificates verifying the *identity* of the certificate holder. The proposal also requested comments on whether this authority should include the ability of a national bank to issue a digital certificate that verifies that the holder has certain *authority* or the *financial capacity* to make a purchase or engage in a transaction, how these activities will be structured, and whether these activities present unique risks.

³¹ 66 Fed. Reg. 34,855.

- Codify OCC interpretations that permit a national bank to collect, process, transcribe, analyze and store banking, financial and economic data for itself and its customers as part of the business of banking. The proposal also requested comments on whether the OCC should issue a rule on incidental data processing that would recognize that a national bank may generally derive a certain specified percentage of its *total* annual data processing revenue from processing non-financial data as incidental to its financial data processing services.
- Clarify that a national bank will not be considered “located” in a state simply because it maintains technology, such as a server or an automated loan center, in that state or because customers in that state electronically access a bank’s products and services.
- Require, as a matter of safety and soundness, that banks that share co-branded web sites or other electronic space with affiliated or unaffiliated third parties take reasonable steps to enable customers to distinguish between products and services offered by the bank and those offered by the third party. National banks must disclose their limited role with respect to the third party product or service, and ensure that these disclosures are conspicuous, simple, direct, readily understandable, and designed to call attention to the fact that the bank does not provide, endorse, or guarantee any of the products or services available.

The comment period on the proposed rule closed on August 31, 2001. OCC received 26 comments. The comments included 16 from financial institutions, 8 from trade and government associations, 1 from an individual, and 1 from a law firm. The comments were generally supportive of the proposed rule, but suggested some refinements. The OCC is currently studying these comments and may issue a final rule before the end of this year.

The OCC also stated in the NPRM that it is considering whether to further revise its regulations in light of the E-Sign Act³² in a separate project, and that any such

³² Shortly after the ANPR was published, Congress passed the E-Sign Act, which was enacted on June 30, 2000. Among other provisions, the E-Sign Act establishes certain uniform Federal rules concerning the use of electronic signatures and records in commercial and consumer transactions and establishes certain requirements for making disclosures to consumers electronically. Although it does not require implementing regulations, the E-Sign Act gives the OCC (and other Federal and state regulatory agencies) authority to interpret the E-Sign Act’s requirements with respect to the statutes they administer, subject to specified limitations.

revisions would be undertaken in a separate rulemaking. To that end, the OCC has completed an initial review of the regulations and statutory provisions administered by the OCC that require banks: (1) to provide signatures or written documents to (or obtain them from) consumers or other third parties or (2) to give notices or disclosures to consumers or other third parties. The OCC is considering various actions to clarify the effect of the E-Sign Act on these regulations and provisions, including the possibility of commencing a rulemaking project or issuing guidance. In this context, the OCC is consulting with other federal banking agencies to determine how to interpret and apply various words and phrases in OCC administered regulations and laws that arguably appear to contemplate written documents or signatures. These words and phrases include “execute,” “written agreement,” “agreement,” “form,” “instrument,” “copy,” “make available,” “notice,” “legend,” “notify,” “inform,” “report,” “publish,” “post,” “inform,” “mail,” and “by mail.” Likewise, OCC is consulting with the other agencies on how to administer provisions that require information to be posted in a particular place or locality, for example in a lobby or in an office.

Part VI

Regulations Administered by the Office of Thrift Supervision

OTS makes the following conclusions based upon its review:

A. Summary of Conclusions

There is not a need, at this time, for legislative amendments to the statutes that OTS's regulations implement in order to adapt requirements to online banking and lending. Nor is there a need, at this time, for OTS to revise its regulations in order to adapt requirements to online banking and lending.

As discussed in more detail in subpart C below, OTS already has a very flexible regulatory framework that permits savings associations to conduct banking and lending electronically. *See* 12 C.F.R. part 555. OTS also reviewed its other regulations but found none that would impede electronic delivery of products or services.

OTS has established processes for periodically reviewing the need for new legislation and legislative amendments, as well as regulatory changes. OTS will consider the information learned through this study as part of those processes.

OTS is committed to updating its regulations and guidance as the need arises, both individually and in conjunction with the other Federal banking agencies and the FFIEC. In doing so, OTS will continue to avoid impediments to online banking and lending. OTS will foster growth of these activities in a manner that is safe and sound and helps ensure consumer acceptance and protection.

B. Report Methodology and Information Learned

An interdisciplinary team OTS established in April 2001 derived the above conclusions. Representatives from OTS's Offices of Supervision Policy, Compliance Policy, Technology Risk Management, and Chief Counsel comprised the team. This team used three methods, described below, to contribute to its thorough review of its regulations on the delivery of financial services for this study: (1) a request for public comment published in the *Federal Register*; (2) a survey of OTS examiners; and (3) a headquarters review of OTS regulations.

1. Request for Comment on Study of Banking Regulations Regarding the Online Delivery of Financial Services

On June 11, 2001, OTS published in the *Federal Register* a request for comment on a variety of issues relating to the electronic delivery of financial products and services by savings associations.³³ (See Appendix D.) OTS received eight comments. Three were from trade associations: America's Community Bankers (ACB), American Bankers Association (ABA), and Electronic Financial Services Counsel (EFSC). The others were from MasterCard International (MasterCard), VISA U.S.A. (VISA), JPMorganChase (JPM), a law firm, and an appraiser. The OTS interdisciplinary team reviewed the public comments.

ACB, ABA, EFSC, MasterCard, and VISA commented against further federal restrictions on electronic transactions, including in the area of Internet link arrangements. ACB and MasterCard urged OTS to continue to provide flexible guidance rather than mandates. ACB and EFSC specifically discouraged OTS from issuing regulations or guidance on the E-Sign Act. MasterCard specifically discouraged OTS from providing guidance on the application of Most Favored Lender rules to electronic banking. These commenters asserted that action by OTS in these areas would be premature and unnecessary.

ACB, EFSC, MasterCard, and VISA encouraged OTS to help ensure that states do not impose a patchwork of requirements burdening electronic commerce. EFSC raised specific concerns about state privacy legislation, state licensing provisions for banking and other financial products and services, and state requirements that financial service providers maintain offices in state or employ local residents. ABA raised the issue of the extent to which the E-Sign Act may preempt state law.

ABA, MasterCard, and the law firm advocated greater flexibility to provide disclosures electronically under federal consumer protection statutes and regulations. VISA argued that if an institution provides disclosures on a web site, the federal banking agencies should not also require the institution to e-mail the disclosure to the consumer. VISA specifically asked the agencies to revise their Privacy rules so as not to require consumer consent before providing privacy notices electronically instead of on paper. A few commenters addressed regulations under the purview of other agencies. JPM focused on disclosures

³³ *Request for Comment on Study of Banking Regulations Regarding the Online Delivery of Financial Services*, 66 Fed. Reg. 31,186 (June 11, 2001).

under Regulations E, DD, and Z, VISA focused on Regulations E and the Truth in Lending Act (TILA), and MasterCard also focused on TILA, all of which are under the Board's purview. The law firm focused on the Real Estate Settlement Procedures Act (RESPA), which is under the Department of Housing and Urban Development's purview.

ACB urged the agencies to allow automated underwriting systems to substitute for the written appraisals currently required for certain real estate loans, an alternative EFSC also suggested the agencies consider through a separate process. ACB also encouraged OTS to raise the current \$250,000 regulatory threshold for loans requiring the use of state licensed or certified appraisers to the conforming GSE loan limit (now \$275,000 for most parts of the country). In contrast, the appraiser who commented urged OTS to retain the written appraisal requirement, arguing that appraisals are necessary to ensure that the collateral for mortgage loans is sufficient. VISA also called for some increased flexibility in using electronic appraisals.

ACB encouraged OTS to consider how to address "location" under the CRA, management interlocks, and branching. It suggested that OTS allow use of something like a CRA strategic plan for management interlocks and branching but did not provide further elaboration on how this option would work. In contrast, ABA and VISA advised the agencies not to revise rules with geographic or time components.

Consistent with the comments, this report does not recommend any new federal restrictions on electronic transactions. Part II of this report, which discusses jointly administered regulations, addresses Appraisal Standards (Part II.A), CRA (Part II.B), and Management Official Interlocks (Part II.E). In Part III of this report, the Board discusses providing disclosures electronically under a variety of federal consumer protection statutes and regulations.

2. Examiner Survey

During July and August 2001, OTS surveyed examiners who are directly involved in examining our savings associations that offer electronic banking and lending services. The questions pertained to the following:

- Examiners' observations of associations and customers that encounter difficulties or barriers with online banking and lending arising from OTS regulations or guidance.

- Whether there are specific regulatory requirements in an association's delivery of financial services, including those regulations that assume person-to-person contact, that OTS should adapt to online banking and lending.
- Whether OTS lacks, or could improve upon, guidance or regulation of online banking and lending.

The interdisciplinary team reviewed the examiners' survey responses. The examiners provided insightful responses regarding their examination experience with online banking and lending. OTS will consider the information learned from the examiners' responses in ongoing agency efforts to ensure that examinations are conducted in a thorough and efficient manner and to enhance employee guidance and training.

3. Interdisciplinary Headquarters Review

The OTS interdisciplinary team, in addition to participating in the interagency review of joint regulations as discussed in this report, also reviewed OTS-specific regulations. In performing this review, the team consulted with those OTS staff most familiar with particular regulations.

The first step of the review was to review all of OTS's regulations to determine which regulations address the delivery of financial services, including those regulations that may assume that there will be person-to-person contact during the course of a financial transaction, as indicated in section 729(a).

The second step was to identify in what way the assumption manifested itself in the particular regulation. For example, some regulations require that certain information be provided in writing through the mail or designate certain types of activities to be provided in separate areas of an office from where other activities are conducted. *See, e.g.,* 12 C.F.R. § 563b.3 (conversions) and § 563.76 (securities sales).

The third step was to identify whether any of the regulations, or the statutes they implement, would need to be revised to adapt the requirements to online banking and lending so as not to impede the electronic delivery of financial products and services. The review uncovered no statutes or regulations impeding the electronic delivery of financial products and services.

C. OTS's Previous Initiatives

Through the end of the 1990's, OTS periodically revised its regulations to better enable savings associations to use new technologies for electronic banking and lending. In 1998, OTS streamlined and updated its regulations relating to electronic operations to make it easier for Federal savings associations to develop new ways of delivering products and services through the prudent and innovative use of emerging technology.³⁴ (See Appendix D.) The revised rule permits Federal savings associations to use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. The rule also requires each savings association (federally chartered or state-chartered) to notify OTS 30 days before it establishes a transactional web site. It provides that savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements.

In promulgating the rule, OTS emphasized the importance of enabling regulations in this area. At the same time, OTS designed its regulations to help ensure that it would have sufficient information to understand developing technologies, to provide appropriate guidance on these technologies, and to supervise electronic operations effectively. OTS designed the final rule to provide both the industry and the agency with the appropriate amount of flexibility to adapt to changing conditions.

The preamble to the final rule noted that the agency had issued, and would continue to issue, guidance as electronic operations evolve. This guidance has taken the form of letters to chief executive officers of savings associations, interagency examiner guidelines, revisions to the Thrift Activities and Compliance Activities Handbooks, conditions on the approval of applications, and responses to requests for legal interpretations.³⁵ Since the publication of the final rule, OTS has

³⁴ See 63 Fed. Reg. 65,673 (Nov. 30, 1998).

³⁵ See, e.g., Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (Nov. 3, 1998) (Policy Statement on Privacy and Accuracy of Personal Customer Information); Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (July 23, 1998) (Interagency Guidance on Electronic Financial Services and Consumer Compliance); Memorandum from John Downey, Executive Director, Supervision, for Chief Executive Officers (June 23, 1997) (Statement on Retail On-Line Personal Computer Banking); Thrift Activities Regulatory Handbook, Section 341, Information Technology (Oct. 1997)

continued to provide additional guidance in this area and post it on its web site at <www.ots.treas.gov>.³⁶

(Regulatory Bulletin 32-6, Oct. 15, 1997); Federal Financial Institutions Examinations Council (FFIEC) Information Systems Examination Handbook (1996); OTS Order No. 95-88 (May 8, 1995) (application approval of Internet bank); OTS Op. Chief Counsel (Oct. 1, 1998) (authority of federal savings associations to provide payroll processing services); OTS Op. Chief Counsel (July 1, 1998) (preemption of state ATM restrictions); OTS Op. Chief Counsel (Sept. 19, 1997) (establishment of automated loan machines).

³⁶ See, e.g., Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (June 10, 1999) (Transactional Web Sites); OTS Op. Chief Counsel (Dec. 7, 1999) (San Francisco ATM fee ordinance); OTS Op. Chief Counsel (Nov. 22, 1999) (preemption of local ATM fee restrictions); OTS Op. Chief Counsel (Jan. 15, 1999) (New York State ATM Safety Act); OTS Mem. Chief Counsel (Dec. 22, 1998) (Massachusetts Electronic Branch Restrictions).

APPENDICES

Relevant Federal Register Publications

APPENDIX A

**Board of Governors of the Federal Reserve System – Request for Comment
on Study of Banking Regulations Regarding the Online Delivery of
Financial Services
(66 Fed. Reg. 27,912)**

Proposed Rules

Federal Register

Vol. 66, No. 98

Monday, May 21, 2001

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Parts 1773

RIN 0572-AB66

Policy on Audits of RUS Borrowers; Management Letter

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS) is proposing to amend its regulations by revising certain requirements regarding the management letter to be provided to RUS by certified public accountants (CPAs) as part of audits of RUS borrowers.

In the final rule section of this Federal Register, RUS is publishing this action as a direct final rule without prior proposal because RUS views this as a non-controversial action and anticipates no adverse comments. If no adverse comments are received in response to the direct final rule, no further action will be taken on this proposed rule and the action will become effective at the time specified in the direct final rule. If RUS receives adverse comments, a timely document will be published withdrawing the direct final rule and all public comments received will be addressed in a subsequent final rule based on this action. Any parties interested in commenting on this proposed action should do so at this time.

DATES: Comments on this proposed action must be received on or before June 20, 2001.

ADDRESSES: Submit adverse comments or notice of intent to submit adverse comments to F. Lamont Heppe, Jr., Director, Program Development and Regulatory Analysis, Staff, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1522, Washington, DC 20250-1522. RUS requests a signed original and three copies of all comments (7 CFR 1700.4). All

comments received will be made available for public inspection at room 4030, South Building, Washington, DC, between the 8 a.m. and 4 p.m. (7 CFR part 1.27(b)).

FOR FURTHER INFORMATION CONTACT:

Richard Annan, Chief, Technical Accounting and Auditing Staff, Program Accounting Services Division, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1523, Washington, DC 20250-1523. Telephone: 202-720-5227.

SUPPLEMENTARY INFORMATION: See the Supplementary Information provided in the direct final rule located in the final rule section of this **Federal Register** for the applicable supplementary information on this action.

Dated: May 8, 2001.

Blaine D. Stockton,
Acting Administrator, Rural Utilities Service.
[FR Doc. 01-12130 Filed 5-18-01; 8:45 am]

BILLING CODE 3410-15-P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Parts 1773

RIN 0572-AB62

Policy on Audits of RUS Borrowers; Generally Accepted Government Auditing Standards (GAGAS)

AGENCY: Rural Utilities Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Utilities Service (RUS) is proposing to amend its regulations to include in its audit requirements for electric and telecommunications borrowers recent amendments to the Generally Accepted Government Auditing Standards (GAGAS) issued by the Government Accounting Office (GAO) and to make other minor changes and corrections.

In the final rule section of this Federal Register, RUS is publishing this action as a direct final rule without prior proposal because RUS views this as a non-controversial action and anticipates no adverse comments. If no adverse comments are received in response to the direct final rule, no further action will be taken on this proposed rule and the action will become effective at the time specified in the direct final rule. If RUS receives

adverse comments, a timely document will be published withdrawing the direct final rule and all public comments received will be addressed in a subsequent final rule based on this action. Any parties interested in commenting on this proposed action should do so at this time.

DATES: Comments on this proposed action must be received on or before June 20, 2001.

ADDRESSES: Submit adverse comments or notice of intent to submit adverse comments to F. Lamont Heppe, Jr., Director, Program Development and Regulatory Analysis, Staff, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1522, Washington, DC 20250-1522. RUS requests a signed original and three copies of all comments (7 CFR 1700.4). All comments received will be made available for public inspection at room 4030, South Building, Washington, DC, between the 8 a.m. and 4 p.m. (7 CFR part 1.27(b)).

FOR FURTHER INFORMATION CONTACT:

Richard Annan, Chief, Technical Accounting and Auditing Staff, Program Accounting Services Division, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave., SW., STOP 1523, Washington, DC 20250-1523. Telephone: 202-720-5227.

SUPPLEMENTARY INFORMATION: See the Supplementary Information provided in the direct final rule located in the final rule section of this **Federal Register** for the applicable supplementary information on this action.

Dated: May 8, 2001.

Blaine D. Stockton,
Acting Administrator, Rural Utilities Service.
[FR Doc. 01-12128 Filed 5-18-01; 8:45 am]

BILLING CODE 3410-15-P

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. R-1105]

Study of Banking Regulations Regarding the Online Delivery of Financial Services

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Study of regulations; request for comment.

SUMMARY: Pursuant to section 729 of the Gramm-Leach-Bliley Act (the GLB Act or Act), the Board is conducting a study and preparing a report about its banking regulations with respect to the online delivery of financial services. To assist this review of its regulations, the Board requests comment on whether any of its regulations should be amended or removed in order to facilitate online banking.

DATES: Comments must be received by August 20, 2001.

ADDRESSES: Comments should refer to Docket No. R-1105 and may be mailed to Ms. Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551, or mailed electronically to regs.comments@federalreserve.gov. Comments addressed to Ms. Johnson also may be delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m. and to the security control room accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, NW. Comments may be inspected in Room MP-500 between 9 a.m. and 5 p.m., pursuant to § 261.12, except as provided in § 216.14, of the Board's Rules Regarding the Availability of Information, 12 CFR 261.12 and 261.14.

FOR FURTHER INFORMATION CONTACT: Stephanie Martin, Assistant General Counsel, Legal Division, (202) 452-3198; Thomas E. Scanlon, Senior Attorney, Legal Division, (202) 452-3594; Heidi Richards, Assistant Director, Division of Banking Supervision and Regulation, (202) 452-3598; Jane Ahrens, Senior Counsel, Division of Consumer and Community Affairs, (202) 452-2412; Minh-Duc Le, Attorney, Division of Consumer and Community Affairs, (202) 452-3667; Jeff Stehm, Assistant Director, Division of Reserve Bank Operations and Payment Systems, (202) 452-2217.

SUPPLEMENTARY INFORMATION:

Background

Section 729 of the GLB Act requires the Board, the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency (OCC), and Office of Thrift Supervision (the Agencies), to conduct a study of banking regulations regarding the online delivery of financial services.¹ Section 729 further requires the Agencies to report their recommendations on adapting existing legislative or

regulatory requirements to online banking and lending.

In accordance with section 729, the Board is reviewing its regulations that relate to the delivery of financial services to assess their suitability for transactions that are conducted through the Internet. The Board plans to consult with the other Federal banking agencies about the appropriate aims and scope of its review and will coordinate its report with those that will be produced by the other Federal banking agencies.² The purpose of this document is to invite public comment on a wide range of issues that bear on delivering financial products and services over the Internet to assess whether any Board regulations should be amended in order to facilitate online banking. In addition, the Board requests comment on how particular statutory provisions affect the online delivery of financial products or services.

The Board recently requested comment on five interim final rules to establish uniform standards for the electronic delivery of notices to consumers, namely: Regulations B (Equal Credit Opportunity), E (Electronic Fund Transfers), M (Consumer Leasing), Z (Truth in Lending), and DD (Truth in Savings).³ In connection with comments sought on those interim final rules, the Board also requested comment on whether other legislative or regulatory changes are needed to adapt current requirements to online banking and lending. In particular, the Board has requested comment on revising its regulations to facilitate electronic delivery of financial products and services to individual consumers, such as the provisions regarding periodic statements under Regulations E, Z, and DD. (Comments on those interim final rules must be received by June 1, 2001.) Any comments submitted in connection with the review of those regulations to facilitate electronic delivery of financial products and services for individual consumers shall also be considered for the study and report under section 729 of the GLB Act.

² The OCC issued an advance notice of proposed rulemaking and requested comment on a wide range of electronic banking issues to determine whether the OCC's regulations should be changed to facilitate national banks' use of new technologies. 65 FR 4895 (February 2, 2000). The Board notes that the OCC specifically requested comment in connection with its study of its regulations under section 729, and the Board will review those comments in connection with the Board's own study.

³ 66 FR 17779 (April 4, 2001); 66 FR 17786 (April 4, 2001); 66 FR 17322 (March 30, 2001); 66 FR 17329 (March 30, 2001); 66 FR 17795 (April 4, 2001).

Issues for Comment

The Board recognizes that using electronic technology to deliver financial products and services poses distinct challenges to financial institutions and their customers. Much of the legislative and regulatory framework that governs banking was developed based on social, cultural, and technological practices that existed before the advent of widespread computer-based communications. The prospect of conducting banking transactions over the Internet has forced reconsideration of the existing legislative and regulatory framework that governs banking businesses.

The Board invites comment on how particular statutes, regulations, or supervisory policies specifically affect financial institutions and their customers' uses of new technologies. The following discussion identifies topics that the Board believes are appropriate for the design of the study and report required under section 729. Commenters are invited to respond to the questions presented and to offer comments or suggestions on any other issues related to financial products or services delivered online that are not described herein.

Laws and Regulations That Affect Transactions

Do any of the Board's regulations, such as those governing payment transactions, negatively affect the ability of financial institutions to offer certain online financial services? Which regulations, if any, negatively affect the likelihood that an individual or business customer would choose to obtain financial products or services through the Internet?

The ways in which financial institutions themselves obtain services from other financial institutions, including Federal Reserve Banks, significantly affects the products and services that financial institutions may, in turn, provide to their non-bank customers. The Board also requests comment on the specific ways in which laws, regulations, and other supervisory policies affect the online delivery of financial products and services between financial institutions.

Geography and Time Considerations

Some aspects of the Board's banking regulations, as well as other banking laws, are predicated on conceptions of geography. For example, bank mergers and acquisitions are regulated, in part, by legal standards that have been developed to determine whether a transaction poses anti-competitive

consequences in the relevant geographic market for the cluster of banking products.⁴ Similarly, the legal standards that apply to the location of bank branches depend on certain conceptions of geography.⁵ How should these kinds of regulatory provisions be revised (if at all) to more appropriately govern the location of online banking and lending activities?

Other laws or regulations contain concepts of time that may not be relevant in an online environment. For example, the term "banking day" in Regulation CC is defined as that part of any business day on which an office of a bank is open to the public for carrying on substantially all of its banking functions.⁶ Regulation CC requires funds that must be available for withdrawal on a business day to be available at the start of business, which may be as late as 9 a.m. local time of the depository bank.⁷ Are these provisions appropriate in the context of a customer that opened an account and performs all banking functions online?

The Board recognizes that these traditional boundaries of geography and time may need to be reexamined in light of online banking practices that enable customers to obtain financial products and services relatively free from customary time or place constraints. Comments are invited on how particular laws and regulations may be modified to accommodate the online delivery of financial products and services under these varying conditions.

Banking and Supervisory Regulations and Policies

The Board invites comment on how particular regulations or supervisory policies specifically affect financial institutions and their customers' uses of new technologies. For example, are there any specific Board regulations that unreasonably interfere with the use of online technologies? Are there any supervisory policies that impose unreasonable burdens on a financial institution's design or adaptation of online technologies? Are there any regulations or other supervisory policies regarding risk management that should be clarified or amended to adequately

address any particular risks associated with methods of online banking?

Electronic Signatures in Global and National Commerce Act and Other Federal Laws That Affect Online Banking

The Board recognizes that the enactment of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) has addressed several important legal and regulatory issues regarding the uses of electronic media in commercial transactions.⁸ For example, the E-Sign Act permits the retention of certain types of records in electronic form (subject to specified conditions) if such records are required by any other law or regulation.⁹ Do any of the Board's regulations or supervisory policies require a banking organization to use or retain written forms, notices, or other records in a manner that hinders its ability to deliver financial products or services over the Internet? The Board requests comment on how particular provisions of the E-Sign Act, or any other law, affect financial institutions and their customers' ability to use (or ease of using) new technologies.

Differing Legal Requirements

Do certain provisions of Federal law that apply to online banking and lending practices make compliance with other provisions of State law (or laws enforced by foreign states) more costly? Are there particular aspects of conducting online banking and lending activities that could benefit from a single set of legal standards that can be applied uniformly nationwide?

Are there any inconsistencies between Federal and State laws or regulations that impede the electronic provision or use of financial products or services? For example, do State laws or regulations apply differently to state-chartered financial institutions, relative to federally chartered institutions, that conduct online banking and lending? Are there any State laws or regulations, such as licensing provisions for banking and other financial products and services, that affect the nationwide provision of financial products or services over the Internet?

By order of the Board of Governors of the Federal Reserve System, May 16, 2001.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 01-12689 Filed 5-18-01; 8:45 am]

BILLING CODE 6210-01-P

⁴ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) [In an action challenging a proposed merger of banks under the antitrust laws, the Court held, in relevant part, that the geographic market for the cluster of banking products and services is local in nature].

⁵ 12 U.S.C. 321 (requiring, in relevant part, a state member bank to obtain the Board's approval to establish certain new branches "beyond the limits of the city, town, or village in which the parent bank is located").

⁶ 12 CFR 229.2(f).

⁷ 12 CFR 229.19(b).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97-ANE-59-AD]

Airworthiness Directives; Pratt & Whitney JT8D Series Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Proposed rule; withdrawal.

SUMMARY: This action withdraws a notice of proposed rulemaking (NPRM) that proposed a new airworthiness directive (AD), applicable to Pratt & Whitney (PW) JT8D series turbofan engines. That action would have superseded an existing AD to require initial and repetitive borescope inspections for loss of fuel nozzle nut torque and nozzle support wear, and replacement or modification of the fuel nozzles at the next accessibility of the diffuser build group as terminating action to the inspections. That proposal was prompted by reports of loss of fuel nozzle nut torque and nozzle support wear. Since the issuance of that NPRM, the FAA has reevaluated the likelihood that the unsafe condition will exist or develop on other products of the same type design. Accordingly, the proposed rule is withdrawn.

FOR FURTHER INFORMATION CONTACT: Tara Goodman, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238-7130; fax (781) 238-7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add a new airworthiness directive (AD), applicable to PW JT8D series turbofan engines, was published in the **Federal Register** on May 1, 1998 (63 FR 24138). The proposed rule would have required initial and repetitive borescope inspections for loss of fuel nozzle nut torque and nozzle support wear, and replacement or modification of the fuel nozzles at the next accessibility of the diffuser build group as terminating action to the inspections. That action was prompted by reports of loss of fuel nozzle nut torque and nozzle support wear. The proposed actions were intended to prevent loss of fuel nozzle nut torque and nozzle support wear, which could result in a fuel leak and possible engine fire.

Since issuing that NPRM, the FAA has reevaluated the safety concerns that the proposed actions would have

⁸ Pub. L. 106-229, 114 Stat. 464 (2000).

⁹ Sec. 101(d), 114 Stat. 466-67.

APPENDIX B

**Federal Deposit Insurance Corporation – Request for Comment on Study of
Banking Regulations Regarding the Online Delivery of Banking Services
(66 Fed. Reg. 37,029)**

For further information, contact Kenneth Hogan at (202) 208-0434.

**Linwood A. Watson, Jr.,
Acting Secretary.**
[FR Doc. 01-17682 Filed 7-13-01; 8:45 am]
BILLING CODE 6717-01-P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2495]

Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding

July 10, 2001.

Petitions for Reconsideration and Clarification have been filed in the Commission's rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of these documents are available for viewing and copying in Room CY-A257, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857-3800. Oppositions to these petitions must be filed by July 31, 2001. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject:

Federal-State Joint Board on Universal Service (CC Docket No. 96-45)
Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers (CC Docket No. 00-256)

Number of Petitions Filed: 4.

**Magalie Roman Salas,
Secretary.**

[FR Doc. 01-17664 Filed 7-13-01; 8:45 am]
BILLING CODE 6712-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Request for Comment on Study of Banking Regulations Regarding the Online Delivery of Banking Services

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Request for comment.

SUMMARY: The FDIC is reviewing its regulations regarding the delivery of financial services. The purpose of this review is to identify changes or additions to its regulations that would facilitate the use of new technologies by

financial institutions. This Request for Comment solicits comment on issues arising from the electronic delivery of financial products and services.

DATES: Comments must be received by September 14, 2001.

ADDRESSES: Send written comments to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. (facsimile number (202) 898-3838; Internet address: comments@fdic.gov <mailto:comments@fdic.gov>).

Comments may be posted on the FDIC internet site at <http://www.fdic.gov/regulations/laws/federal/propose.html>

and may be inspected and photocopied in the FDIC Public Information Center, Room 100, 801 17th Street, NW., Washington, DC 20429, between 9 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT:
Jeffrey M. Kopchik, Senior Policy Analyst, Division of Supervision (202) 898-3872; or Robert A. Patrick, Counsel, Legal Division (202) 898-3757.

SUPPLEMENTARY INFORMATION:

Introduction

Section 729 of the Gramm-Leach-Bliley Act, Public Law 106-102 (GLBA), requires the FDIC, and other federal bank regulatory agencies, to review regulations regarding the delivery of financial services and report to Congress recommendations for adapting existing requirements to online banking and lending. The purpose of this Request for Comment is to invite public comment on issues regarding financial institutions' involvement in electronic banking, before submission of the Corporation's report to Congress. Public comment will help determine whether any FDIC regulations should be revised to remove regulatory impediments to financial institutions' use of new technologies. The FDIC also would like to know whether it should consider promulgating regulations that would facilitate financial institutions' use of new technologies. Based on the comments received, the FDIC, in its report to Congress, may identify possible revisions or additions to FDIC regulations or supervisory guidance.

Background

The application of new technologies to traditional banking products and services is dramatically altering the ways in which financial institutions conduct business. Advances in

telecommunications provide financial institutions with faster and more efficient communication and data transmission. The Internet provides financial institutions with a vehicle to reach a global market area without an investment in "brick and mortar" offices. Developments in technology are causing financial institutions to reevaluate existing delivery channels and business practices, develop new products and services, and serve customers more efficiently.

Through the issuance of supervisory guidelines such as the Standards for Safeguarding Customer Information, 12 CFR part 364, Appendix B (66 FR 8616, Feb. 1, 2001) (FIL 22-2001, March 14, 2001), the FDIC is working to identify and educate banks about the risks presented by electronic banking and to ensure that its regulations appropriately address these risks.¹

General Comments

Commenters are invited to submit comments and recommendations in connection with any of the following questions or any other issues relating to the FDIC's policies or procedures for supervising financial institutions' use of electronic delivery channels.

- Are there specific regulations the FDIC should modify because they impede the use of a new technology that would allow financial institutions to offer improved products or services in a more efficient manner and at a lower cost?
- Are there areas where financial institutions would benefit from additional clarification of rules or guidance concerning the risks associated with electronic banking activities?
- Are there specific areas in which regulatory changes are needed to enhance consumer acceptance of, confidence in, or access to, electronic banking?

¹ The FDIC issued electronic banking examination procedures in January 1997 and implemented an electronic banking subject matter expert program in April 1997. The Division of Supervision created an Electronic Banking Branch to focus attention on electronic banking supervisory issues in September 2000. In addition, the FDIC has issued a variety of written guidance concerning risks and appropriate procedures for electronic banking. See e.g., FIL 81-2000, Risk Management of Technology Outsourcing (November 29, 2000); FIL 77-2000, Bank Technology Bulletin, Internet Domain Names (November 9, 2000); FIL 72-2000, Electronic Signature in Global and National Commerce Act (November 2, 2000); FIL 67-2000, Security Monitoring of Computer Networks (October 3, 2000); FIL 63-2000, Online Banking (September 21, 2000); FIL 131-97, Security Risks Associated with the Internet (December 18, 1997).

Hyperlinking

The Internet has made it possible for financial institutions and non-financial commercial enterprises to partner in ways that may not be apparent to customers visiting a web site. For example, a financial institution's web site may include hyperlinks that transfer the customer to the web sites of one or more non-financial institutions. These other web sites may provide non-financial information or sell non-financial products or services. Sites differ in the degree to which they inform a person that products or services accessible through the selection of a hyperlink are, or are not, offered, sponsored, or endorsed by the bank, which may be confusing to site visitors.

- Should the FDIC promulgate a regulation or publish guidance setting forth standards for state nonmember banks concerning the use of hyperlinks?

- Are there technology solutions to address these issues?

Physical Location

Internet banking raises issues with respect to how the FDIC should interpret existing laws and regulations that reference geographic terms or rely on concepts of physical presence. For example, the definition of "branch" contained in § 303.41(a) of the FDIC's regulations (12 CFR 303.41(a)) assumes the existence of a building permanently or temporarily located at a specific physical location. It does not address banking transactions conducted over the Internet where the consumer and a bank representative do not meet face to face. See 12 CFR part 303, subpart C.

- Does reliance on these terms and concepts create an impediment to financial institutions conducting operations on the Internet? If so, how should the FDIC clarify its regulations?

• Are there other instances in which online banking or lending would benefit from a clarification of references to physical location in FDIC regulations? If so, how should the FDIC address those instances?

Appraisals

Certain loans must be supported by written real estate appraisals performed in accordance with uniform standards, supported by the presentation and analysis of relevant market information. See 12 CFR part 323.

- Would online lending benefit from any clarification of the FDIC's application of this regulation in terms of what constitutes a written appraisal, or the presentation of relevant market information. If so, what clarifications should the FDIC make to facilitate the use of appraisals in electronic form?

- What types of controls regarding authentication of an electronic appraisal, certification of the appraiser, or other standards would be appropriate to assure authenticity and integrity in connection with filing electronic appraisals?

Electronic Signatures

The Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001, *et seq.* (E-Sign Act), provides that contracts and signatures with respect to any transaction affecting interstate commerce may not be denied validity solely because they are in electronic form. The E-Sign Act also provides that records of such contracts may be maintained in electronic form, subject to certain requirements, *i.e.*, they must accurately reflect the information in the contract, be accessible to all persons who are entitled to access them, and be capable of being accurately reproduced for later reference.

- Should the FDIC promulgate regulations or publish guidance setting forth standards for the use of electronic signatures and records? See 15 U.S.C. 7004.

By order of the Board of Directors.

Dated at Washington, DC, this 10th day of July, 2001.

Federal Deposit Insurance Corporation.

*Robert E. Feldman,
Executive Secretary*

[FR Doc. 01-17666 Filed 7-13-01; 8:45 am]

BILLING CODE 6714-01-P

affected by the catastrophe declared a major disaster by the President in his declaration of May 16, 2001:

Dodge, Faribault, and Isanti Counties for Public Assistance.

Beltrami County for Public Assistance (already designated for Individual Assistance).

McLeod and Pope Counties for Individual Assistance (already designated for Public Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Assistant Director, Readiness, Response and Recovery Directorate.

[FR Doc. 01-17642 Filed 7-13-01; 8:45 am]

BILLING CODE 6718-02-P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-1384-DR]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA-1384-DR), dated June 29, 2001, and related determinations.

EFFECTIVE DATE: June 29, 2001.

FOR FURTHER INFORMATION CONTACT:

Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-5920.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated June 29, 2001, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5121, as follows:

I have determined that the damage in certain areas of the State of Oklahoma, resulting from severe storms, flooding, and tornadoes on May 27-30, 2001, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5121 (Stafford Act). I, therefore, declare that such a major disaster exists in the State of Oklahoma.

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA-1370-DR]

Minnesota; Amendment No. 6 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Minnesota, (FEMA-1370-DR), dated May 16, 2001, and related determinations.

EFFECTIVE DATE: June 26, 2001

FOR FURTHER INFORMATION CONTACT:

Madge Dale, Readiness, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646-5920.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Minnesota is hereby amended to include the following areas among those areas determined to have been adversely

APPENDIX C

**Office of the Comptroller of the Currency – Electronic Banking Notice of Proposed Rulemaking (66 Fed. Reg. 34,855);
Electronic Banking Advanced Notice of Proposed Rulemaking
(65 Fed. Reg. 4895)**

Proposed Rules

Federal Register

Vol. 66, No. 127

Monday, July 2, 2001

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 7

[Docket No. 01-15]

RIN 1557-AB76

Electronic Banking

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its regulations in order to facilitate national banks' ability to conduct business using electronic technologies, consistent with safety and soundness. This proposal groups together new and revised regulations addressing: National banks' exercise of their Federally authorized powers through electronic means; the location, for purposes of the Federal banking laws, of a national bank that engages in electronic activities; and the disclosures required when a national bank provides its customers with access to other service providers through hyperlinks in the bank's website or other shared electronic "space."

DATES: Comments must be received by August 31, 2001.

ADDRESSES: Please send your comments to: Office of the Comptroller of the Currency, Public Information Room, 250 E Street, SW., Mail Stop 1-5, Washington, DC 20219, Attention: Docket No. 01-15. You may make an appointment to inspect and photocopy comments at the same location by calling (202) 874-5043. In addition, you may fax your comments to (202) 874-4448 or electronic mail them to regs.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT:

Stuart Feldstein, Assistant Director, or Heidi M. Thomas, Counsel, Legislative and Regulatory Activities, at (202) 874-5090; James Gillespie, Assistant Chief

Counsel, at (202) 874-5200; or Clifford Wilke, Director, Bank Technology, at (202) 874-5920.

SUPPLEMENTARY INFORMATION:

Background

Automation, the Internet, wireless communications, and other technologies are impacting not just how financial products and services are delivered, but also the substantive characteristics of those products and services.¹ By the end of 2000, approximately 37 percent of national banks offered Internet banking via transactional World Wide Web (Web) sites, with another 18 percent expecting to offer Internet banking services in the future.² By the end of 2003, an estimated 25 million to 40 million households will bank on-line.³

The OCC has approved a number of activities involving innovative uses of new technology, including the establishment of transactional Web sites, virtual marketplaces, Internet access services, and electronic payment systems. We have also permitted national banks to provide digital certification and electronic correspondent banking services.⁴

To ensure that electronic banking activities are conducted consistent with bank safety and soundness, we have issued guidance addressing supervisory issues relating to banks' use of technology.⁵ Together with the other Federal banking agencies, we have recently issued guidelines prescribing information security standards that implement the requirements of the

¹ John D. Hawke, Jr., "The Internet Impact," *Independent Banker*, March 2001; Veronica Agosta, "Nation's Small Banks Have Big Plans for the Internet," *The American Banker*, March 9, 2001, at 5; Leslie Walker, "E-Mail Money Gains Currency," *The Washington Post*, October 5, 2000, at E1; Steve Marlin, "B2B: Swirling E-Marketplace Pulls in Banks," *Bank Systems & Technology*, June 2000, at 32; "Online Finance Survey: Paying Respects," *The Economist*, May 20, 2000, at 24; Carol Power, "Banks Start to Click into Wireless Banking," *The American Banker*, June 7, 2000, at 16.

² See OCC Internet Banking Questionnaire, December 31, 2000.

³ "Online Finance Survey: Branching Out," *The Economist*, May 20, 2000, at 19.

⁴ The OCC has established a website that contains information relating to electronic banking activities. See www.occ.treas.gov/netbank/netbank.htm (Electronic Banking website). The site includes a listing of opinions, approval letters, supervisory guidance, and other issuances on this subject and provides links to the documents listed.

⁵ See, e.g., OCC Bulletin 98-3, Technology Risk Management—Guidance for Bankers and Examiners (February 4, 1998).

Gramm-Leach-Bliley Act (GLBA).⁶ We also have issued a comprehensive handbook on Internet banking that discusses business and technical issues associated with providing goods and services via the World Wide Web, the risks presented by these activities, and the OCC's procedures for Internet-related examinations.⁷ In addition, we recently issued "The Internet and the National Bank Charter," as part of the Comptroller's Corporate Manual (January 2001). These and other issuances, including Internet-related regulatory updates, are available on our Electronic Banking website.

Finally, we have initiated a review of the OCC's regulations with a view toward removing unnecessary impediments to national banks' use of technology. In an advance notice of proposed rulemaking (ANPR) published on February 2, 2000,⁸ the OCC invited public comment on issues involving Internet banking and other uses of electronic technology. Specifically, the ANPR focused on three issues: (1) How should the OCC adapt its regulations and supervisory policies to facilitate national banks' use of electronic technology consistent with bank safety and soundness? (2) What statutes can the OCC interpret more flexibly to accommodate new technologies? and (3) How can the OCC enhance the operational flexibility of banks engaging in electronic banking consistent with bank safety and soundness?⁹

The OCC received 16 comments on the ANPR, including 7 from banks, 6 from trade associations, 2 from individuals, and 1 from a company that provides information processing

⁶ 66 FR 8616 (Feb. 1, 2001) (information security guidelines issued jointly by the OCC, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision). These guidelines implement the requirements of section 501(b) of GLBA, Pub. L. 106-102, sec. 501(b), 113 Stat. 1338, 1436-37 (Nov. 12, 1999), codified at 15 U.S.C. 6801.

⁷ Comptroller's Handbook, Other Income Producing Activities: Internet Banking (Oct. 1999).

⁸ 65 FR 4895 (Feb. 2, 2000).

⁹ Section 729 of GLBA requires the OCC and the other Federal banking agencies to conduct a study of banking regulations pertaining to the delivery of on-line financial services and to make recommendations on adapting existing regulations and legislative requirements to on-line banking and lending. We noted in the ANPR that commenters' suggestions would be helpful in formulating recommendations for legislative action or for actions that may be appropriately undertaken on an interagency basis. We continue to invite commenters to address these points.

management, outsourcing services, and application software to banks. The commenters strongly supported the OCC's initiative, emphasizing that outdated and inflexible regulations are one of the largest obstacles banks face as they attempt to adopt new technologies. The comments offered suggestions in each of the three areas identified in the ANPR and raised a wide variety of additional issues.

After reviewing these comments, the OCC has developed a proposed rule to update its regulations to reflect national banks' use of new technologies and to provide simpler, clearer guidance to banks engaging in electronic activities.

Shortly after the ANPR was published, Congress passed the Electronic Signatures in Global and National Commerce Act (the E-Sign Act), which was enacted on June 30, 2000.¹⁰ Among other provisions, the E-Sign Act establishes certain uniform Federal rules concerning the use of electronic signatures and records in commercial and consumer transactions and establishes certain requirements for making disclosures to consumers electronically. Although it does not require implementing regulations, the E-Sign Act gives the OCC (and other Federal and state regulatory agencies) authority to interpret the Act's requirements with respect to the statutes they administer, subject to specified limitations. The OCC is considering whether it would be appropriate to further revise its regulations in light of the E-Sign Act. Any such revisions would be undertaken in a separate rulemaking, however, and are, accordingly, not covered by this proposal.

Section-by-Section Analysis of the Proposal

In the following discussion, the changes included in this proposal are grouped in three categories: national bank powers, location with respect to the conduct of electronic activities, and safety and soundness requirements for shared electronic "space."

A. National Bank Powers

1. National Bank Finder Authority (revised § 7.1002)

The OCC has long permitted a national bank to act as a finder to bring together buyers and sellers of financial and nonfinancial products and services. Under our current rules, a national bank, acting as a finder, may identify potential parties, make inquiries as to interest, introduce or arrange meetings

of interested parties, and otherwise bring parties together for a transaction that the parties themselves negotiate and consummate.¹¹ National banks have used the finder authority to engage in several new activities made possible by technological developments, particularly the Internet.¹²

The proposal makes several changes to section 7.1002. First, the proposal clarifies that it is part of the business of banking for a national bank to engage in finder activities. This provision codifies the position the OCC has taken in recent interpretative letters.¹³

¹¹ 12 CFR 7.1002.

¹² See OCC Conditional Approval No. 369 (Feb. 25, 2000) (national bank may, incidental to its hosting of a virtual mall, provide at that site access to a limited amount of nonfinancial information (e.g., information on current events and weather) that is necessary to attract persons to the virtual mall site); OCC Interpretive Letter No. 875, reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-369 (Oct. 31, 1999) (the components of Internet services package that involve hosting of commercial web sites, registering merchants with search engines and obtaining URLs, and electronic storage and retrieval of the data set for a merchant's on-line catalog are permissible finders activities authorized for national banks pursuant to 12 U.S.C. 24(Seventh)); OCC Conditional Approval No. 221 (Dec. 4, 1996) (national banks, in the exercise of their finder authority, may establish hyperlinks between their home pages and the Internet pages of third party providers so that bank customers will be able to access those non-bank web sites from the bank site); Letter from Julie L. Williams, Chief Counsel, October 2, 1996 (unpublished) (national bank as finder could use electronic means to facilitate contacts between third party providers and potential buyers); OCC Interpretive Letter No. 611, reprinted in [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) P 83,449 (Nov. 23, 1992) (national bank linking non-bank service providers to its communications platform of smart phone banking services was within its authority as a finder "in bringing together a buyer and seller;" national banks may act as finders by providing to their customers links to non-banking, third-party vendors' Internet web sites); OCC Interpretive Letter No. 516, reprinted in [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) P 83,220 (July 12, 1990) (national banks as finder may provide electronic communications channels for persons participating in securities transactions).

¹³ See, e.g., OCC Interpretive Letter No. 824 (Feb. 27, 1998) (determining, in the context of insurance activities, that the "finder function is an activity authorized for national banks under 12 U.S.C. 24(Seventh) as part of the business of banking."). The OCC makes this determination pursuant to its authority under section 24(Seventh) to authorize activities as part of the business of banking. *NationsBank v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 258 n.2 (1995) (VALIC) ("We expressly hold that the "business of banking" is not limited to the enumerated powers in [section] 24(Seventh) and that the Comptroller therefore has discretion to authorize activities beyond those specifically enumerated."). In VALIC, the Court noted that the Comptroller's exercise of discretion is subject to a reasonableness standard. *Id.* It is clear that our determination that finder activities are part of the business of banking satisfies this standard. See *Norwest Bank v. Sween Corporation*, 118 F.3d 1255 (8th Cir. 1997) (determining that finder activities were authorized for a national bank because "allowing banks to use their expertise as

Second, the proposal adds a number of specific examples illustrating the full range of finder activities that we have authorized. For example, the proposal states that a national bank may communicate information about third-party providers, their services and products, and proposed offering prices and terms to potential markets. These examples are illustrative and not exclusive, and the OCC may find new activities to be authorized under the finder authority that are not included in the examples.

Finally, the current rule contains the express statement that acting as a finder does not include activities that would characterize the bank as a broker under applicable Federal law. Like other aspects of the financial services business, the concept of what constitutes acting as a broker is changing in response to technology and is expanding in some Federal regulatory regimes.¹⁴ Accordingly, the proposed rule restates the exclusion contained in the current rule to provide that the authority to act as a finder does not enable a national bank to engage in activities that would characterize the bank as a broker under Federal law that are not otherwise permissible for national banks. This change is prompted in response to changes in the definition of "broker" under Federal law and does not affect whether activities regulated as brokerage under state law are permissible for a national bank. In addition, as under the current regulation, a national bank acting as finder may not represent or bind either of the parties to a transaction, nor may it take title to goods as finder.

2. Electronic Banking—Scope (new Subpart E and § 7.5000)

The proposal creates a new Subpart E to part 7, which collects regulations pertaining to electronic activities. New section 7.5000 describes the scope of Subpart E, which addresses national

an intermediary effectuating transactions between parties facilitates the flow of money and credit through the economy."). The *Sween* court did not distinguish between activities that are "part of" the business of banking and those that are "incidental to" that business, relying, instead, on the pre-VALIC formulation of the analysis as whether an activity is "closely related to an express power and is useful in carrying out the business of banking." *Id.* at 1260. The court's conclusions are nonetheless clear that finder activities are authorized pursuant to section 24(Seventh) and that the Comptroller's determination to that effect, embodied in the OCC's regulations, was a reasonable construction of the statute.

¹⁴ See, e.g., "SEC Redefines What Triggers B/D Registration," VII *Compliance Rep.* 1 (April 10, 2000) and "On-line Brokerage: Keeping Apace of Cyberspace," Report of Laura S. Unger, Commissioner, U.S. Securities and Exchange Commission 98-106 (Nov. 1999).

banks' use of electronic technology to deliver products and services, consistent with safety and soundness.

3. Electronic Banking Activities That Are Part of, or Incidental to, the Business of Banking (§ 7.5001)

The rapid development of new technologies requires banks to be able to respond quickly and effectively to changing customer needs. As they take up the new lines of business and offer the new financial products needed to serve their customers, national banks must continually evaluate their authority, pursuant to 12 U.S.C. 24(Seventh), to conduct electronic activities that are part of, or incidental to, the business of banking.¹⁵ Proposed new § 7.5001 assists banks that are contemplating new electronic activities by identifying the factors the OCC uses to determine whether the electronic activity would be authorized pursuant to section 24(Seventh).

Section 7.5001(a) provides the purpose and scope of the new section and describes the general parameters of national banks' ability to engage in electronic activities. First, it sets out expressly the OCC's authority to impose conditions on the exercise of newly authorized activities if necessary to ensure that they are conducted safely and soundly and in accordance with applicable law and supervisory policies. Second, it clarifies that state law applies to a national bank's conduct of electronic activities to the extent it would apply if the activity were conducted through traditional means. The provision clarifies that the same analysis governs the applicability of state law to Federally authorized activities that national banks conduct whether using new technologies or using more traditional means.¹⁶

Electronic banking activities that are part of the business of banking (new § 7.5001(b)). Proposed § 7.5001(b) provides that an electronic activity is authorized for national banks as part of the business of banking if the activity is permitted under 12 U.S.C. 24(Seventh) or other statutory authority applicable to national banks, or otherwise constitutes part of the business of banking. The proposal sets forth four factors the OCC considers in determining whether an electronic activity is part of the business

of banking. A proposed activity does not necessarily have to satisfy all four criteria in order to be permissible. Rather, we recognize that one or more of these factors may predominate, depending on the specific facts and circumstances presented.¹⁷

The first factor is whether the electronic activity is functionally equivalent to, or a logical outgrowth of, a recognized banking activity. This factor is based on judicial precedents approving activities that have traditionally been performed by banks, that are functionally similar to recognized banking activities, or that represent advances in recognized banking practices.¹⁸

The second factor that we consider is whether the proposed activity strengthens the bank by benefitting its customers or its business. Courts have long recognized that banks' ability to serve the needs of their customers by offering appropriate products and services is crucial to the capability of national banks to compete successfully. Therefore, the courts have also approved many activities on the basis that they benefit a bank's customers or the bank's business itself.¹⁹ Examples of the types of activities the OCC would look to that would benefit bank customers or may be useful or convenient to banks include those where the activity increases service, convenience, or options for bank customers or lowers the cost to banks of providing a product or service.

The third factor that we consider in determining whether an electronic activity is part of the business of banking is whether the activity presents

the types of risk that banks are experienced in managing.²⁰

Finally, the proposal recognizes the relevance of state law in the analysis the OCC conducts when it receives requests regarding the permissibility of new electronic activities for national banks. Since the statutory reference to the "business of banking" does not imply that there are two distinct businesses of banking, one for Federally-chartered and another for state-chartered banks, activities that are recognized as permissible for state banks are at least a relevant factor in determining whether an electronic activity is part of the business of banking.²¹

Electronic activities that are incidental to the business of banking (new § 7.5001(c)). We are also proposing to set forth the factors the OCC considers in determining whether an electronic activity is incidental to the business of banking. In *Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972), the court held that a national bank's activity is authorized as an incidental power if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to the five express powers enumerated in 12 U.S.C. 24(Seventh). Consistent with the Supreme Court's holding in *VALIC* that national banks' authority to engage in the business of banking is not limited to the five express powers, proposed § 7.5001(c) updates this standard to provide that an activity is incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national banks or to an activity that is otherwise part of the business of banking.

¹⁷ See, e.g., Conditional Approval No. 267 (January 12, 1998) (A national bank may engage in certification authority activities that are the functional equivalent to and a logical outgrowth of established banking functions) and Conditional Approval No. 220 (December 2, 1996) (The creation, sale and redemption of electronic stored value in exchange for dollars are part of the business of banking because these activities comprise the electronic equivalent of issuing circulating notes or other paper-based payment devices like travelers checks).

¹⁸ See, e.g., *M&M Leasing v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), cert. denied, 436 U.S. 956 (1978) (national bank leasing of personal property permissible because it was functionally interchangeable with loaning money on personal security and therefore incidental to the express power of loaning money on personal security); *VALIC*, 513 U.S. at 259-60 (national bank annuity sales are permissible because they are functionally similar to other financial investment products banks have long been authorized to sell).

¹⁹ *Merchants' Bank v. State Bank*, 77 U.S. 604, 648 (1871) ("The practice of certifying checks has grown out of the business needs of the country.") *See Clement National Bank v. Vermont*, 231 U.S. 120, 140 (1923) ("the bank should be free to make * * * reasonable [depositors'] agreements, and thus promote the convenience of its business * * * .")

²⁰ See *Merchants' Bank*, 77 U.S. at 648 ("A bank incurs no greater risk in certifying a check than in giving a certificate of deposit."); *M&M Leasing*, 563 F.2d at 1383 (leasing personal property functionally equivalent to secured lending because the risks to the bank of such leasing were essentially the same as if the bank had made secured loans to buyers of the same property). See also Decision of the Comptroller of the Currency on the Operating Subsidiary Application by Zions First National Bank, Salt Lake City, Utah, OCC Conditional Approval No. 267 (January 12, 1998) at 13 (acting as a certification authority involves core competencies of national banks and thus entails risks similar to those that banks are already expert in handling).

²¹ The U.S. Supreme Court has relied upon the permissibility of an activity for state banks as a factor in the analysis of permissible national bank powers. *See Colorado National Bank v. Bedford*, 310 U.S. 41 (1940), in which the Court, concluding that national banks had the authority to conduct a safe-deposit business, stated that "State banks, quite usually, are given the power to conduct a safe-deposit business. We agree with the appellant bank that such a generally adopted method of safeguarding valuables must be considered a banking function authorized by Congress." 310 U.S. at 51.

¹⁵ *VALIC*, 513 U.S. at 258.

¹⁶ In brief, state law applies to a national bank's exercise of a Federally authorized activity if a Federal statute directs that result or if the state law is found to apply under principles of Federal preemption derived from the Supremacy Clause of the U.S. Constitution and applicable judicial precedent. See, e.g., *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

Proposed § 7.5001(c) relies on Federal incidental powers precedents to identify the factors the OCC uses in determining whether an activity is convenient or useful to the business of banking. As with determinations about whether an activity is part of the business of banking, specific facts may implicate one or more factors, and the activity need not satisfy each factor to be permissible as incidental to that business.

The first factor listed in the proposal as part of the OCC's determination as to whether an electronic banking activity is incidental to the business of banking is whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations in light of risks presented, innovations, strategies, techniques and new technologies for providing financial products and services. For example, relying on well established judicial precedents,²² the OCC has determined that the provision of certain products and services is permissible as incidental to the business of banking when needed to package successfully or promote other banking services.²³

In addition to incidental activities based on specific banking services or products, proposed § 7.5001(c)(1) also recognizes a category of incidental activities based on the operation of the bank itself as a business concern. Banking activities that fall in this category may include hiring employees, issuing stock to raise capital, owning or renting equipment, borrowing money for operations, purchasing the assets and assuming the liabilities of other financial institutions, and operating through optimal corporate structures, such as subsidiary corporations or joint ventures. Various Federal statutes have implicitly recognized national banks' authority to perform the activities necessary to conduct their business. For example, Federal laws refer to limits on persons who can serve as bank employees, to the permissible

²² See *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954) (national bank may advertise savings accounts); *Clement National Bank*, 231 U.S. at 140 (national bank may promote its deposit services by computing, reporting and paying the state tax levied upon the interest earned by bank customers on their deposits).

²³ See OCC Interpretative Letter No. 754, reprinted in [1996-97 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-118 (Nov. 6, 1996) (national bank operating subsidiary may sell general purpose computer hardware to other financial institutions as part of larger product or service when necessary, convenient, and useful to bank permissible activities.)

disposition of bank stock, and to the existence of bank subsidiaries.²⁴ In each case, the statutes presume the existence of corporate power to conduct the bank's business under 12 U.S.C. 24(Seventh).

The authority of banks to deliver and sell products and services or improve the effectiveness of its operations must be viewed in light of innovations, strategies, techniques and new technologies for marketing financial products and services. For example, in *VALIC*, the Supreme Court recognized that the concepts of the "business of banking" and of activities "incidental" to that business must be sufficiently flexible to accommodate the constant evolution of banking services. These grants of power must be given a broad and flexible interpretation to allow national banks to utilize modern methods and meet modern needs. The court in the *M&M Leasing* case also focused on this point noting that "commentators uniformly have recognized that the National Bank Act did not freeze the practices of national banks in their nineteenth century form* * *. [W]e believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking."²⁵ Proposed § 7.5001(c)(1) recognizes that market and technological changes that will affect the banking industry will shape the OCC's future determinations of whether an activity is incidental to the business of banking.

The second factor is whether the activity enables the bank to profitably use capacity acquired for its banking operations or otherwise avoid economic waste or loss. For example, it is well settled that a nonbanking activity can be validly incidental when it enables a bank to realize gain or avoid loss from activities that are part of, or necessary to, its banking business. Federal statutes and case law also recognize national banks' need to optimize the value of bank property by authorizing banks to sell excess space or capacity in that property.²⁶ Proposed § 7.5004, which

²⁴ See, e.g., 12 U.S.C. 78 (defining persons ineligible to be bank employees); 12 U.S.C. 83 (limiting national bank's purchase of its own stock); 12 U.S.C. 24 (Seventh) (limiting presupposed authority of national bank to own a subsidiary engaged in the safe deposit business); 12 U.S.C. 371d(1994) (defining "affiliates" to include subsidiaries owned by national banks); GLBA section 121 (defining financial subsidiary as a subsidiary "other than" a subsidiary that conducts bank-permissible activities under the same terms and conditions as apply to the parent bank or a subsidiary expressly authorized by Federal statute).

²⁵ 563 F.2d at 1382.

²⁶ See 12 U.S.C. 24(Seventh) and 29; *Perth Amboy National Bank v. Brodsky*, 207 F.Supp. 785, 788

pertains to excess capacity, is a specific application of this general principal.

4. Furnishing of Products or Services by Electronic Means and Facilities (§ 7.5002).

The OCC's rules currently provide that a national bank may perform, provide, or deliver through electronic means and facilities any function, product, or service that it is otherwise authorized to perform, provide or deliver.²⁷ This so-called "transparency doctrine" is a key provision for national banks engaging in electronic activities because it requires the OCC to look through the means by which the product is delivered and focus instead on the authority of the national bank to offer the underlying product or service.

The proposed rule moves the transparency rule to new subpart E and expands it to include examples of permissible activities under the rule. For example, we have relied on the transparency doctrine in § 7.1019 to approve a number of technology-based activities, such as web site hosting and the operation of a "virtual mall," that are otherwise permissible under a national bank's finder authority. Similarly, we have approved electronic bill presentment activities because billing and collecting services are permissible for national banks.²⁸ We believe that moving this section under new subpart E and providing concrete examples of how it may be used will provide clearer guidance to national banks that wish to engage in new electronic activities.²⁹

5. Composite Authority To Engage in Electronic Banking Activities (§ 7.5003)

An electronic banking activity may appear to be novel but may actually comprise a collection of interrelated activities, each of which is permissible under well-settled authority. For example, the authority for a national bank to offer a commercially enabled web site service to merchants is actually

(S.D.N.Y. 1962) ("It is clear beyond cavil that the statute [12 U.S.C. 29] permits a national bank to lease or construct a building, in good faith, for banking purposes, even though it intends to occupy only a part thereof and to rent out a large part of the building to others.")

²⁷ 12 CFR 7.1019.

²⁸ OCC Conditional Approval No. 304 (Mar. 5, 1999).

²⁹ See also, Conditional Approval No. 220 (December 2, 1996) (The creation, sale and redemption of electronic stored value in exchange for dollars is part of the business of banking because it is the electronic equivalent of issuing circulating notes or other paper based payment devices like travelers checks); Conditional Approval No. 267 (January 12, 1998) (A national bank may store electronic encryption keys as an expression of the established safekeeping function of banks.)

a blend of established authorities to offer the constituent parts of the service, including the authorities to act as finder, to process banking or financial data, and to engage in payments processing and collection. To clarify national banks' conduct of this type of "composite" activity, proposed § 7.5003 codifies the approach we have used in our approval letters by providing that an electronic product or service that comprises several elements, or activities, is authorized if each of the constituent elements or activities is authorized. This provision does not authorize activities that are not otherwise permissible for national banks under Federal law.

6. Excess Electronic Capacity (§ 7.5004)

The OCC has long permitted national banks to rely on the "excess capacity" doctrine to avoid waste and deploy resources efficiently. The excess capacity doctrine holds that a bank acquiring an asset in good faith to conduct its banking business is permitted, under its incidental powers, to make full economic use of the property if using the property solely for banking purposes would leave the property underutilized.³⁰ While the doctrine originated to allow banks to use excess real property efficiently, it has taken on particular significance as banks conduct more business through developing technologies. We have applied the excess capacity doctrine to a broad range of electronic products and services, including Internet access, software production and distribution, long line telecommunications and data processing equipment, electronic security systems and a call center.³¹

The OCC's rules currently recognize the excess capacity doctrine with respect to excess electronic capacities acquired or developed by a bank in good faith for banking purposes. The proposal relocates the excess electronic capacity rule from current § 7.1019 to new subpart E and adds specific examples. These examples, while not exclusive, illustrate uses of excess electronic capacity that we have approved. The proposal retains the requirement that the excess capacity must be acquired in

good-faith for banking purposes.³² As our approvals to date demonstrate, the determination that a particular use of excess electronic capacity is permissible is fact specific. Accordingly, we encourage banks considering appropriate uses of excess electronic capacity to consult with the OCC.

This proposal does not affect other bases upon which the OCC has approved similar types of activities. For example, this proposal does not affect the so-called "by-product theory," where a national bank may sell by-products, such as software, developed by the bank for or during the performance of its permissible data processing functions.³³

7. National Bank Acting as a Digital Certification Authority (§ 7.5005).

Digital signatures are a form of electronic authentication that permit the recipient of an electronic message to verify the sender's identity. In order for a digital signature system to operate successfully, the message recipient must have assurance that the public key³⁴ used to decode a message is uniquely associated with the sender. One method of providing that assurance is for a trusted third party—called a certification authority—to issue a digital certificate attesting to this association. The certification authority generates and signs digital certificates to verify the identity of the person transmitting a message electronically.

To date, we have permitted a national bank to act as a certification authority that issues certificates verifying the *identity* of the certificate holder.³⁵ The proposed rule would codify this position.

National banks also have demonstrated increasing interest in issuing certificates that verify the

authority or *financial capacity* of the certificate holder. In these instances, for example, the bank could issue a certificate that the individual has the authority to debit a particular account (account authority digital certificates) or has the financial capacity to make a purchase or engage in a particular transaction. We invite comment on the extent to which national banks propose to engage in these activities, how they will be structured, and whether permitting national banks to issue certificates to verify authority or financial capacity presents unique risks.

8. Data Processing (§ 7.5006)

We have repeatedly confirmed that a national bank may collect, process, transcribe, analyze and store banking, financial and economic data for itself and its customers as part of the business of banking.³⁶ The proposed rule would codify these interpretations. Commenters are invited to address whether more modern terminology should be used to better describe what functions should be considered to be (or not to be) "data processing" in light of advances in technology.

We have also found that national banks, under their authority to conduct activities incidental to the business of banking, may provide limited amounts of nonfinancial information processing to their customers to enhance marketability or use of a banking service.³⁷ We typically inquire whether the processing of nonfinancial data is convenient or useful to the specific processing of financial data or other business of banking activities in a specific contract or relationship. In the final rule, we could codify this case-

³⁰ See, e.g., OCC Conditional Approval No. 289 (Oct. 2, 1998); OCC Interpretive Letter No. 805 (Oct. 9, 1997). A prior OCC interpretive ruling on electronic banking specifically stated that "as part of the business of banking and incidental thereto, a national bank may collect, transcribe, process, analyze and store for itself and others, banking, financial, or related economic data." 39 FR 14192, 14195 (Apr. 22, 1974). This language was deleted from former 12 CFR 7.3500 because the OCC was concerned that the specific examples of permissible activities in the ruling, such as the marketing of excess time, by-products, and the processing of "banking, financial, or related economic data" had led to confusion and misinterpretation. See 47 FR at 46526, 46529 (Oct. 19, 1982).

³¹ Until 1984, the OCC's data processing rule specifically recognized the by-product theory. 12 CFR 7.3500 (1983). Although this language was deleted from the rule in 1984, see 49 FR 11157 (Mar. 26, 1984), this deletion did not indicate a change in the OCC's position regarding this theory. The 1984 revision was merely a non-substantive format change in the rule. *Id.*; see also 47 FR 46526 (Oct. 19, 1982).

³² The mathematical function the sender uses to encode a message is called the sender's private key. The related function that the recipient of the message uses to decode the message is called the sender's public key. In public key infrastructure systems based on asymmetric encryption, each private key is uniquely associated with a particular counterpart public key. Thus, if one has assurance that a specific private key is associated with a person and under their sole control, any message that can be decoded using that person's public key may be assumed to have been sent by that person.

³³ See OCC Conditional Approval No. 267 (Jan. 12, 1998).

³⁴ See, e.g., OCC Conditional Approval No. 369 (Feb. 25, 2000).

³⁰ OCC Conditional Approval No. 361 (Mar. 3, 2000).

³¹ See OCC Interpretive Letter No. 742, reprinted in [1996–1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81–106 (Aug. 19, 1996); OCC Interpretive Letter No. 677, reprinted in [1994–1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶83,625 (June 28, 1885); unpublished letter from William Glidder (June 6, 1986); unpublished letter from Stephen Brown (Dec. 20, 1989); and OCC Conditional Approval No. 361 (Mar. 3, 2000).

specific approach to incidental nonfinancial data processing.

However, we also are considering whether to issue a rule on incidental data processing that would recognize that a national bank may generally derive a certain specified percentage of its total annual data processing revenue from processing nonfinancial data as incidental to its financial data processing services. We are aware of anecdotal evidence suggesting that national banks attempting to market financial data processing services are frequently confronted with customer demands that the bank also process some nonfinancial data so that the customer can avoid the inconvenience of having to use two different processors: the bank for financial data and some other firm for nonfinancial data. Indeed, one commenter to the ANPR suggested that bank customers would like their banks to offer broader processing services and that competitors in the marketplace are providing these services. We are interested in comments and evidence on the extent of this phenomenon so we can determine whether it is so pervasive as to warrant a general rule establishing a limited and specific safe harbor for processing nonfinancial data in connection with financial data processing in lieu of our current case by case approach.³⁸

We invite comment on all aspects of this provision. We specifically invite commenters to provide any evidence indicating whether or not national banks' data processing customers need incidental nonfinancial data processing services on a routine basis. We also invite comment on what percentage of nonfinancial data revenue would be appropriate for such a safe harbor if it were adopted.

9. Correspondent Banking (§ 7.5007)

The OCC has long permitted national banks to perform for other entities an array of activities called "correspondent services" as part of the business of banking.³⁹ These activities include any

³⁸ We note that the Board of Governors of the Federal Reserve System's Regulation Y currently authorizes bank holding companies to conduct data processing and data transmission activities where the data to be processed or furnished is not financial, banking, or economic if the total annual revenue derived from those activities does not exceed 30% of the company's total annual revenue derived from data processing and data transmission activities. 12 CFR 225.28(b)(14) (2000). Further, the Board of Governors recently proposed amending this rule to expand the permissible nonfinancial revenue percentage to 49%. 65 FR 80384 (Dec. 21, 2000).

³⁹ See, e.g., OCC Interpretative Letter No. 875, reprinted in [1999–2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–369 (Oct. 31, 1999); OCC Interpretative Letter No. 811, reprinted in

corporate or banking service that a national bank may perform for itself.⁴⁰ A national bank may perform these activities for any of its affiliates or for other financial institutions.⁴¹ The proposed rule would codify this position.

In addition, the OCC has approved a number of electronic- and technology-related activities as permissible correspondent services for national banks. These activities have included:

- Providing computer networking packages and related hardware that meet the banking needs of financial institution customers;⁴²
- Processing bank, accounting, and financial data, such as check data, other bookkeeping tasks, and general assistance of correspondents' internal operating, bookkeeping, and data processing;⁴³
- Selling data processing software;⁴⁴
- Developing, operating, managing, and marketing products and processing services for transactions conducted at electronic terminal devices including, but not limited to, ATMs, POS terminals, scrip terminals, and similar devices;⁴⁵
- Item processing services and related software development;⁴⁶
- Document control and record keeping through the use of electronic imaging technology;⁴⁷

[1997–1998 Transfer Binder] Fed. Banking L. Rep. ¶ 81–259 (Dec. 18, 1997); Corporate Decision 97–79 (July 11, 1997).

⁴⁰ See OCC Interpretative Letter No. 467, reprinted in [1988–1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,691 (Jan. 24, 1989) (national bank may offer wide range of correspondent services); Letter from Wallace S. Nathan, Regional Counsel (Dec. 3, 1982) (unpublished) (microfiche services); Letter from John E. Shockey, Chief Counsel (July 31, 1978) (unpublished) (advertising services).

⁴¹ E.g., OCC Interpretative Letter No. 875, supra; OCC Interpretative Letter No. 513, reprinted in [1990–1991 Transfer Binder] Fed. Banking L. Rep. ¶ 83,215 (June 18, 1990).

⁴² See OCC Interpretative Letter No. 754, reprinted in [1996–1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–118 (Nov. 6, 1996).

⁴³ See, e.g., Letter from Vernon E. Fasbender, Director for Analysis, Southeastern District (Dec. 6, 1990); OCC Interpretative Letter No. 345, reprinted in [1985–1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,515 (July 9, 1985); Letter from Joe H. Selby, Deputy Comptroller (November 22, 1978); Letter from Vernon E. Fasbender, Director for Analysis, Southeastern District (Dec. 6, 1990).

⁴⁴ See, e.g., OCC Interpretative Letter No. 868, reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–362 (Aug. 16, 1999).

⁴⁵ See, e.g., OCC Interpretative Letter No. 890, reprinted in [1999–2000 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–409 (May 15, 2000).

⁴⁶ See, e.g., Letter from Vernon E. Fasbender, Director for Analysis, Southeastern District (Dec. 6, 1990); and Letter from J.T. Watson, Deputy Comptroller of the Currency (Mar. 22, 1973).

⁴⁷ See OCC Interpretative Letter No. 805, reprinted in [1997–1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–252 (Oct. 9, 1997).

• Internet merchant hosting services for resale to merchant customers;⁴⁸ and

- Communication support services through electronic means, such as the provision of electronic "gateways" in order to communicate and receive financial information and to conduct transactions; creating, leasing, and licensing communications systems, computers, analytic software, and related equipment and services for sharing information concerning financial instruments and economic information and news; and the provision of electronic information and transaction services and linkage for financial settlement services.⁴⁹

This proposal would codify these interpretations and include these activities in the text of the regulation as examples of electronic activities that banks may offer as correspondent services.

B. Location

1. Location of a national bank conducting electronic banking activities (§ 7.5008)

The effect of several statutes affecting national banks turns in part on where the bank in question is "located." The scope of this term—specifically, whether it refers only to the bank's main office, includes branches as well, or means something different—varies from statute to statute and depends on the specific statutory context.⁵⁰ Moreover, national banks often conduct a significant portion of their operations in locations that are distinct from their main office and branches. For example, a bank that has a branch in State A and its main office in State B may have an automated loan processing center in State C and depend on a third party vendor in State D for certain ministerial lending functions.

One commenter on the ANPR said that a national bank's location for Federal banking law purposes should not be determined by the physical site of its technology-related equipment. The OCC agrees with that result, and the

⁴⁸ See Corporate Decision No. 2000–08 (June 1, 2000); and OCC Interpretative Letter No. 875, reprinted in [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81–369 (Oct. 31, 1999).

⁴⁹ OCC Interpretative Letter No. 611, reprinted in [1992–1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,449 (Nov. 23, 1992); OCC Interpretative Letter No. 516, reprinted in [1990–1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,220 (July 12, 1990); and OCC Interpretative Letter No. 346, reprinted in [1985–1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,516 (July 31, 1985).

⁵⁰ See, 12 U.S.C. 24(8) (charitable contributions); 12 U.S.C. 29 (authority to hold real estate); 12 U.S.C. 36 (branching); 12 U.S.C. 72 (director qualifications); 12 U.S.C. 92a (trust powers); 12 U.S.C. 94 (venue); and 12 U.S.C. 548 (State taxation).

proposal, accordingly, provides that a national bank will not be considered located in a state solely because it physically maintains technology, such as a server or automated loan center, in that state, or because the bank's products or services are accessed through electronic means by customers located in the state. This is consistent with evolving case authority.⁵¹

2. Location of Internet-only bank under 12 U.S.C. 85 (§ 7.5009)

Twelve U.S.C. 85 authorizes a national bank to charge interest in accordance with the laws of the state in which it is located. In interpreting section 85, the Supreme Court has held that a national bank is "located" in the state where it has its main office (its home state).⁵² Thus, a national bank may charge the interest rates permitted by its home state no matter where the borrower resides or what contacts with the bank occur in another state.

The OCC has chartered several Internet-only national banks that operate without physical branches and that make loans or extend credit primarily through the Internet. The proposal provides that, for purposes of 12 U.S.C. 85, the main office of a national bank that operates exclusively through the Internet is the office identified by the bank under 12 U.S.C. 22(Second) or as relocated pursuant to 12 U.S.C. 30 or other appropriate authority.

C. Safety and Soundness

Shared electronic space (§ 7.5010).

The advent of Internet technology has dramatically increased the ability of banks to enter into joint marketing relationships with third parties. For example, national banks are becoming increasingly involved in electronic marketing arrangements that involve providing bank customers with access to providers of retail or financial services through hyperlinks on the bank's web site or through other shared electronic "space." Under current OCC rules, a national bank may lease space on bank premises to other businesses and share space jointly with other businesses subject to certain conditions.⁵³ These conditions, set forth in section 7.3001(c), are intended to minimize customer confusion about the nature of the products offered and promote the safe and sound operation of the bank.

⁵¹ See, e.g., *Amberson Holdings LLC v. Westside Story Newspaper*, 110 F. Supp. 2d 332 (D.N.J. 2000).

⁵² *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978).

⁵³ 12 CFR 7.3001.

The proposal would extend the same general principles set forth in section 7.3001 to situations where banks share co-branded web sites or other electronic space with subsidiaries or unaffiliated third parties. Under the proposal, the bank would be required to take reasonable steps to enable customers to distinguish between products and services offered by the bank and those offered by the bank's subsidiary or a third party. The bank also should disclose its limited role with respect to the third party product or service.

The proposal also recognizes that the way disclosures are displayed and the context in which they are displayed may vary significantly. Thus, the proposal requires disclosures to be conspicuous, simple, direct, readily understandable, and designed to call attention to the fact that the bank does not provide, endorse, or guarantee any of the products or services available through third party web pages.

Comment Solicitation

The OCC requests comment on all aspects of this proposal, including the specific issues that follow.

The OCC seeks comment on the impact of this proposal on community banks. The OCC recognizes that community banks operate with more limited resources than larger institutions and may present a different risk profile. Thus, the OCC specifically requests comment on the impact of the proposal on community banks' current resources and available personnel with the requisite expertise, and whether the goals of the proposal could be achieved, for community banks, through an alternative approach.

Solicitation of Comments on Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, Pub. L. 106-102, sec. 722, 113 Stat. 1338, 1471 (Nov. 12, 1999), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. We invite your comments on how to make this proposal easier to understand. For example:

- Have we organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the proposed regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the proposed regulation contain language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings,

paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand?

- What else could we do to make the regulation easier to understand?

Regulatory Analysis

A. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Comptroller of the Currency certifies that this proposal will not have a significant economic impact on a substantial number of small entities.

B. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (Unfunded Mandates Act) requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that the proposal will not result in expenditures by State, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

C. Executive Order 12866

The Comptroller of the Currency has determined that this rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

D. Paperwork Reduction Act of 1995

For purposes of compliance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, the OCC invites comment on:

- (1) Whether the proposed collection of information contained in this notice of proposed rulemaking is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;
- (2) The accuracy of the OCC's estimate of the burden of the proposed information collection;
- (3) Ways to enhance the quality, utility, and clarity of the information to be collected;
- (4) Ways to minimize the burden of the information collection on the

respondents, including the use of automated collection techniques or other forms of information technology; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Respondents are not required to respond to this collection of information unless the final regulation displays a currently valid Office of Management and Budget (OMB) control number.

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Alexander Hunt, Desk Officer, Washington, DC 20503, with a copy to Jessie Dunaway, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Mailstop 8-4, Washington, DC 20219.

Section 7.5010 of the proposed rule requires a national bank that shares a co-branded website or other electronic space with a bank subsidiary or a third party to make certain disclosures designed to enable its customers to distinguish its products and services from those of the subsidiary or third party.

The likely respondents are national banks.

Estimated number of respondents:
1,609 respondents.

Estimated number of responses: 1,609 responses.

Estimated burden hours per response:
1 hour.

Estimated total annual burden hours:
1,609 hours.

List of Subjects in 12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

Authority and Issuance

For reasons set forth in the preamble, part 7 of chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 7—BANK ACTIVITIES AND OPERATIONS

1. The authority citation for part 7 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.* and 93a.
2. Revise § 7.1002 to read as follows:

§ 7.1002 National bank acting as finder.

(a) *General.* It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to act as a finder bringing together buyers and sellers.

(b) *Permissible finder activities.* A national bank that acts as a finder may identify potential parties, make inquiries as to interest, introduce or arrange contacts or meetings of interested parties, and otherwise bring parties together for a transaction that the parties themselves negotiate and consummate. For example, permissible finder activities include:

(1) Communicating information about providers of products and services, their products and services, and proposed offering prices and terms to potential markets for these products and services;

(2) Communicating to the seller an offer to purchase or a request for information, including forwarding completed applications, application fees, and requests for information to third-party service providers;

(3) Arranging for third-party providers to offer reduced rates to those customers referred by the bank;

(4) Providing administrative, clerical, and record keeping functions related to the bank's finder activity, including retaining copies of documents, instructing and assisting individuals in the completion of documents, scheduling sales calls on behalf of retailers, and conducting market research to identify potential new customers for retailers;

(5) Conveying between interested parties expressions of interest, bids, offers, orders, and confirmations relating to a transaction; and

(6) Conveying other types of information between potential buyers and sellers.

(c) *Limitation.* The authority to act as a finder does not enable a national bank to engage in brokerage activities that have not been found to be permissible for national banks.

(d) *Advertisement and fee.* Unless otherwise prohibited, a national bank may advertise the availability of, and accept a fee for, the services provided pursuant to this section.

§ 7.1019 [Removed]

3. Remove § 7.1019.
4. Add new subpart E to read as follows:

Subpart E—Electronic Banking

Sec.

- 7.5000 Scope.
- 7.5001 Electronic banking activities that are part of, or incidental to, the business of banking.
- 7.5002 Furnishing of products and services by electronic means and facilities.

7.5003 Composite authority to engage in electronic banking activities.

7.5004 Excess electronic capacity.

7.5005 National bank acting as digital certification authority.

7.5006 Data processing.

7.5007 Correspondent banking.

7.5008 Location of national bank conducting electronic banking activities.

7.5009 Location of Internet-only bank under 12 U.S.C. 85.

7.5010 Shared electronic space.

§ 7.5000 Scope.

This subpart applies to a national bank's use of technology to deliver services and products consistent with safety and soundness.

§ 7.5001 Electronic activities that are part of, or incidental to, the business of banking.

(a) *Purpose and scope.* This section identifies the criteria that the OCC uses to determine whether an electronic activity is authorized as part of, or incidental to, the business of banking under 12 U.S.C. 24(Seventh). The OCC may restrict or condition activities that are permissible under the statutory standard in order to ensure that they are conducted safely and soundly, and in accordance with applicable statutes, regulations, or supervisory policies. State laws may be applicable to the provision of activities by a national bank through electronic means to the extent that they apply to the activity otherwise conducted by the national bank.

(b) *Activities that are part of the business of banking.* An activity is authorized for national banks as part of the business of banking if the activity is described in 12 U.S.C. 24(Seventh) or other statutory authority, or is otherwise part of the business of banking. In determining whether an electronic activity is part of the business of banking, the OCC considers the following factors:

(1) Whether the activity is the functional equivalent to, or a logical outgrowth of, a recognized banking activity;

(2) Whether the activity strengthens the bank by benefitting its customers or its business;

(3) Whether the activity involves risks similar in nature to those already assumed by banks; and

(4) Whether the activity is expressly authorized by law for state-chartered banks.

(c) *Activities that are incidental to the business of banking.* An electronic banking activity is authorized for a national bank as incidental to the business of banking if it is convenient or useful to an activity that is specifically authorized for national

banks or to an activity that is otherwise part of the business of banking. In determining whether an activity is convenient or useful to such activities, the OCC considers the following factors:

(1) Whether the activity facilitates the production or delivery of a bank's products or services, enhances the bank's ability to sell or market its products or services, or improves the effectiveness or efficiency of the bank's operations, in light of risks presented, innovations, strategies, techniques and new technologies for producing and delivering financial products and services; and

(2) Whether the activity enables the bank to profitably use capacity acquired for its banking operations or otherwise avoid economic loss or waste.

§ 7.5002 Furnishing of products and services by electronic means and facilities.

(a) *Use of electronic means and facilities.* A national bank may perform, provide, or deliver through electronic means and facilities any activity, function, product, or service that it is otherwise authorized to perform, provide, or deliver. For example, permissible activities under this authority include:

(i) Acting as an electronic finder by:

(ii) Establishing, registering, and hosting commercially enabled web sites in the name of retailers;

(iii) Establishing hyperlinks between the bank's site and a third party site, including acting as a "virtual mall" by providing a collection of links to web sites of third party vendors, organized by product type and made available to bank customers;

(iv) Hosting an electronic marketplace on the bank's Internet web site by providing links to the web sites of third party buyers or sellers through the use of hypertext or other similar means;

(v) Hosting on the bank's servers the Internet web site of:

(A) A buyer (or seller) that provides information concerning the buyer (or seller) and the products or services it seeks to buy (or sell) and allows sellers (or buyers) to submit expressions of interest, bids, offers, orders and confirmations relating to such products or services; or

(B) A governmental entity that provides information concerning the services or benefits made available by the governmental entity, assists persons in completing applications to receive such services or benefits from the governmental entity, and permits persons to transmit their applications for services or benefits to the governmental entity;

(v) Operating an Internet web site that permits numerous buyers and sellers to exchange information concerning the products and services that they are willing to purchase or sell, locate potential counter parties for transactions, aggregate orders for goods or services with those made by other parties, and enter into transactions between themselves; and

(vi) Operating a telephone call center that provides permissible finder services;

(2) Providing electronic bill presentation services;

(3) Offering electronic stored value systems; and

(4) Safekeeping for personal information or valuable confidential trade or business information, such as encryption keys.

(b) *State laws.* State laws are applicable to the activities of a national bank conducted through electronic means only to the extent that they would apply to the activities conducted otherwise by a national bank.

§ 7.5003 Composite authority to engage in electronic banking activities.

Unless otherwise prohibited by law, a national bank may engage in an electronic activity that is comprised of several component activities if each of the component activities is itself permissible as part of or incidental to the business of banking.

§ 7.5004 Excess electronic capacity.

A national bank may, in order to optimize the use of the bank's resources or avoid economic loss or waste, market and sell to third parties excess electronic capacities acquired or developed by the bank in good faith for its banking business. Examples of permissible excess electronic capacity that banks have acquired or developed in good faith for banking purposes include:

(a) Data processing services;

(b) Production and distribution of nonfinancial software;

(c) Providing periodic back-up call answering services;

(d) Providing full Internet access;

(e) Providing electronic security system support services;

(f) Providing long line communications services; and

(g) Electronic imaging and storage.

§ 7.5005 National bank acting as digital certification authority.

It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to act as a certificate authority and to issue digital certificates verifying the persons associated with a

particular public/private key pair. As part of this service, the bank may also maintain a listing or repository of public keys.

§ 7.5006 Data processing.

It is part of the business of banking under 12 U.S.C. 24(Seventh) for a national bank to collect, transcribe, process, analyze, and store for itself and others, banking, financial, or economic data. A national bank also may collect, transcribe, process, and analyze other types of data if the derivative or resultant product is banking, financial, or economic data.

§ 7.5007 Correspondent banking.

It is part of the business of banking for a national bank to offer as a correspondent service to any of its affiliates or to other financial institutions any service it may perform for itself. Examples of electronic activities that banks may offer correspondents under this authority include the following:

(a) The provision of computer networking packages and related hardware;

(b) Data processing services;

(c) The sale of software that performs data processing functions;

(d) The development, operation, management, and marketing of products and processing services for transactions conducted at electronic terminal devices;

(e) Item processing services and related software;

(f) Document control and record keeping through the use of electronic imaging technology;

(g) The provision of Internet merchant hosting services for resale to merchant customers; and

(h) The provision of communication support services through electronic means.

§ 7.5008 Location of a national bank conducting electronic banking activities.

A national bank shall not be considered located in a state solely because it physically maintains technology, such as a server or automated loan center, in that state, or because the bank's products or services are accessed through electronic means by customers located in the state.

§ 7.5009 Location of Internet-only bank under 12 U.S.C. 85.

For purposes of 12 U.S.C. 85, the main office of a national bank that operates exclusively through the Internet is the office identified by the bank under 12 U.S.C. 22(Second) or as relocated under 12 U.S.C. 30 or other appropriate authority.

§ 7.5010 Shared electronic space.

A national bank that shares a co-branded web site or other electronic space with a bank subsidiary, affiliate, or a third party must take reasonable steps to enable customers to distinguish between products and services offered by the bank and those offered by the bank's subsidiary, affiliate, or the third party. The bank also should disclose its limited role with respect to the third party product or service. This disclosure should be conspicuous, simple, direct, readily understandable, and designed to call attention to the fact that the bank does not provide, endorse, or guarantee any of the products or services available through third party web pages.

Dated: June 19, 2001.

John D. Hawke, Jr.,
Comptroller of the Currency.

[FR Doc. 01-16330 Filed 6-29-01; 8:45 am]

BILLING CODE 4810-33-P

COMMODITY FUTURES TRADING COMMISSION
17 CFR Part 41

RIN 3038-AB77

SECURITIES AND EXCHANGE COMMISSION
17 CFR Part 240

[Release No. 34-44475; File No. S7-11-01]

RIN 3235-AI13

Method for Determining Market Capitalization and Dollar Value of Average Daily Trading Volume; Application of the Definition of Narrow-Based Security Index

AGENCIES: Commodity Futures Trading Commission and Securities and Exchange Commission.

ACTION: Proposed rule; reopening and extension of comment period.

SUMMARY: The Commodity Futures Trading Commission ("CFTC") and Securities and Exchange Commission ("SEC") (collectively the "Commissions") are extending the comment period for proposed Subparts A and B of Part 41 of the CFTC's regulations under the Commodity Exchange Act ("CEA") and SEC Rules 3a55-1 through 3a55-3 under the Securities Exchange Act of 1934 ("Exchange Act"), contained in Release No. 34-44288 (May 10, 2001), 66 FR 27560 (May 17, 2001). The original comment period ended on June 18, 2001. The new deadline for submitting public comments is July 11, 2001.

DATES: Public comments are due on or before July 11, 2001.

ADDRESSES: Comments should be sent to both agencies at the addresses listed below.

CFTC: Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581, Attention: Office of the Secretariat. Comments may be sent by facsimile transmission to (202) 418-5521, or by e-mail to secretary@cftc.gov. Reference should be made to "Narrow-Based Security Indexes."

SEC: Please send three copies of your comment letter to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549-0609.

Comments can also be sent electronically to the following e-mail address: rule-comments@sec.gov. Your comment letter should refer to File No. S7-11-01. If e-mail is used, include this file number on the subject line. Anyone can inspect and copy the comment letters in the Commission's Public Reference Room at 450 5th Street, NW., Washington, DC 20549-0102. Electronically submitted comments will be posted on the Commission's Internet web site (<http://www.sec.gov>). The SEC does not edit personal identifying information, such as names or e-mail addresses, from electronic submissions. Submit only the information you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT:

CFTC: Elizabeth L.R. Fox, Acting Deputy General Counsel; Richard A. Shultz, Acting Director; or Thomas M. Leahy, Jr., Financial Instruments Unit Chief, Division of Economic Analysis, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581. Telephone: (202) 418-5000. E-mail: EFox@cftc.gov, RShultz@cftc.gov, or TLeahy@cftc.gov.

SEC: Nancy J. Sanow, Assistant Director, at (202) 942-0771; Ira L. Brandriss, Special Counsel, at (202) 942-0148, or Sapna C. Patel, Attorney, at (202) 942-0166, Office of Market Supervision, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-1001.

SUPPLEMENTARY INFORMATION: On May 17, 2001, the Commissions published for public comment proposed Subparts A and B of Part 41 of the CFTC's regulations under the CEA and SEC Rules 3a55-1 through 3a55-3 under the Exchange Act. These proposed rules would implement new statutory

provisions of the Commodity Futures Modernization Act of 2000 ("CFMA") concerning the definition of "narrow-based security index." The CFMA directed the Commissions jointly to specify by rule or regulation the method to be used to determine "dollar value of average daily trading volume" and "market capitalization" for purposes of the new definition of "narrow-based security index" in the CEA and the Exchange Act.

The proposing release established a deadline of June 18, 2001 for submitting public comments. The Commissions have received requests to extend the deadline. Therefore, the Commissions are extending the comment period to July 11, 2001 so that commenters will have adequate time to address the issues raised by the proposing release.

Dated: June 26, 2001.

By the Commodity Futures Trading Commission.

Jean A. Webb,
Secretary.

Dated: June 26, 2001.

By the Securities and Exchange Commission.

Jonathan G. Katz,
Secretary.

[FR Doc. 01-16501 Filed 6-29-01; 8:45 am]

BILLING CODE 6351-01-P; 8010-01-P

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 52

[IN 131a; FRL-7005-9]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Oxides of Nitrogen Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On March 30, 2001, Indiana submitted and requested parallel processing on a draft plan to control emissions of oxides of nitrogen (NO_x) throughout the State. The plan consists of two proposed rules, a preliminary budget demonstration, and supporting documentation. The plan will contribute to attainment and maintenance of the 1-hour ozone standard in several 1-hour ozone nonattainment areas including the Chicago-Gary-Lake County and Louisville areas. Indiana's plan, which focuses on electric generating units, large industrial boilers, turbines and cement kilns, was developed to achieve the majority of reductions required by EPA's October 27, 1998, NO_x State

Proposed Rules

Federal Register

Vol. 65, No. 22

Wednesday, February 2, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

[Docket No. 00-02]

RIN 1557-AB76

Electronic Banking

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is undertaking a review of its regulations with a view toward identifying changes or additions to its rules that would facilitate national banks' use of new technologies. This advance notice of proposed rulemaking (ANPR) solicits comment on a wide range of issues arising from national bank involvement in electronic activities.

DATES: Comments must be received by April 3, 2000.

ADDRESSES: Please send your comments to: Office of the Comptroller of the Currency, Communications Division, 250 E Street, SW, Washington, DC 20219, Attention: Docket No. 00-02. You may inspect and photocopy comments at the same location. In addition, you may fax your comments to (202) 874-5274 or electronic mail them to regs.comments@occ.treas.gov.

FOR FURTHER INFORMATION CONTACT:

Stuart Feldstein, Assistant Director, or Karl Betz, Attorney, Legislative and Regulatory Activities, at (202) 874-5090; James Gillespie, Assistant Chief Counsel, at (202) 874-5200; or Clifford Wilke, Director, Bank Technology, at (202) 874-5920.

SUPPLEMENTARY INFORMATION:

Background

Technological developments are dramatically altering the ways in which national banks conduct their business.

Telecommunications advances offer banks faster and more efficient communication and data transmission. Improvements in computer hardware and software are opening up new banking applications. These rapid developments in new technologies are causing banks to reevaluate existing delivery channels and business practices and to develop new products and services in order to reach new customers, better serve existing customers, and take advantage of cost efficiencies.

The explosive growth of the Internet also is prompting banks to reconsider business strategies and adopt alternative distribution and marketing systems. The recent chartering of Internet-only banks that operate without a conventional brick and mortar physical presence and the use of the Internet by existing banks to establish transactional World Wide Web (Web) sites¹ present new opportunities and challenges for national banks.

The OCC has already taken a number of steps to facilitate national banks' use of developing technology, including the Internet. For example, in 1996, we revised our data processing regulation to reflect the fact that banks today use technology to engage in a range of electronic activities. 61 FR 4849 (Feb. 9, 1996). As revised, the regulation authorizes national banks to conduct through electronic means or facilities any activity that they are otherwise authorized to conduct and permits banks to sell excess electronic capacities acquired or developed in good faith for banking purposes. 12 CFR 7.1019.

The OCC has also recently issued a comprehensive handbook that addresses the risks presented by Internet banking activities. Comptroller's Handbook, Other Income Producing Activities, Internet Banking (Oct. 1999) (Handbook).² The Handbook describes procedures for examining Internet banking activities in national banks. It also provides guidance to national banks that are conducting, or considering, Internet banking activities by outlining business and technical issues associated with offering banking products and services through the

Internet. The Handbook follows previous OCC guidance on electronic banking issues, including certification authority systems, technology risk management, retail personal computer banking, Web privacy statements, cyber-terrorism, reporting computer-related crime, and consumer compliance.³

In addition, on a case-by-case basis, the OCC reviews specific bank uses of technology. To date, we have approved a number of Internet applications, including transactional Web sites, commercial Web site hosting services, a virtual mall, an electronic marketplace for non-financial products, and Internet access services.⁴ The OCC also has

¹OCC Advisory Letter No. 97-9, "Reporting Computer-Related Crimes" (Nov. 19, 1997); OCC Advisory Letter No. 99-6, "Guidance to National Banks on Web Site Privacy Statements" (May 4, 1999); OCC Bulletin 98-3, "Technology Risk Management" (Feb. 4, 1998); OCC Bulletin 98-31, "Guidance on Electronic Financial Services and Consumer Compliance" (July 30, 1998); OCC Bulletin 98-38, "Technology Risk Management: PC Banking" (Aug. 24, 1998); OCC Bulletin 99-9, "Infrastructure Threats from Cyber-Terrorists" (Mar. 5, 1999); OCC Bulletin 99-20, "Certification Authority Systems" (May 6, 1999). All of these issuances are available on the OCC's Web site at www.occ.treas.gov.

²OCC Interpretive Letter No. 742, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (Aug. 19, 1996) (allowing a national bank to offer Internet banking services); OCC Conditional Approval No. 253 (Aug. 20, 1997) (chartering a national bank to deliver products and services to customers primarily through electronic means); Interpretive Letter No. 856, [1998-1999 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-313 (Mar. 5, 1999) (permitting a national bank to host commercially enabled Web sites for small retailers); Interpretive Letter No. 875 (Oct. 31, 1999) (to be published in the January 2000 issue of "Interpretations and Actions") (opining that a national bank may offer a bank-hosted set of Web pages with a collection of links to third party Web sites organized according to product type so that bank customers can shop for a range of financial and non-financial products and services via these links to third party vendors); OCC Corporate Decision No. 99-35 (Oct. 20, 1999) (permitting a national bank operating subsidiary to provide links to merchant processing-related third party vendors on its Internet site); OCC Corporate Decision No. 97-60 (July 1, 1997) (authorizing a national bank to operate a Web site providing consumers and dealers with detailed information on used cars offered by third party sellers that meet purchaser preferences); OCC Interpretive Letter No. 742, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-106 (Aug. 19, 1996) (permitting a national bank to provide full Internet access service in connection with its Internet banking services and, incidental to that, the national bank may sell good faith excess capacity in access service to persons who are not Internet banking customers). In addition to being available through the Federal Banking Law Reporter (CCH), most of the OCC staff opinions and decisions cited in this ANPR are available on the OCC's Web site at www.occ.treas.gov.

Continued

³As of mid-September 1999, 541 national banks had transactional Web sites.

⁴This Handbook and others in the Comptroller's Handbook series are available on the OCC's Web site at www.occ.treas.gov.

permitted national banks to engage in a number of electronic payment systems activities. For example, we have allowed national banks to provide electronic bill payment and presentment services, stored value systems, electronic data interchange (EDI) services, and to dispense prepaid alternate media (such as stamps and prepaid phone cards) from automated teller machines (ATMs).⁵ Finally, the OCC has authorized national banks to offer additional technology-based services, such as digital certification authority services and electronic correspondent banking services.⁶

We periodically review and reevaluate our regulations to ensure that they encourage national banks' efficiency and competitiveness, consistent with safety and soundness. The purpose of this ANPR is to invite public comment on a wide range of issues involving national bank involvement in electronic banking to determine whether the OCC's regulations should be revised to remove regulatory impediments and unnecessary burdens, if any, to bank use of technology, or add new provisions that would facilitate national banks' use of new technologies. Based on the comments we receive, we may propose specific revisions to our rules for

site. The OCC published redacted versions of these letters and decisions in its monthly publication "Interpretations and Actions." Beginning with the May 1996 issue, the OCC's Web site provides electronic access to issues of "Interpretations and Actions." See www.occ.treas.gov.

⁵ OCC Conditional Approval No. 304 (Mar. 5, 1999) (stating that electronic bill presentment is part of the business of banking); OCC Conditional Approval No. 332 (Oct. 18, 1999) (allowing national bank subsidiaries to invest in an electronic interbank switch to support electronic bill presentment services over the Internet); OCC Conditional Approval No. 220 (Dec. 2, 1996) (concluding that the creation, sale and redemption of electronic stored value in exchange for dollars is part of the business of banking); OCC Interpretive Letter No. 732, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049 (May 10, 1996) (opining that EDI services are "part of or incidental to business of banking"); OCC Interpretive Letter No. 718, [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-033 (Mar. 14, 1996) (finding that a national bank may dispense alternate media, such as prepaid phone cards, public transportation system tickets, and promotional and advertising materials, from ATM machines).

⁶ OCC Conditional Approval No. 267 (Jan. 12, 1998) (allowing a national bank to act as a certification authority to enable subscribers to generate digital signatures that verify the identity of a sender of an electronic message); OCC Conditional Approval No. 339 (Nov. 16, 1999) (permitting national banks to invest in a multiple bank venture to establish an entity that will support a multiple bank certification authority system); OCC Interpretive Letter No. 754, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-118 (Nov. 6, 1996) (approving a national bank operating subsidiary that sells computer network services and related hardware to other financial institutions as a correspondent banking service).

comment or issue additional supervisory guidance.⁷

Issues for Comment

The following discussion identifies some areas where modification of the OCC's regulations or supervisory policies may be useful to national banks that provide financial services electronically. Commenters are invited to respond to the questions presented and to offer comments or suggestions on any other issues related to electronic banking that are not specifically mentioned here, including whether OCC initiatives other than regulatory changes are appropriate.⁸

1. Electronic Banking in General: How Should the OCC Adapt its Regulations or Supervisory Policies To Facilitate National Banks' Use of Electronic Technology, Consistent With Safety and Soundness?

Recognizing the fluid, fast-evolving nature of bank use of technology, the OCC wants to ensure that its regulations are flexible enough to address emerging trends and new banking activities. To this end, we invite commenters to describe how national banks want to use new technologies and how these technologies will impact the ways in which national banks operate under the OCC's current regulations. For example, are there specific regulations that the

⁷ Section 729 of the Gramm-Leach-Bliley Act (GLBA) requires the OCC and the other Federal banking agencies to conduct a study of banking regulations pertaining to the delivery of financial services and make recommendations on adapting existing regulations to on-line banking and lending. A report to Congress detailing these recommendations is due by November 12, 2001. Public Law 106-102, section 729, 113 Stat. 1338 (Nov. 12, 1999). The OCC will not delay making changes to its rules or supervisory policies during the pendency of the § 729 study and report. Commenters' responses to this ANPR will, however, help the OCC formulate recommendations for legislative action or for actions that may appropriately be undertaken on an interagency basis.

We also note that on November 29, 1999, President Clinton issued a memorandum for the heads of executive departments and agencies announcing an initiative to update laws and regulations developed before the advent of the Internet that may have unintended negative effects on electronic commerce. The memorandum asks each Federal agency to identify any provision of law administered by such agency, or any regulation issued by such agency, that may impose a barrier to electronic transactions, and to recommend how such laws or regulations may be modified to allow electronic commerce to proceed while ensuring that consumers and the general public continue to enjoy the same degree of protection that they do under current law. Memorandum on Facilitating the Growth of Electronic Commerce, Nov. 29, 1999, 35 Weekly Comp. Pres. Doc. 2457-2458 (Dec. 6, 1999).

⁸ Not within the scope of this ANPR are privacy issues, which are being addressed on an interagency basis pursuant to Title V of the GLBA, and issues concerning the Community Reinvestment Act.

OCC should modify because they impede the use of developing technology?

Technology also enables national banks to reach nationwide markets for the financial products and services they provide. Are there areas where conducting electronic banking activities could particularly benefit from a single set of standards that can be applied uniformly on a nationwide basis?

Electronic banking activities of all forms expose banks to new combinations of risks from different sources. Through the issuance of the Internet Banking Handbook and other supervisory guidance, the OCC is working to identify, and educate national banks about, the risks presented by electronic banking and to ensure that its regulations appropriately address these risks. We invite comment on whether existing OCC regulations adequately address the risks presented by current or future electronic banking activities. Are there areas where banks would benefit from additional clarification in our rules or in other guidance on the risks associated with electronic banking activities? For example, are banks experiencing problems related to the permissibility, validity, and enforceability of electronic transactions? What could the OCC do to provide greater legal certainty in these or other areas?

Electronic banking also provides consumers with more convenient access to a wider variety of financial services. Studies indicate that a significant percentage of households in the United States will do their banking online as a growing number of consumers conduct their banking and other financial transactions through automated teller machines and over the Internet. We invite comment on whether there are specific areas in which regulatory changes are needed to enhance consumer acceptance of, confidence in, or access to, electronic banking.

2. Adapting Existing Law to Electronic Banking: What Statutes That the OCC Administers Could Be Interpreted More Flexibly To Accommodate New Technologies?

Internet banking raises legal issues with respect to how the OCC should construe references in existing law to the "location" of a national bank. A number of statutes applicable to national banks refer to the state or place where the bank is "located" or use similar terms.⁹ In some of these

⁹ E.g., 12 U.S.C. 24 (Eighth) (charitable contributions), 29 (real estate holding period), 72 (directors' residency requirement), 75 (impact of

statutes, the activities and operations of a national bank depend on the laws of the state in which the bank is located.

Generally, for many of these statutes, banks have been considered located in a state where they have a main office or a branch. For some statutes, only the main office is considered. For others, a bank has been considered located in a state with a non-branch office, as well as the states of its main office and branches. Moreover, the determination of the bank's location focuses on the location of the bank's offices and activities, not the location of the bank's customers.

We invite comment on whether new developments in bank technology require the OCC to address how "location" applies in the context of activities conducted via the Internet. Specifically, is the determination of "location" for purposes of the statutes an impediment to national banks conducting all or part of their operations on the Internet? If so, should we further clarify our regulations on this issue? Is there a uniform approach to "location" that works for all the relevant statutes or should we address each statute separately?

3. Operational Issues: How Can the OCC Enhance the Operational Flexibility of Banks Engaging in Electronic Banking, Consistent With Safety and Soundness?

A. Marketing Access Arrangements

The rapid growth of electronic commerce has resulted in many marketing arrangements involving providing bank customers with access to providers of retail or financial services through hypertext links on the bank's Web site. Under some marketing arrangements, the bank is the dominant brand and refers its customers to non-bank third parties for additional products and services not provided by the bank directly. In other cases, the non-bank is the dominant brand and it uses a bank to provide its customers with access to bank services while minimizing the bank's brand.

It is well settled that a national bank may lease excess space on bank premises to other businesses and share space jointly with other businesses, subject to certain conditions. These conditions, which are currently set forth

in the OCC's regulation governing the sharing of space and employees, are intended to minimize customer confusion about the nature of the products offered and promote the safe and sound operation of the bank. See 12 CFR 7.3001.

We invite comment on whether the OCC should issue a regulation similar to 7.3001 that would apply to these types of electronic marketing arrangements. Commenters are specifically requested to address whether any or all of the supervisory conditions set forth in 7.3001(c) are relevant in the electronic banking context and whether other conditions intended to minimize customer confusion should apply to these arrangements.

B. Branching

National banks may receive deposits and pay withdrawals in a variety of ways that are not subject to geographical restrictions or the need to apply for branch certification. For example, it is well settled that national banks may arrange to have their customers use ATMs established by third parties in order to undertake transactions with the bank. In 1996, Congress passed legislation permitting national banks to establish ATMs and remote service units (RSUs) without geographical limits or the need to seek approval to establish these types of facilities.¹⁰

Both Congress, through legislation, and the OCC, through interpretation, also permit national banks to arrange for their customers to undertake banking transactions with the national bank through offices of affiliated banks and thrifts without implicating branching restrictions. Additionally, the OCC has established guidelines to enable national banks and their customers to transact business with each other through messenger services without implicating branching restrictions. Of course, national banks and their customers can transact business electronically without raising branching concerns.

The OCC seeks comment on whether these forms of delivery systems are flexible enough to permit technology-based banks to serve the transaction-related needs of their retail, as well as their commercial, customers. Specifically, are existing regulations

sufficient to permit customers of technology-based banks to make deposits in the bank by cash or check in an efficient and expeditious manner? Additionally, are there other types of transactions that banks are considering where geographical restrictions create impediments or that could benefit from the development of alternative delivery systems not within the scope of branching restrictions?

Dated: January 21, 2000.

John D. Hawke, Jr.,
Comptroller of the Currency.

[FR Doc. 00-2199 Filed 2-1-00; 8:45 am]
BILLING CODE 4810-33-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-203-AD]

RIN 2120-AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica, S.A. (EMBRAER), Model EMB-145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to all Empresa Brasileira de Aeronautica, S.A. (EMBRAER), Model EMB-145 series airplanes, that currently requires repetitive emergency extension (free-fall) functional tests of the nose landing gear (NLG), and lubrication of all NLG hinge points, to ensure that the NLG extends and locks down properly; and corrective action, if necessary. This action would require a terminating modification that includes replacement of the NLG door solenoid valve with an improved valve; replacement of the landing gear (LG) safety pins holder with an improved holder; and replacement of the NLG maneuvering actuator with an improved actuator. This proposed action would also limit the applicability of the existing AD. This proposal is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by the proposed AD are intended to prevent failure of the NLG to extend and lock down properly, which could result in damage to the airplane structure, and consequent

¹⁰The OCC recently defined an RSU as "an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money." The term RSU includes ATMs, automated loan machines, and automated devices for receiving deposits, and may be equipped with a telephone or televideo device that allows contact with bank personnel. 64 FR 60,092, 60,100 (Nov. 4, 1999) (adding 12 CFR 7.4003).

¹⁰The OCC recently defined an RSU as "an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money." The term RSU includes ATMs, automated loan machines, and automated devices for receiving deposits, and may be equipped with a telephone or televideo device that allows contact with bank personnel. 64 FR 60,092, 60,100 (Nov. 4, 1999) (adding 12 CFR 7.4003).

APPENDIX D

**Office of Thrift Supervision – Request for Comment on Study of Banking
Regulations Regarding the Online Delivery of Financial Services
(66 Fed. Reg. 31,186); Electronic Operations (63 Fed. Reg. 65,673)**

Submitted by: Associated Milk Producers, Inc. et.al., First District Association, and Lakeshore Federated Dairy Cooperative

Proposal No. 1

1. Amend § 1030.12 by adding a new paragraph (b)(5) to read as follows:

§ 1030.12 Producer

* * * * *

(b) * * *

Notice of Hearing—Upper Midwest Marketing Area—DA-01-03

(5) A dairy farmer whose milk is pooled on a state order with a marketwide pool.

Submitted by: Land O'Lakes, Inc.

Proposal No. 2

Proposes that California milk previously qualified for pooling on the Upper Midwest Order be "grandfathered" or exempt from any change in the marketing order that would provide for its exclusion.

Proposal No. 3

Proposes that quota milk from California be excluded from being pooled on the Upper Midwest Order.

Submitted by: Dairy Farmers of America

Proposal No. 4

1. Amend § 1030.13 by designating paragraph (d)(3) as (d)(4); adding a new paragraph (d)(3); and adding a new paragraph (e) to read as follows:

§ 1030.13 Producer Milk

* * * * *

(d) * * *

(3) The quantity of milk diverted to nonpool plants by a pool plant operator as described in § 1030.7(a) or (b) may not exceed 90 percent of each reporting unit of the handler's receipts made pursuant to § 1030.30(a). This percentage is subject to adjustments that may be made pursuant to § 1030.7(g).

(e) Milk from producers physically located outside of the states of Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wisconsin and the Upper Peninsula portion of Michigan shall be grouped by individual state units and each state unit shall be:

(1) Reported on separate report(s) pursuant to § 1030.30; and

(2) At least 10 percent of each reporting unit of the handler shall be delivered to pool plants as described in § 1030.7(a) or (b), and such deliveries shall not be used by the handler in meeting the minimum shipping percentages required pursuant to § 1030.7(c) or (f) or § 1030.13(d); and

(3) The percentages of § 1030.13(e)(2) are subject to any adjustments that may be made pursuant to § 1030.7(g).

Proposal No. 5

Proposes that the rate for advance payments be set at a percentage of the prior month's lowest class price, expected to be between 103 and 108 percent; or the rate for advance payment be set between 93 and 96 percent of the Class I price mover for the month.

Proposed by Dairy Programs, Agricultural Marketing Service:

Proposal No. 6

Make such changes as may be necessary to make the entire marketing agreement and the order conform with any amendments thereto that may result from this hearing.

Copies of this notice of hearing and the order may be procured from the Market Administrator of the Upper Midwest Milk Marketing Area, or from the Hearing Clerk, Room 1083, South Building, United States Department of Agriculture, Washington, DC 20250, or may be inspected there.

Copies of the transcript of testimony taken at the hearing will not be available for distribution through the Hearing Clerk's Office. If you wish to purchase a copy, arrangements may be made with the reporter at the hearing.

From the time that a hearing notice is issued and until the issuance of a final decision in a proceeding, Department employees involved in the decision-making process are prohibited from discussing the merits of the hearing issues on an ex parte basis with any person having an interest in the proceeding. For this particular proceeding, the prohibition applies to employees in the following organizational units:

Office of the Secretary of Agriculture
Office of the Administrator, Agricultural Marketing Service

Office of the General Counsel

Dairy Programs, Agricultural Marketing Service (Washington office) and the Office of the Market Administrator for the Upper Midwest Milk Marketing Area.

Procedural matters are not subject to the above prohibition and may be discussed at any time.

Dated: June 5, 2001.

Kenneth C. Clayton,
Acting Administrator, Agricultural Marketing Service.

[FR Doc. 01-14539 Filed 6-8-01; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Chapter V

[No. 2001-41]

RIN 1550-AB50

Request for Comment on Study of Banking Regulations Regarding the Online Delivery of Financial Services

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Study of regulations; request for comment.

SUMMARY: Pursuant to section 729 of the Gramm-Leach-Bliley Act (GLBA), OTS and the other federal banking agencies are studying their regulations on the delivery of financial services. The purpose of the study is to report findings and conclusions to Congress, together with recommendations for appropriate legislative or regulatory action to adapt existing requirements to online banking and lending. To assist in this review, OTS requests comment on a variety of issues relating to the electronic delivery of financial products and services by savings associations (federally-chartered or state-chartered).

DATES: Comments must be received by August 10, 2001.

ADDRESSES: *Mail:* Send comments to Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention Docket No. 2001-41.

Delivery: Hand deliver comments to the Guard's Desk, East Lobby Entrance, 1700 G Street, NW., from 9 a.m. to 4 p.m. on business days, Attention Regulation Comments, Chief Counsel's Office, Docket No. 2001-41.

Facsimiles: Send facsimile transmissions to FAX Number (202) 906-6518, Attention Docket No. 2001-41.

E-Mail: Send e-mails to regs.comments@ots.treas.gov, Attention Docket No. 2001-41, and include your name and telephone number.

Public Inspection: Comments and the related index will be posted on the OTS Internet Site at www.ots.treas.gov. In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906-5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906-7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) Appointments will be scheduled on business days

between 10:00 a.m. and 4:00 p.m. In most cases, appointments will be available the next business day following the date a request is received.

FOR FURTHER INFORMATION CONTACT:

Mary Jo Johnson, Project Manager, Supervision Policy, (202) 906-5739; Richard Bennett, Counsel (Banking and Finance), (202) 906-7409; or Paul J. Robin, Assistant Chief Counsel, (202) 906-6648; Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

Section 729 of GLBA,¹ titled "Study and Report on Adapting Existing Legislative Requirements to Online Banking and Lending," requires OTS, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System, to conduct a study of banking regulations regarding the online delivery of financial services.² Section 729 further requires these Federal banking agencies to report their recommendations on adapting existing legislative or regulatory requirements to online banking and lending.

In accordance with section 729, OTS is reviewing its regulations on the delivery of financial services to assess their suitability for transactions conducted through electronic technologies such as the Internet. The purpose of this Request for Comment is to invite public comment on a variety of issues regarding savings association involvement in electronic banking. OTS will use these comments to help it determine whether it should revise any of its regulations to facilitate online banking and lending. OTS also requests comment on how particular statutory provisions affect the online delivery of financial products or services and whether OTS should propose any legislative changes.

II. OTS's Regulatory Approach to New Technologies

OTS recognizes that technological developments are dramatically altering the ways in which savings associations conduct their business. Telecommunication advances offer savings associations faster and more efficient communication and data

transmission. Improvements in computer hardware and software are opening up new applications. The Internet has greatly expanded the market available to financial institutions. These rapid developments in technology are causing savings associations to reevaluate existing delivery channels and business practices, develop new products and services, expand market reach, and serve existing customers more efficiently.

The explosive growth of the Internet also is prompting savings associations to reconsider business strategies and adopt alternative distribution and marketing systems. The rapid establishment of transactional World Wide Web (web) sites by savings associations and the continued operation of some Internet-only savings associations without a conventional brick-and-mortar physical presence present new opportunities and challenges for savings associations. Recent estimates suggest that more than 2,100 financial institutions in the United States have established transactional web sites. To date, approximately 350 savings associations have filed notices with OTS indicating their intent to establish a transactional web site.

Through the end of the 1990s, OTS periodically revised its regulations to better enable savings associations to use new technologies for electronic banking and lending. In 1996, OTS revised its lending and investment regulations to eliminate obsolete loan documentation requirements. In 1997, OTS replaced specific requirements to use written agreements and receipts for deposit accounts with a more general recordkeeping requirement. The purpose of these changes was to provide sufficient flexibility for savings associations to participate in telephone and electronic banking and take better advantage of technological and marketplace advances.³

In 1998, OTS streamlined and updated its regulations relating to electronic operations to make it easier for Federal savings associations to develop new ways of delivering products and services through the prudent and innovative use of emerging technology.⁴ The revised rule permits Federal savings associations to use, or participate with others to use, electronic means or facilities to perform any

function, or provide any product or service, as part of an authorized activity. The rule also requires each savings association (federally-chartered or state-chartered) to notify OTS thirty days before it establishes a transactional web site. It provides that savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements.

In crafting the Electronic Operations rule, OTS was guided by two broad principles:

- The public and insured depository institutions are best served if statutory and regulatory restrictions are kept to a minimum. The premature imposition of restrictive operational standards could impede the development of improved financial services.
- Federal savings associations should be permitted to compete effectively with other regulated financial institutions and unregulated firms offering financial and related services.

In promulgating the rule, OTS emphasized the importance of enabling regulations in this area. At the same time, OTS designed its regulations to help ensure that it would have sufficient information to understand developing technologies, to provide appropriate guidance on these technologies, and to supervise electronic operations effectively. OTS designed the final rule to provide both the industry and the agency with the appropriate amount of flexibility to adapt to changing conditions.

The preamble to the final rule noted that the agency had issued, and would continue to issue, guidance as electronic operations evolve. This guidance has taken the form of letters to chief executive officers of savings associations, interagency examiner guidelines, revisions to the Thrift Activities Handbook, conditions on the approval of applications, and responses to requests for legal interpretations.⁵

¹ See, e.g., Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (November 3, 1998) (Policy Statement on Privacy and Accuracy of Personal Customer Information); Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (July 23, 1998) (Interagency Guidance on Electronic Financial Services and Consumer Compliance); Memorandum from John Downey, Executive Director, Supervision, for Chief Executive Officers (June 23, 1997) (Statement on Retail On-Line Personal Computer Banking); Thrift Activities Regulatory Handbook, Section 341, Information Technology (October 1997) (Regulatory Bulletin 32-6, October 15, 1997); Federal Financial Institutions Examinations Council (FFIEC) Information Systems Examination Handbook (1996); OTS Order No. 95-88 (May 8, 1995) (application approval of Internet bank); OTS Op. Chief Counsel (October 1, 1998) (authority of federal savings associations to provide payroll processing services); OTS Op. Chief Counsel Continued

² 12 U.S.C. 4801 note.

³ The OCC issued an advance notice of proposed rulemaking and requested comment on a wide range of electronic banking issues to determine whether the OCC's regulations should be changed to facilitate national banks' use of new technologies, citing section 729. See 65 FR 4895, 4896 n.7 (February 2, 2000).

⁴ See *Lending and Investment: Proposed Rule*, 61 FR 1162, 1172 (January 17, 1996), and *Deposits and Electronic Banking: Proposed Rule and Advance Notice of Proposed Rulemaking*, 62 FR 15,626, 15,629 (April 2, 1997).

⁵ See *Electronic Operations: Final Rule*, 63 FR 65673 (November 30, 1998).

Since the publication of the final rule, OTS has continued to provide additional guidance in this area and post it on its web site at www.ots.treas.gov.⁶

III. Issues for Comment

OTS recognizes that using electronic technology to deliver financial products and services poses distinct challenges to financial institutions and their customers. Much of the legislative and regulatory framework that governs banking was developed based on social, cultural, and technological practices that existed before the advent of widespread computer-based communications. The prospect of conducting banking transactions over the Internet forces the federal banking agencies to reconsider the existing legislative and regulatory framework that governs banking businesses.

OTS invites comment on how particular statutes, regulations, or supervisory policies specifically affect financial institutions and their customers' uses of new technologies. The following discussion identifies topics that OTS believes are appropriate for the design of the study and report required under section 729. OTS invites commenters to respond to the questions presented and to offer comments or suggestions on any other issues related to financial products or services delivered through electronic technologies that we do not specifically mention here.

A. How May OTS Facilitate the Use of Technology in Financial Operations Consistent With Safety and Soundness?

1. Mitigating Burdens

Savings associations have evolved in their use of technology, not only to provide financial services more efficiently, but also to offer new financial services and reach nationwide markets. Are there any specific OTS regulations that unreasonably interfere with the use of online technologies? Are there any supervisory policies that impose unreasonable burdens on a financial institution's design or adaptation of online technologies?

(July 1, 1998) (preemption of state ATM restrictions); OTS Op. Chief Counsel (September 19, 1997) (establishment of automated loan machines).

⁶ See, e.g., Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (June 10, 1999) (Transactional Web Sites); OTS Op. Chief Counsel (December 7, 1999) (San Francisco ATM fee ordinance); OTS Op. Chief Counsel (November 22, 1999) (preemption of local ATM fee restrictions); OTS Op. Chief Counsel (January 15, 1999) (New York State ATM Safety Act); OTS Mem. Chief Counsel (December 22, 1998) (Massachusetts Electronic Branch Restrictions).

2. Addressing Risks

Electronic banking activities expose savings associations to new combinations of risks from different sources. OTS's Electronic Operations rule addresses some of those risks by requiring savings associations to inform OTS before establishing transactional web sites and follow any additional procedures the OTS regional office may impose in writing. Further, through the issuance of supervisory guidelines such as the interagency Standards for Safeguarding Customer Information,⁷ OTS is working to identify and educate savings associations about the risks electronic banking presents and to ensure that its policies appropriately address these risks.

Do OTS regulations adequately address the risks presented by current or anticipated electronic banking activities? Do any OTS regulations impose unnecessary burdens? Are there any regulations or other supervisory policies regarding risk management that OTS should clarify or amend to address any particular risks associated with methods of online banking?

3. Consumer Acceptance and Protection

Electronic banking provides consumers with convenient access to a wide variety of financial services. Studies indicate that a significant percentage of households in the United States will do their banking online as a growing number of consumers conduct their banking and other financial transactions through automated teller machines and over the Internet. Are there specific areas in which regulatory changes are needed to enhance consumer acceptance of, confidence in, access to, or protections in using electronic banking?

B. How May OTS Enhance the Electronic Operational Flexibility of Savings Associations, Consistent With Safety and Soundness?

1. Internet Link Arrangements

The rapid growth of electronic commerce has resulted in many marketing arrangements that provide customers with access to providers of both financial and non-financial retail products or services through a hypertext link on the savings association's web site. The link transfers the customer to another entity's web site. Under some marketing arrangements, the savings association's name remains apparent on the linked site even though the products or services are sold by a non-thrift third

party. In other situations, once this transfer occurs, the non-thrift's name is the dominant brand. The non-thrift web site may include a link back to the savings association's web site to provide its customers with access to savings association services while minimizing the savings association's brand on its site.

Does the current situation create customer confusion as to which products savings associations actually offer (and which are FDIC-insured) that impairs the development of electronic banking? Should OTS create a regulation or other supervisory guidance setting forth standards for savings association identification in connection with the use of hypertext links? Are there technology solutions that can be used to address these issues?

2. Transactions

Savings associations may receive deposits, pay withdrawals, and lend in a variety of ways that are not subject to geographical restrictions (or the need to file branch applications). For example, savings associations may arrange to have their customers use ATMs established by third parties in order to conduct transactions with the savings association. OTS regulations permit savings associations to transact business with their customers through electronic and other means not involving face-to-face contact.

Are OTS regulations flexible enough to permit savings associations operating on the Internet to serve the transaction related needs of their retail, as well as their commercial, customers? For example, do any OTS regulations impede the development or use of technologies that would enable customers efficiently and expeditiously to deposit cash or checks in, or borrow money from, savings associations operating on the Internet?

3. Location Considerations

Internet banking raises legal issues with respect to how OTS should construe references in existing laws and regulations, including those related to filing requirements and management interlocks, to the "location" of a savings association. Should OTS address how "location" applies in the context of activities conducted via the Internet? Specifically, is the determination of "location" for purposes of any statute or regulation an impediment to savings associations conducting all or part of their operations on the Internet? If so, should we further clarify our regulations or suggest statutory changes on this issue?

⁷ See 66 FR 8616 (February 1, 2001) (to be codified at 12 CFR part 570, Appendix B).

4. Appraisals

Written appraisals must support certain loans.⁸ Does the requirement for written appraisals impair or impede online lending operations? If so, what modifications to the existing regulation would facilitate the use of appraisals in electronic form? What types of controls would be appropriate to assure record authenticity and integrity in connection with the filing of electronic appraisals (e.g., authentication of an electronic appraisal, certification of the appraiser)?

5. Electronic Signatures

The Electronic Signatures in Global and National Commerce Act (E-Sign Act)⁹ provides that certain contracts and signatures may not be denied validity solely because they are in electronic form. The E-Sign Act also provides that certain records may be maintained in electronic form, subject to certain requirements. OTS recognizes that the enactment of the E-Sign Act has resolved several important legal and regulatory issues regarding the uses of electronic media in commercial transactions. Nevertheless, the E-Sign Act has left some legal issues unresolved and, indeed, may have created new ones, particularly for online banking.

What issues are savings associations facing as a result of the E-Sign Act? Would it facilitate implementation of the E-Sign Act if OTS were to issue regulations or other supervisory guidance? If so, which aspects of the E-Sign Act should OTS address? Are there any written forms or notices required by OTS's regulations or other supervisory policies that could be obtained or transmitted over the Internet in a manner that would facilitate the online delivery of financial products or services? How do particular provisions of the E-Sign Act, or any other law, affect financial institutions and their customers' ability to use (or ease of using) new technologies?

6. Differing Legal Requirements

OTS recognizes that a variety of federal, state, and foreign laws regulate the use of electronic technologies. Are there areas where conducting electronic banking activities could particularly benefit from a single set of standards that can be applied uniformly on a nationwide basis? Are there any inconsistencies between Federal and State laws or regulations that impede the electronic provision or use of financial products or services? Do certain provisions of Federal law that

apply to online banking and lending practices make compliance with provisions of State law (or laws enforced by foreign states) more costly?

Dated: June 4, 2001.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 01-14562 Filed 6-8-01; 8:45 am]

BILLING CODE 6720-01-P

may be inspected at the Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations Group, Fort Worth, Texas 76193-0111, telephone (817) 222-5122, fax (817) 222-5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this document will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 99-SW-34-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 99-SW-34-AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

On May 9, 2000, the FAA issued AD 2000-10-08, Amendment No. 39-11732 (65 FR 31256) to require inspecting each tail rotor blade for bonding separation, measuring the clearance between the tip of each tail rotor blade and the circumference of the air duct, and replacing a blade if necessary. That action was prompted by an inflight incident in which the tail rotor blades were significantly damaged due to bonding separation. That condition, if

⁸ 12 CFR part 564.

⁹ 15 U.S.C. 7001 et seq.

By the Office of Thrift Supervision.
Ellen Seidman,
Director.
[FR Doc. 98-31745 Filed 11-27-98; 8:45 am]
BILLING CODE 6720-01-P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Parts 545, 555, and 559

[No. 98-119]

RIN 1550-AB00

Electronic Operations

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of Thrift Supervision (OTS) is issuing a final rule that streamlines and updates its regulations relating to electronic operations. Under this rule, Federal savings associations may engage in prudent innovation through the use of emerging technology. The rule permits Federal savings associations to use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. The rule also requires each savings association (state- or federally-chartered) to notify OTS 30 days before it establishes a transactional web site. Savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements. Finally, the rule includes a conforming change to OTS's service corporation regulation, reflecting a recent statutory change.

EFFECTIVE DATE: January 1, 1999.

FOR FURTHER INFORMATION CONTACT:
Richard Bennett, Counsel (Banking and Finance), (202) 906-7409; Karen A. Osterloh, Assistant Chief Counsel, (202) 906-6639; Paul D. Glenn, Special Counsel, Chief Counsel's Office, (202) 906-6203; Paul J. Robin, Program Analyst, Compliance Policy, (202) 906-6648; or Paul R. Reymann, Senior Policy Analyst, Supervision Policy, (202) 906-5645, Office of Thrift Supervision, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION:

I. Background

A. Advance Notice of Proposed Rulemaking

On April 2, 1997, OTS published an advance notice of proposed rulemaking (ANPR) seeking comment on all aspects of banking affected by electronic

operations.¹ The ANPR was designed to elicit information to enhance OTS's understanding of new electronic banking technologies and the impact of these technologies on the regulation of Federal savings associations.² The ANPR asked a series of questions concerning the types of restrictions or requirements OTS should impose on electronic operations, including Internet banking.

B. Notice of Proposed Rulemaking

Based on the comments received on the ANPR, on October 3, 1997, OTS published a notice of proposed rulemaking (NPR) to streamline and update its regulations relating to electronic operations.³ The NPR proposed to amend OTS's electronic-related regulations to address advances in technology and to permit prudent innovation through the use of emerging technology by Federal savings associations. In crafting the proposed rule, OTS was guided by two broad principles suggested by commenters on the ANPR:

- The public and insured depository institutions will be best served if statutory and regulatory restrictions are kept to a minimum. The premature imposition of restrictive operational standards could impede the development of improved financial services.
- Federal savings associations should be permitted to compete effectively with other regulated financial institutions and unregulated firms offering financial and related services.

Consistent with these principles, OTS proposed a broad enabling regulation designed to allow Federal savings associations to engage in any activity through electronic means that they may conduct through more traditional delivery mechanisms. OTS proposed to eliminate three existing regulations: § 545.138 (Data-Processing Services), § 545.141 (Remote Services Units), and § 545.142 (Home Banking Services). The elimination of these sections would not take away the authority to engage in any activities described in these sections.

OTS made the proposal to enhance the ability of Federal savings associations to serve as financial intermediaries and to permit Federal savings associations to utilize fully their capacities and by-products generated in providing financial services. The proposal was consistent with the

principles established in the Administration's electronic commerce policy statement.⁴ The NPR noted, however, that OTS would continue to gain additional experience with electronic technology and might issue more specific guidance regulating particular elements of electronic operations.⁵

C. Comments on NPR—General Discussion

The comment period on the NPR closed on December 2, 1997. OTS received nine comment letters on the NPR from five Federal savings associations, two trade associations, and two technology firms.

All of the commenters recognized the need for the agency to revise or remove its existing regulations in this area. Seven commenters supported the proposal's overall flexible regulatory approach, while suggesting modifications or clarifications to particular aspects of the rule. Two commenters argued that for even greater flexibility the agency should not issue any new electronic banking regulations. These two commenters suggested the agency rely entirely on flexible guidelines and advisories as technology evolves. OTS has addressed specific comments on the NPR below.

D. Supplemental Notice of Proposed Rulemaking

One commenter on the NPR argued that OTS should establish a procedure to review and approve new products or services, in order to protect the safety and soundness of the industry. Another urged OTS not to require a Federal savings association to obtain OTS's prior approval before adopting new technologies "unless absolutely necessary to ensure industry-wide safety and soundness." After considering these comments, OTS concluded that safety and soundness and compliance considerations warranted the agency receiving advance notice of industry use of one developing technology—transactional web sites. Such web sites allow savings association customers to use the Internet to conduct a wide variety of financial transactions. They may, however, also pose particular security, compliance, and privacy risks.

Accordingly, on August 13, 1998, OTS issued a supplemental notice of proposed rulemaking (Supplemental NPR) seeking comment on additional proposed rules that would require each savings association to notify OTS before

¹ 62 FR 15626 (April 2, 1997).

² See 62 FR at 15631 and 15633.

³ 62 FR 51817 (October 3, 1997). The NPR contains a summary of the comments received on the ANPR.

⁴ See "Framework for Global Electronic Commerce" (July 1, 1997).

⁵ 62 FR at 51820.

it establishes a transactional web site.⁶ OTS also proposed to give the Regional Offices discretion to impose additional requirements in appropriate circumstances.

Safety and soundness and compliance considerations are similar for state-chartered and federally-chartered institutions. Thus, the Supplemental NPR proposed to require every savings association to notify OTS before it established a transactional web site and to comply with additional requirements that the Regional Offices may impose in appropriate circumstances. Since the ANPR and NPR did not specifically discuss these requirements and applied only to Federal savings associations, OTS concluded that additional public comment would assist in the development of a final rule.

E. Comments on Supplemental NPR—General Discussion

The comment period on the Supplemental NPR closed on September 14, 1998. OTS received nine comment letters from six Federal savings associations, two trade associations, and one public interest organization.

Two commenters supported the notice requirement. Four commenters opposed the requirement. The other three commenters did not specifically support or oppose the requirement. OTS has addressed the specific comments on the Supplemental NPR below.

II. Today's Final Rule

Today's final rule incorporates the same broad principles and reflects the same supervisory concerns articulated in the NPR and Supplemental NPR. OTS continues to believe that it is important to have enabling regulations in this area. These regulations will help ensure that OTS has sufficient information to understand developing technologies, to provide appropriate guidance on these technologies, and to supervise electronic operations effectively. The proposed approach in the NPR and Supplemental NPR, with some modifications as discussed below, will provide both the industry and the agency with the appropriate amount of flexibility to adapt to changing conditions.

Today's final rule is meant to provide authority for Federal savings associations' electronic operations and a structure for all savings associations' use of electronic means and facilities.⁷ Standing alone, it cannot, and does not

purport to, answer all questions in this rapidly changing area. These operations, by their very nature, are evolving, presenting the industry and the agency with both old issues in a new form (e.g., the appropriate documentation to open an account) and new issues unique to electronic operations (e.g., treatment of stored value cards). The agency has issued, and will continue to issue, guidance as electronic operations evolve. This guidance has taken the form of letters to chief executive officers of savings associations, interagency examiner guidelines, revisions to the Thrift Activities Handbooks, conditions on the approval of applications, and responses to requests for legal interpretations.⁸ The agency expects to continually update its guidance and to continue to make it available on OTS's web site at www.ots.treas.gov.

Further, while today's final rule removes §§ 545.138, 545.141, and 545.142, OTS emphasizes that the new rules continue to authorize all activities formerly authorized under these provisions.

III. Section-by-Section Discussion

Today's final rule creates a new part 555 to address electronic operations. In the NPR, OTS originally proposed to place the electronic operations regulations in a new subpart B to part 545. However, part 545 only applies to Federal savings associations. The notice requirements proposed in the Supplemental NPR and incorporated into this final rule, however, apply to all savings associations. Thus, as proposed in the Supplemental NPR, OTS is placing the electronic operations regulations in a new part 555.

A. What Does This Part Do? (§ 555.100)

Section 555.100 explains the purpose of part 555. Subpart A explains how a Federal savings association may provide products and services through electronic means and facilities. Subpart B contains the advance notice and other

requirements applicable to all savings associations.

OTS received no specific comments on § 555.100 of the Supplemental NPR (or on § 545.140 of the NPR, which served a similar function). The section is unchanged from the Supplemental NPR.

B. Authority of Federal Savings Associations to Conduct Electronic Operations (Subpart A to Part 555)

1. How May I Use or Participate With Others to use Electronic Means and Facilities? (Proposed §§ 545.141, 545.142, and 545.143, Final § 555.200)

Final § 555.200 combines, with changes, proposed § 545.141, 545.142, and 545.143. Section 555.200(a) corresponds to proposed § 545.141, but merges part of proposed § 545.143. Section 555.200(b) corresponds to proposed § 545.142 and also merges part of proposed § 545.143. Sections 555.200(a) and 555.200(b) are discussed separately below.

Section 555.200(a)

Consistent with OTS's goal of minimizing regulatory restrictions on electronic operations, proposed § 545.141 would have specifically permitted Federal savings associations to use electronic means or facilities to perform any authorized function or provide any authorized product or service. Electronic means or facilities would include, but would not be limited to, automated teller machines (ATMs), automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices. The preamble explained that this authority would include the opening of savings or demand accounts and the establishment of loan accounts—functions previously excluded from the definition of remote service unit—because performing these functions electronically may enhance the operating flexibility of Federal savings associations.

Commenters generally supported this section. One commenter, however, a trade association, argued that proposed § 545.141 was too broad and did not sufficiently protect the safety and soundness of the industry. Instead, the commenter emphasized the need for a thorough risk assessment of any new delivery system to protect safety and soundness. The commenter urged OTS to establish a procedure whereby OTS would issue an approval or interpretation before a product or service was first offered electronically. Once one institution was approved to use an electronic delivery system,

⁶See, e.g., Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (November 3, 1998) (Policy Statement on Privacy and Accuracy of Personal Customer Information); Memorandum from Richard M. Riccobono, Deputy Director, for Chief Executive Officers (July 23, 1998) (Interagency Guidance on Electronic Financial Services and Consumer Compliance); Memorandum from John Downey, Executive Director, Supervision, for Chief Executive Officers (June 23, 1997) (Statement on Retail On-Line Personal Computer Banking); Thrift Activities Regulatory Handbook, Section 341, Information Technology (October 1997) (Regulatory Bulletin 32-6, October 15, 1997); Federal Financial Institutions Examinations Council (FFIEC) Information Systems Examination Handbook (1996); OTS Order No. 95-88 (May 8, 1995) (application approval of Internet bank); OTS Op. Chief Counsel (September 19, 1997) (establishment of automated loan machines).

⁷63 FR 43327 (August 13, 1998).

⁷New § 555.200 is similar to the Office of the Comptroller of the Currency's (OCC) rule on furnishing of products and services by electronic means and facilities. See 12 CFR 7.1019 (1998).

approval for subsequent institutions would not be required. Presumably, subsequent institutions would be required to provide the same protections and safeguards.

While OTS does not believe that a new procedure is necessary for most types of electronic operations, OTS has added subpart B to part 555, to deal with the special risks associated with transactional web sites. As discussed in Section III.C. below, subpart B will enhance OTS's ability to supervise electronic operations, particularly Internet banking activities.

Three Federal savings associations asked OTS to clarify whether the new regulation would permit specific products or services. As noted in the preamble to the proposed rule, by revising its rules, OTS intends to allow Federal savings associations to engage in any authorized activity through electronic means that they may conduct through more traditional delivery mechanisms.⁹ To clarify this point, OTS has revised the language of § 555.200(a) to provide that a Federal savings association may use electronic means or facilities "to perform any function, or provide any product or service, as part of an authorized activity."

As with all activities of Federal savings associations, OTS's position, like that of its predecessor agency, the Federal Home Loan Bank Board (FHLBB), has been that if the Home Owners' Loan Act (HOLA)¹⁰ authorizes an activity, a specific authorizing regulation is not necessary.¹¹ In some cases, the HOLA speaks clearly on an activity and institutions generally choose to act without obtaining agency concurrence. In other cases, where the authority is less clear or specific facts are more determinative, an application or an interpretive legal opinion may be the best route for resolving issues of first impression.

To assist the industry further, OTS will continue to provide both formal and informal guidance on authorized activities for Federal savings associations. If applicable statutes, regulations, court cases, and OTS opinions do not provide a sufficient basis for a Federal savings association to determine whether a product or service is authorized under the HOLA or the use of electronic means or facilities is appropriate, it may request an interpretive opinion¹² or consult with

⁹ 62 FR at 51818.

¹⁰ 12 U.S.C. 1461-1468c.

¹¹ See, e.g., 60 FR 44442, 44444 (August 28, 1995); 48 FR 23032 (May 23, 1983).

¹² See OTS Customer Service Plan—Interpretive Opinions (January 1996). Such questions may also

OTS's Regional Director for the Region in which its home office is located.

OTS has previously provided explicit guidance on several of the questions about specific products or services raised. For example, the preamble to the proposed rule stated that Federal savings associations could establish loan accounts and open savings or demand accounts through electronic means.¹³ Similarly, the ANPR indicated that the term "electronic means and facilities" would clearly encompass new technologies that enable a depository institution to make risk-based judgments electronically.¹⁴ This would include, for example, automated credit scoring and other forms of automated underwriting.

In addition, OTS and the FHLBB have long recognized that Federal savings associations may open accounts and transfer funds for persons overseas. For example, the FHLBB opined that Federal savings associations may solicit deposits and open accounts for individuals who are not citizens or residents of the United States by mail or electronic means.¹⁵ Since this is an authorized activity under the HOLA, this final rule permits a Federal savings association to engage in this activity through electronic operations. However, Federal savings associations engaging in such electronic activities must comply with all applicable requirements, including addressing safety and soundness concerns and ensuring compliance with other federal laws and requirements.¹⁶

OTS has not opined on whether certain activities cited by commenters

be addressed in the context of an application process (e.g., *de novo* applications).

¹³ 62 FR at 51818. However, all statutory and regulatory restrictions associated with offering a product or service continue to apply where electronic means and facilities are used.

One commenter asked whether a signed deposit application would have to be executed and transmitted with the initial deposit in hard copy. At one time, FHLBB regulations specifically imposed this type of signature card requirement. See 12 CFR 545.2(a) (1983). In May 1983, the FHLBB eliminated this specific requirement. 48 FR 23032 (May 23, 1983).

¹⁴ 62 FR at 15632.

¹⁵ See Memorandum from Jack D. Smith, Deputy General Counsel, FHLBB, to Alvin Smuzynski, Deputy Director, Supervisory Activities (December 7, 1987). Pursuant to that opinion, the institution was permitted to undertake the activity where the institution maintained the deposits in United States dollar denominations, offered standard money market and term certificate of accounts with interest rates and other terms and conditions that were the same as those offered by the institution to those residing in the United States, and complied with the requirements applicable to the type of accounts. See also FHLBB Op. General Counsel (May 10, 1984).

¹⁶ OTS anticipates that it will shortly publish a proposed "Know Your Customer" rule, as part of an interagency rulemaking effort.

are authorized for Federal savings associations. Specifically, one commenter asked whether a Federal savings association may issue, use, and deal in all forms of electronic monetary value, including stored value and smart-card technologies. Another commenter asked whether a Federal savings association may use and participate in digital authentication and certification, including serving as a certificate authority (an entity certifying electronic signatures for use in electronic commerce).

OTS has not opined on whether every activity that could involve the use of electronic money or participation in digital authentication regimes is an authorized activity for Federal savings associations.¹⁷ With any new activity, the factual context and the accompanying safeguards are often critical to determining whether and how an activity may be conducted, whether or not electronic means are involved. Thus, OTS believes that it is important that savings associations continue to consult with their Regional Offices to obtain up-to-date guidance as they move forward in the use of electronic means and facilities.

Another Federal savings association asked OTS to adopt an expansive

¹⁷ With regard to electronic monetary value, OTS has opined that a Federal savings association has authority to market and sell prepaid telephone cards as agent for a telephone company. OTS Op. Chief Counsel (August 29, 1996). We also note that the other federal banking agencies have indicated that financial institutions may deal in other types of electronic monetary value. See OCC Interpretive Letter No. 718 (March 14, 1996) (national banks may dispense alternate media such as public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising materials, electronic benefits transfer scripts, and credit and debit cards) and Federal Deposit Insurance Corporation General Counsel's Op. No. 8, published in, 61 FR 40490 (Aug. 2, 1996) (discussing whether, and under what circumstances, funds underlying stored value cards may be considered deposits under the Federal Deposit Insurance Act, 12 U.S.C. 1811-1835a).

With regard to digital authentication and certification, Federal savings associations have incidental authority under the HOLA to guarantee customer signatures for documentary transactions in which an association has an interest as part of its deposit taking, lending, or trust business, as well as guarantees executed as a separate customer service with respect to stock transfers and similar transactions in which the association has no direct interest. FHLBB Op. General Counsel (August 11, 1981). In addition, the OCC has authorized a national bank operating subsidiary to act as a certification authority and repository for certificates that verify digital signatures. The authority was not limited to transactions in which the subsidiary had a direct interest. OCC Op. Chief Counsel (January 12, 1998) (Operating Subsidiary Application by Zions First National Bank, Salt Lake City, Utah).

OTS believes the reasoning of the other regulators appears persuasive. OTS will consider these opinions when it reviews a Federal savings association's authority to conduct such activities as these issues are presented to the agency.

interpretation of the phrase "authorized product or service." The commenter's proposed interpretation would clarify that as long as the primary electronic product or activity is permitted, the Federal savings association may provide a minor ancillary application, even though the ancillary application is not specifically authorized by the HOLA. Federal savings associations possess powers that are incident to the express powers of Federal savings associations, as set forth in the HOLA.¹⁸ Today's final rule allows Federal savings associations to use electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity, including activities authorized under the incidental powers doctrine. OTS will review whether particular activities are authorized as incidental powers on a case-by-case basis as these issues are presented to the agency.

As noted above, § 555.200(a) continues to permit Federal savings associations to perform all data processing and transmission services formerly authorized under § 545.138(a) and (b). When § 545.138 was promulgated in 1983, the FHLBB imposed certain data and customer restrictions designed to ensure that a Federal savings association would conduct data processing and transmission services consistent with the authority provided in HOLA.¹⁹ OTS recognizes that the HOLA may authorize the provision of data processing services in additional circumstances.

Accordingly, the final rule, like the OCC's rule, does not impose specific data or customer restrictions. Rather, final § 555.200(a) merely requires that services provided through electronic means and facilities must be a "part of an authorized activity." This restriction means that data processing and transmission services provided must be authorized under the HOLA, either expressly or as an incidental power.

Final § 555.200(a) has also been revised to incorporate provisions in proposed § 545.143, entitled "How may I participate with others in the use of electronic means and facilities?" Proposed § 545.143 would have permitted a Federal savings association to participate with others to perform, provide, or deliver activities, functions, products, or services described in the proposed rule. A Federal savings association could have participated with an entity that is not subject to examination by a Federal agency

regulating financial institutions only if that entity agreed, in writing, to permit OTS to examine its electronic means or facilities, to pay for any related OTS examination fees, and to make all relevant records in its possession, written or electronic, available to OTS for examination. OTS also indicated that if the participation by a Federal savings association was through a service corporation, OTS's service corporation rules would apply.²⁰

The Examination Parity and Year 2000 Readiness for Financial Institutions Act,²¹ has obviated the need for proposed § 545.143 as a separate section of the rule. Section 3 of this legislation provides:

[I]f a savings association, a subsidiary thereof, or any savings and loan affiliate or entity, as identified by section 8(b)(9) of the Federal Deposit Insurance Act [12 U.S.C. 1818(b)(9)], that is regularly examined or subject to examination by the Director [of OTS], causes to be performed for itself, by contract or otherwise, any service authorized under [HOLA] * * *, such performance shall be subject to regulation and examination by the Director to the same extent as if such services were being performed by the savings association on its own premises.

In light of this legislation, today's final rule simply clarifies the authority of a Federal savings association to participate with others to perform any function, or provide any product or service, as part of an authorized activity, through electronic means and facilities. This language has been merged into final § 555.200(a). OTS is making a similar conforming change to § 555.200(b), discussed below.

In making these changes, OTS is removing the proposed requirement concerning record availability since this requirement is implicit in examinations authorized by the legislation. OTS is also removing the proposed requirement concerning examination fees. The other banking agencies do not charge fees specifically for examinations of service providers. OTS does not intend to impose fees for the examination of service providers, except as otherwise provided for under OTS's assessment rule and Thrift Bulletins.

While the relevance of many of the comments on proposed § 545.143 has been negated by this intervening legislation, it is useful to respond to some of the points raised by commenters on the NPR. Two commenters criticized the third party examination, fee, and record requirements as burdensome and unnecessary. In implementing the new legislation, OTS will focus its service

provider examinations on those whose activities could have a direct impact on the safety and soundness of savings associations.²² Data processing servicers and ATM servicers are among the types of service providers OTS examines because they provide functions critical to financial operations.

Another Federal savings association explained that the software industry is wary of providing unrestricted access to their information without explicit assurances of confidentiality to protect proprietary trade secrets. The commenter stated that, at a minimum, the final rule should provide that any information reviewed or gathered during an examination of a service provider will be treated as "unpublished OTS information" under 12 CFR 510.5 (1998), which provides confidentiality safeguards.

OTS treats service provider examination reports as confidential unpublished OTS information.²³ Consistent with this regulation, these reports are not publicly available, but OTS does share the examination reports of service providers with the Federal banking agencies. It also shares relevant portions of the examination reports with Federal and State savings associations that use the services of those service providers.

Section 555.200(b)

Former § 545.138(c) subjected marketing by-products and excess capacity of data processing and transmission services to significant restrictions. In contrast, under proposed § 545.142, a Federal savings association could market and sell electronic capacities and by-products to third parties if it acquired or developed the capacities and by-products in good faith as part of providing financial services. The proposed rule was substantially identical to the OCC rule on marketing and selling such capacities.²⁴

Two commenters expressly supported the proposed section. Upon further review, OTS believes it is necessary to make two minor clarifications to § 555.200(b).

First, the final rule indicates that the marketing and selling of electronic capacities and by-products to third-parties is to enable Federal savings

¹⁸ See OTS Op. Chief Counsel (August 29, 1996) at 2.

¹⁹ See 48 FR 7428, 7429-7430 (February 22, 1983).

²⁰ See 12 CFR 559.4 (1998).

²¹ Pub. L. No. 105-164 (enacted March 20, 1998).

²² See Statement of Ellen Seidman, Director, Office of Thrift Supervision, concerning Examination Parity and Year 2000 Readiness for Financial Institutions Act, before the Committee on Banking and Financial Services, United States House of Representatives, February 5, 1998, at 8-10.

²³ See 12 CFR 510.5(a)(2)(ii) (1998).

²⁴ See 12 CFR 7.1019 (1998).

associations to optimize their resources. This language conforms the OTS rule more closely to the OCC's rule.

Second, the final rule indicates that a Federal savings association may also participate with others to market and sell electronic capacities and by-products to third-parties. Like the revision to § 555.200(a) discussed above, this change incorporates part of § 555.143 of the proposed rule.

One Federal savings association asked OTS to define the phrase "electronic capacities and by-products" to clarify that Federal savings associations may provide "fully integrated solutions to a range of business needs." These solutions may involve a combination of software development, computer systems design and construction, electronic communication (including sending electronic mail), and data processing and storage.

OTS does not believe it is appropriate to make the clarification requested by the commenter. As long as a Federal savings association acquired or developed its electronic capacities and by-products in good faith as part of providing financial services, the Federal savings association may market and sell them to third-parties. OTS cautions, however, that to the extent a Federal savings association may wish to engage in additional activities in connection with the marketing and sale of such capacities and by-products, the additional activities must be authorized under the HOLA, either expressly or as an incidental power.

2. What Precautions Must I Take? (Proposed § 545.144, Final § 555.210)

Although OTS believes that it is vital that Federal savings associations establish appropriate internal controls for risks and security measures when they engage in electronic operations, it did not propose to codify static risk or security requirements. Because methods of electronic commerce and their attendant security measures are continually evolving, OTS's proposed rule reflected the view that it is impracticable to prescribe security measures that would remain useful for the indefinite future.

Instead, proposed § 545.144 would have required a Federal savings association to adopt standards and policies designed to ensure secure operations. In addition, the proposed rule would have required a Federal savings association to implement security measures adequate to prevent unauthorized access to its records and its customers' records, and to prevent financial fraud through the use of electronic means or facilities. The

proposed rule also stated that a Federal savings association must comply with the current security devices requirements of part 568, if it provides an ATM, an automated loan machine, or another similar electronic device.

One Federal savings association noted that the banking industry has not yet embraced any particular standards with respect to encryption, authentication, digital signatures, and other technical matters affecting transmission over the Internet. Accordingly, the commenter urged OTS to avoid imposing unnecessary regulatory impediments or micro-managing system implementation or maintenance. While the commenter was not critical of proposed § 545.144, the commenter criticized OTS's imposition of certain security-related conditions on approvals of recent applications, such as requiring an applicant to have its delivery of services over the Internet tested and reviewed by independent computer security specialists before commencing operation. The commenter urged OTS to reconsider whether there is a need to impose such conditions.

In approving applications to commence operations, OTS requires proof that adequate security measures are in place for safe, sound, and secure operations. To date, these requirements routinely have included testing and review by independent computer security specialists. OTS tailors specific conditions on a case-by-case basis. It may be possible that future applications may not raise these security concerns. However, currently OTS believes such a condition in application approval orders remains essential to safe and sound internal operations. Similarly, under the notice procedures in subpart B to part 555 of this final rule (including the 30-day advance notice requirement), OTS will have an opportunity to consider, before any savings association establishes a transactional web site, whether the savings association will be able to conduct such operations in a safe, sound, secure, and compliant manner.

In the preamble to the proposed rule, OTS indicated that it "expects Federal savings associations to establish security measures that are consistent with current industry standards, and to continually monitor and regularly update these security procedures to keep pace with changes to industry standards."²⁵ One trade association urged OTS to incorporate this statement in the final rule.

OTS believes that such interpretive statements are best contained in OTS

policy statements, advisories, and other explanatory materials, rather than the regulation. For similar reasons, OTS has deleted from the final rule the proposed statement indicating that Federal savings associations should adopt standards and policies on security issues. Instead, the rule requires Federal savings associations to implement security measures designed to ensure secure operations.

Another trade association urged OTS to provide guidelines alerting Federal savings associations to security issues that should be addressed before a new electronic delivery mechanism is implemented. As summarized in Section II above, OTS has issued such guidelines and advisories to Federal savings associations, both on its own and as part of FFIEC.

OTS has made clarifying revisions to the section. These revisions require that the management of Federal savings associations identify, assess, and mitigate potential risks and establish prudent internal controls, in addition to implementing security measures that are designed to ensure secure operations.²⁶ These risks may be strategic, legal, regulatory, or operational.²⁷

C. Requirements Applicable to All Savings Associations

1. Must I Inform OTS Before I Use Electronic Means or Facilities? (§ 555.300)

Proposed § 555.300(a) of the Supplemental NPR sets forth the general rule that a savings association does not have to inform OTS before it uses electronic means and facilities. However, two exceptions apply. First, proposed § 555.300(b) would require a savings association to file a written notice with OTS before it establishes a transactional web site. Second, proposed § 555.300(c) would provide that if the OTS Regional Office has informed a savings association of any supervisory or compliance concerns that may affect the savings association's use of electronic means or facilities, the savings association must follow any additional procedures the Regional Office has imposed in writing. Proposed § 555.300(a) also would encourage savings associations to consult with OTS even in circumstances not covered by the notice requirement or other procedures in § 555.300(b) or (c).

²⁵ Further guidance on these requirements is provided in Appendix A to Part 570, section 341 of the Thrift Activities Regulatory Handbook, and Statement on Retail On-Line Personal Computer Banking.

²⁷ See Statement on Retail On-Line Personal Computer Banking.

Four commenters indicated that the proposed notice requirement would help OTS to monitor adequately savings associations' technological innovations and to assess security, compliance, and privacy risks. Some commenters, however, expressed concerns.

Four commenters argued that the notice requirement would place savings associations at a competitive disadvantage, since other banking regulators do not impose a similar notice requirement. OTS does not anticipate that the notification requirement will place savings associations at a significant competitive disadvantage. As discussed below, in general, once an association has addressed any follow-up questions from the Regional Office and the 30-day period has expired, the association will be free to bring its transactional web site on-line. No affirmative authorization from OTS is necessary except where the Regional Office may otherwise indicate.

While providing this information will impose a minimal burden on savings associations, the process will allow individual associations, and the industry as a whole, to reap important benefits. The notice will make it easier for OTS to obtain information on the industry's use of transactional web sites. As a result, OTS will be better able to assist associations that are contemplating or already conducting Internet operations to identify and address the risks that accompany such activities. The information will also broaden OTS's awareness of trends in Internet banking operations, which OTS can share with institutions. It will also efficiently allow OTS to keep abreast of significant changes in the way particular savings associations interact with their existing or potential customers to enable OTS to issue appropriate guidance. Finally, the procedure responds to the concern raised by the commenter on the NPR who indicated that OTS should be vigilant about new electronic operations raising safety and soundness concerns, since the procedure will assist OTS to supervise effectively the electronic operations of savings associations.²⁸

²⁸ A September 30, 1998 report prepared, at OTS's request, by the Office of Inspector General (OIG), United States Department of the Treasury, made several suggestions. Among these were that OTS: (1) develop a complete list of savings associations providing on-line and Internet banking services; (2) enhance monitoring of savings associations' web sites for compliance with federal disclosure regulations and laws, and (3) begin to focus more on the operational risks presented by on-line and Internet banking. The OIG recommended these steps to help OTS determine risks, plan strategic examination coverage, identify staff development needs, and foster examination uniformity and consistency. See Office of Inspector General, U.S. Dep't of the Treasury, *Consultative Report on the*

One commenter asserted that transactions conducted over the Internet pose no more risk than transactions performed using other technologies for which no prior notice is required. This commenter also asserted that the notice was unnecessary since the industry already fully understands the risks associated with the Internet.

OTS does not agree that transactions conducted over the Internet pose no more risk than transactions performed through other more established technologies.²⁹ While it is true that risks are inherent in all electronic capabilities, the use of an electronic channel such as the Internet to deliver products and services introduces unique risks due to the increased speed at which systems operate, user anonymity, and broad access in terms of geography, user groups, applications, databases, and peripheral systems.

As explained in the preamble to the Supplemental NPR, OTS has been, and continues to be, concerned with the adequacy of firewalls to prevent hackers from breaking into an association's computer systems and thereby jeopardizing the association's security.³⁰ OTS is also concerned about other operational and compliance risks presented by Internet banking and intends to increase its monitoring of web sites for compliance with disclosure laws and regulations.³¹ Additionally, OTS is concerned about protecting the privacy of individuals submitting information (or about whom information has been submitted).³²

Even traditional risks that are similar to those in customary banking activities must be considered in a new light. For example, if an association conducts lending or deposit gathering activities over an electronic channel, credit risks must be considered in the context of the high-speed, wide-access electronic environment. The collection of baseline information on transactional web sites is an important and integral part of OTS

Office of Thrift Supervision Examination of On-Line and Internet Banking Risks, (OIG-CA-98-003, 1998).

²⁹ See 63 FR at 43328.

³⁰ *Id.*

³¹ As noted in the preamble to the Supplemental NPR, OTS is aware that advertising and disclosure problems may apply equally to transactional and informational web sites. OTS believes, however, that the need for advance notice is greater where such concerns are combined with the other compliance, security, and privacy issues related to transactional web sites. To minimize regulatory burden, OTS is limiting the advance notice requirement to transactional web sites. However, OTS will continue to examine both types of web sites for operational and compliance problems. See 63 FR at 43329 n. 11.

³² 63 FR at 43328.

efforts to enhance its supervision of Internet banking activities.

Another commenter noted that the costs of developing a web site are substantial and would be incurred before the savings association files the notice. Consistent with § 555.300(a), OTS encourages associations concerned about expending resources to develop a transactional web site to consult with their Regional Office in the early stages of development, even before filing a notice.

In lieu of the notice requirement, several commenters urged OTS to continue to rely on existing supervisory guidance, examination oversight, and application processes to ensure that Internet activities are conducted in a safe, sound, secure, and compliant manner. One commenter encouraged OTS to address transactional web sites in the Statement on Retail On-Line Personal Computer Banking and in additional questions in the Pre-Examination Response Kit. Another commenter suggested that the additional guidance should address such issues as development costs, security and privacy issues, and compliance matters.

OTS has provided and will continue to provide important guidance to the industry. OTS has addressed development costs, security, privacy, and compliance matters in its Statement on Retail On-Line Personal Computer Banking and in section 341 of the Thrift Activities Regulatory Handbook. OTS will update and supplement this guidance as necessary. However, this guidance is not a substitute for OTS's obtaining information necessary for proper supervision.

OTS proposed to define a transactional web site as "an Internet site that enables users to conduct financial transactions such as accessing an account, obtaining an account balance, transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other products or services."³³ Four commenters supported OTS's proposed definition. Two commenters indicated that the Supplemental NPR adequately distinguished between transactional and informational web sites.

In light of the generally favorable comments, OTS does not believe significant changes to the definition are necessary. However, OTS is making one clarifying change to the definition of transactional web site in response to a comment. The commenter recommended clarifying the meaning of the phrase "purchasing other products

³³ 63 FR at 43330 (proposed § 555.300(b)).

or services" used in the definition. The final rule clarifies that the phrase refers to any authorized products or services.

Another commenter asked OTS whether a new notice would be required when the type and level of activities conducted on a transactional web site are increased or substantially modified. A new notice will not be required in such circumstances. Once the savings association alerts OTS about its transactional web site, the agency will be able to monitor and examine the web site without a need for subsequent notices when changes are made.³⁴

Other commenters, however, suggested further revisions or clarifications that OTS believes would be too limiting. One commenter indicated that the covered web sites should be those that transact business equivalent to a branch through which money passes. Another argued that a web site is not transactional if an applicant may only complete and return a loan application electronically, but would be transactional if the web site also permits the application to be processed through an automated credit scoring system and is used to notify the customer of an approval or denial.

OTS does not agree that transactional web sites subject to the notice requirement should be limited to those that are used for monetary transactions or are used to notify the customer of an application approval or denial. The same concerns about providing a secure environment apply where confidential information is exchanged in other circumstances that are transactional, but do not necessarily constitute a monetary transaction or notification on an application.

However, it is appropriate to clarify a related matter. OTS will not consider a web site to be transactional simply because it allows the sending of e-mail messages. For an association simply to include an e-mail address on its web site does not necessarily invite the public to attempt to conduct transactions with the association over the Internet or to submit confidential information. For example, the public may use the e-mail address for a variety of tasks (e.g., inquiring about products or services offered, requesting that a customer service representative call, or asking that forms or information be mailed). In contrast, a web site that provides an electronic application form for transmission to the association by e-mail would be considered transactional.

³⁴ However, as noted in the preamble to the Supplemental NPR, before a savings association may change an informational web site to a transactional web site, the savings association must file a notice with OTS. 63 FR at 43329 n. 9.

Such an application, by its nature, is designed to conduct a transaction and will likely actively elicit the submission of confidential information to the association over the Internet through the questions contained in the application.

One commenter recommended that OTS define an "informational web site." OTS does not believe that a separate definition of this term is necessary. As noted in the preamble to the Supplemental NPR, an informational web site is a non-transactional web site, such as one limited to advertising and fee and rate posting.³⁵

Six commenters opposed a notice requirement for electronic activities other than a transactional web site. Three commenters explained that OTS already has sufficient authority to examine any activity that raises safety and soundness concerns.

OTS is not requiring a notice under § 555.300(b) for any activities using electronic means or facilities other than transactional web sites. For example, a savings association would not be required to notify OTS before it establishes an informational web site.³⁶ As with other activities, OTS will continue to rely on its existing supervisory examinations and application processes to ensure the savings association's ability to engage in new activities in a safe, sound, secure, and compliant manner.³⁷

As technologies emerge, OTS may revise the rule to require notice of activities other than establishing a transactional web site. Similarly, as technologies mature and the industry and OTS gain additional experience, OTS may revise the rule to no longer require notice before establishing a transactional web site.

OTS is also making an editorial change to § 555.300(a). The change

³⁵ 63 FR at 43329.

³⁶ However, OTS has implemented a change to the Thrift Financial Report (TFR). The electronic filing software now collects information on all savings associations' Internet web site addresses. This change was effective for the third quarter 1998 TFR.

³⁷ OTS reviews the safety and soundness of new activities, the appropriateness of the internal controls and security precautions, and compliance with applicable laws and regulations on a case-by-case and institution-by-institution basis in connection with applications and through the examination process. For institutions subject to an application process (e.g., *de novo* applications), these initial safety and soundness and compliance determinations will be made in the application review. After application approval or where no application is required, safety and soundness and compliance will generally be assessed as a part of the examination process. This process will review and assess the institution's identification of risks of the activity, the steps it has taken to mitigate these risks, the testing it has undertaken to ensure safety and soundness, and its compliance monitoring process.

clarifies that OTS encourages consultations with the Regional Office regardless of whether the notice requirement in § 555.300(b) or the additional procedures in § 555.300(c) apply.

2. How do I Notify OTS? (§ 555.310)

Proposed § 555.310 of the Supplemental NPR described the advance notice procedures. Proposed § 555.310(a) would require a savings association to provide a written notice to the appropriate Regional Office at least 30 days before establishing a transactional web site. Proposed § 555.310(b) contained a transition provision applicable to transactional web sites established after the date of the association's last regular onsite OTS safety and soundness examination but before the effective date of the rule.

Two commenters supported the 30-day advance notice period. Another commenter argued that the 30-day notice period would be too long and suggested a 10-day notice period. Another commenter urged OTS to permit a savings association to apprise OTS within 30 days *after* establishing a transactional web site. This notice would permit OTS to review the web site in an examination.

OTS has decided to retain the 30-day advance notice procedure as proposed. As discussed above, OTS does not anticipate this procedure will be burdensome. Thirty days is an appropriate time period to allow OTS to consider the notice and ask any follow-up questions that may be necessary.

In the Supplemental NPR, OTS did not propose to prescribe any particular form for the notice. Proposed § 555.310(a) would simply require that a savings association describe the transactional web site, indicate the date the transactional web site will become operational, and list a contact familiar with the deployment, operation, and security of the transactional web site. The preamble to the Supplemental NPR indicated that, upon receipt of the notice, the Regional Office may require additional information to ensure that the savings association will operate the transactional web site in a safe, sound, secure, and compliant manner.³⁸ The preamble further indicated that OTS contemplated that the notice may be brief. It contained sample language that read:

[Name of savings association] plans to establish a transactional web site on the Internet at [URL]. It will be operational on [Date]. The site will contain mortgage loan applications that can be transmitted securely

³⁸ 63 FR at 43329.

to our loan processing office. For further information contact: [Name at telephone number, e-mail].³⁹

Four commenters stated that OTS should not require any information in the notice beyond that described in the Supplemental NPR. One commenter specifically endorsed OTS's sample statement in the preamble as sufficient. One commenter, however, recommended that institutions describe how they will conduct the activity, the type of security they will use, the internal controls they will follow, and the program they will follow to ensure compliance with all applicable laws and regulations. Another commenter observed that an overview of controls and safeguards designed to preserve privacy and security and protect against financial fraud would be sufficient.⁴⁰ One commenter suggested that if OTS discovers that new information is necessary following this rulemaking, it should require this information in guidance, rather than in a revised rule.

OTS is adopting the requirements concerning the contents of the notice as proposed. It believes these requirements will provide sufficient information to the Regional Offices without being burdensome or inflexible. The guidance contained in the preamble to the Supplemental NPR, including the sample language set forth above, remains valid.

Several commenters sought clarification of the review procedures. One commenter sought assurance that the notice process was informational only. Two commenters sought clarification whether OTS would approve or disapprove notices (e.g., where there are supervisory or compliance concerns). One noted that if prior OTS approval is required, the notice process would impose substantial financial, strategic, and compliance risks on institutions. Another commenter urged OTS to review all notices within the notice period and quickly act to prevent a savings association from establishing a transactional web site that could threaten its safety and soundness.

The procedure will work as follows: The savings association will file a written notice with the Regional Office. The Regional Office will review the notice and may ask follow-up questions. In general, once an association has addressed those follow-up questions

from the Regional Office and the 30-day period has expired, the association will be free to bring its transactional web site on-line. No affirmative authorization from OTS is necessary except where the Regional Office may otherwise indicate. If, however, by the end of the 30-day period, the Regional Office informs the association that there are supervisory or compliance concerns that may affect the association's establishment of a transactional web site, the association must follow any procedures that the Regional Office imposes in writing. The procedures the Regional Office may impose could include, for example, requiring further information to be submitted or precautions to be taken before the savings association may establish the transactional web site, limiting in some fashion the ways in which the association may use the transactional web site, or prohibiting the association from establishing a transactional web site.

One commenter opposing notice procedures observed that the advance notice only made sense if the Regional Office would review the notice before the roll-out of the web site. This commenter, however, predicted that OTS Regional Offices may apply inconsistent standards and that this inconsistency could be problematic since web sites provide services nationwide. The commenter suggested that the final rule should require the Regional Office to notify the thrift of any conditions it would impose on web site operations. OTS will issue industry guidance to help a savings association deploy a transactional web site in a safe, sound, secure, and compliant manner. OTS will also issue uniform guidance to its Regional Offices to verify that transactional web sites are in compliance with the industry guidance and this regulation and that savings associations have established an adequate infrastructure for operating safe, sound, secure, and compliant transactional web sites.

One commenter urged OTS to require public notice and comment before a savings association may establish a transactional web site. This commenter indicated that, in some states, financial institutions must provide public notice and comment before opening a deposit-collecting branch or deposit-taking ATM.

OTS does not believe it is appropriate to require a public comment procedure. Moreover, OTS posts notices on its web site upon filing. The same policy will apply to notices for transactional web sites. This procedure will provide adequate information to the public.

IV. Other Rule Provisions

A. Conforming Amendment to Branch Offices Regulation

The proposed rule would revise OTS's branch office regulation to clarify that electronic facilities (such as automated loan machines) are not branch offices. Three commenters specifically supported this section, although two requested clarifications. One Federal savings association argued that the final rule should indicate that *all* electronic facilities and the Internet are excluded from the definition of "branch office." The proposed rule would have excluded an "electronic facility" from the definition of "branch office," but did not indicate that an "electronic means" was also excluded.

For consistency in terminology, the final rule has been revised to exclude all "electronic means or facilities" from the definition of "branch office." Under § 555.200(a), the Internet continues to be an electronic means or facility and is not considered to be a branch.

Another Federal savings association asked whether a "hybrid office" would be treated as a branch office. This commenter defined a hybrid office as an office in which a Federal savings association conducts the majority of its operations electronically, but conducts some functions in person by appointment. The type of office the commenter has described may be either a branch office⁴¹ or an agency⁴² depending upon the types of services provided. A Federal savings association may request an OTS opinion if it requires further guidance on this topic.⁴³

B. Conforming Amendment to Subordinate Organizations Rule

The Examination Parity and Year 2000 Readiness for Financial Institutions Act, discussed above, applies to Federal and State savings associations and provides OTS with the authority to examine service corporations. Accordingly, OTS is conforming the service corporation examination provision of its Subordinate Organizations regulation, 12 CFR 559.3(o)(2), to reflect this authority.

V. Other Issues Raised by Commenters

A. Preemption

One Federal savings association commenting on both the NPR and the

³⁹*Id.*

⁴⁰One commenter, however, noted that security information may be difficult to obtain when the web site is maintained by a service bureau. This commenter noted that service bureaus often claim that the release of such information will compromise their systems.

⁴¹12 CFR 545.92 (1998).

⁴²12 CFR 545.96 (1998).

⁴³OTS will shortly undertake another rulemaking to clarify the regulations governing various types of offices.

Supplemental NPR urged OTS to add specific preemption provisions stating that OTS's electronic operations regulations preempt state laws purporting to restrict or govern the electronic operations of federal savings associations. The commenter noted that various states have enacted such laws. The commenter argued that preemption would encourage Federal savings associations to participate in various electronic banking activities, facilitate the development of best industry practices, and prevent the development of a patchwork of conflicting state and local rules.

Electronic operations and related state and federal laws are still evolving. Thus, OTS believes it is premature to craft specific preemption regulations in the area of electronic operations. OTS intends to address specific state laws on a case-by-case basis as they are raised to the agency.

The commenter may have raised this matter, in part, because the electronic operations provisions will not be placed in part 545, but rather in a new part 555. Part 545 currently contains regulations pertaining to electronic operations⁴⁴ and also contains a general provision preempting state laws affecting "Operations."⁴⁵ However, the movement of the electronic operation provisions to a new part 555 does not indicate a substantive change. OTS will apply principles of preemption consistently with its prior interpretations of OTS's authority under the HOLA.⁴⁶ Accordingly, the regulations in subpart A to part 555 will have preemptive effect where appropriate to: (1) facilitate the safe and sound operations of a Federal savings association, (2) enable a Federal savings association to operate according to the best thrift institution practices in the United States, or (3) further other purposes of the HOLA.⁴⁷

When evaluating preemption of a state law, OTS will focus first on the underlying activity affected by the state law. For example, if a state law affects a Federal savings association's ability to take deposits or lend using electronic means and facilities, OTS will apply the part 557 or part 560 preemption analysis for deposit or lending activities, respectively. OTS will evaluate other activities that may be conducted electronically, on a case-by-case basis.

While OTS intends to give Federal savings associations maximum

flexibility to operate electronically according to a uniform federal scheme of regulation, OTS has recognized that some types of state laws, under certain circumstances, generally will not be preempted.⁴⁸ Consistent with this approach, OTS will determine that a state law regulating electronic operations is not preempted if it furthers a vital state interest, and either has only an incidental effect on Federal savings associations' ability to provide financial services electronically or is not otherwise contrary to the purposes of OTS's rule.

B. Community Reinvestment Act

Several commenters on the NPR addressed the impact of emerging electronic technologies on Community Reinvestment Act (CRA) requirements. The comments generally argued that the current CRA requirements do not: (1) provide adequate recognition of loans, investments and services generated outside of a Federal savings association's traditional assessment area (i.e. the area surrounding its branch network), or (2) permit Federal savings associations with Internet operations to define their CRA assessment areas more broadly than the branch network concept allows. Some commenters offered options intended to address these types of concerns. These included allowing Federal savings associations that engage in alternate delivery systems to be treated as limited purpose institutions or to define an assessment area in a manner that is tied to the customer base rather than a particular geography. One commenter on the Supplemental NPR expressed concern that financial institutions may use web sites to conduct business nationwide, but would be required to include only certain geographical areas in their CRA assessment areas.

Currently, OTS is working on an interagency basis to resolve these concerns and other CRA issues arising from the use of alternative methods of delivering financial products and services. The interagency effort involves revisiting the definition of an assessment area for institutions that use alternative delivery systems. Until this interagency effort is completed, OTS intends to allow the new electronic technologies to develop within the existing CRA regulatory framework. Specific CRA issues that arise in connection with an application will continue to be handled on a case-by-case basis in an effort to adapt existing laws to modern technologies and

innovations.⁴⁹ An institution, of course, always has the option of taking advantage of the flexibility in the existing CRA regulation by developing and seeking approval of a strategic plan that would link CRA performance to its particular business strategy.⁵⁰

C. Other Interagency Issues

Both trade association commenters on the NPR urged OTS, other Federal bank regulators, and the Treasury Department to coordinate their activities to ensure the development of consistent approaches to electronic operations issues, to minimize regulatory burdens, and to avoid potential conflicts. One commenter on the Supplemental NPR indicated it would only support the notice requirement for transactional web sites if all banking regulators imposed the same requirement on their regulated institutions.

As OTS issues rules and guidance on electronic operations, it continually strives for consistency with other Federal banking regulators. Accordingly, OTS will continue to participate in all interagency efforts to establish consistent regulatory approaches to electronic operations issues.

One Federal savings association noted that when the Federal banking agencies and the Department of Justice review a merger or acquisition for its impact on competition, the analysis focuses on the relevant product and geographic markets. These concepts generally require an analysis of deposits taken, loans made, and services provided in the geographic areas served by the combining institutions. The commenter urged the Federal banking agencies to view Internet banking activities as outside the scope of the traditional antitrust analysis and recognize that current technology gives Federal savings associations and banks the ability to conduct business with customers all over the country.

The entry of financial institutions into electronic operations raises a host of new issues. OTS has attempted through

⁴⁴ 12 CFR 545.138, 545.141, and 545.142 (1998).

⁴⁵ 12 CFR 545.2 (1998).

⁴⁶ See 12 CFR 545.2 (Operations), 557.11-557.13 (Deposits), and 560.2 (Lending and Investment) (1998).

⁴⁷ Accord 12 CFR 557.11(a) and 560.2(a) (1998).

⁴⁸ See 12 CFR 557.13 and 560.2(c) (1998).

⁴⁹ While not specifically involving electronic operations, the 1997 application from the Travelers Group is illustrative of an institution's efforts to develop a new approach on CRA. The Travelers Group filed an application to convert a state-chartered bank to a Federal savings association charter. The converted Federal savings association was to engage in consumer lending and trust services nationwide. In its application, Travelers stated that its CRA obligation extended throughout all the communities where it does business and made an initial pledge to make at least \$430 million of home equity loans to low- and moderate-income borrowers over three years. OTS approved Travelers' application. See Order No. 97-120 (November 24, 1997).

⁵⁰ See 12 CFR 563c.27 (1998).

this rulemaking and guidelines to address issues that have arisen. To date, the antitrust issue cited by the commenter has not been a critical issue in an application. Currently, financial business through electronic operations constitutes a very small portion of financial services offered by Federal savings associations. OTS will consider providing guidance on this issue and other issues in the future should they emerge as prominent issues.

VI. Executive Order 12866

The Director of OTS has determined that this final rule does not constitute a "significant regulatory action" for the purposes of Executive Order 12866.

VII. Paperwork Reduction Act of 1995

The collection of information requirements in this rule have been submitted to and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under OMB control number 1550-0095.

Comments on all aspects of this information collection should be sent to the Office of Management and Budget, Paperwork Reduction Project (1550-0095), Washington, DC 20503, with copies to the Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a currently valid OMB control number. The valid OMB control number assigned to the collection of information in this final rule is displayed at 12 CFR 506.1.

The collection of information requirements are found in 12 CFR 555.300 and 555.310. OTS requires this information for the proper supervision of electronic operations by savings associations. The likely respondents/recordkeepers are savings associations.

VIII. Regulatory Flexibility Act Analysis

Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that this regulation will not have a significant impact on a substantial number of small entities. This final rule should make it easier for Federal savings associations, including small institutions, to engage in electronic operations. While it imposes a notice requirement on savings associations using one particular type of electronic means or facility (*i.e.*, a transactional web site) and allows Regional Offices to impose case-by-case restrictions for

supervisory or compliance reasons, these requirements are the minimum necessary for proper supervision and should not have a significant impact on a substantial number of small institutions.

IX. Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. OTS has determined that the rule will not result in expenditures by state, local, or tribal governments or by the private sector of \$100 million or more. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

List of Subjects

12 CFR Part 545

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 555

Accounting, Consumer protection, Credit, Electronic funds transfers, Investments, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 559

Reporting and recordkeeping requirements, Savings associations, Securities.

Accordingly, the Office of Thrift Supervision amends chapter V, title 12 of the Code of Federal Regulations as set forth below:

PART 545—OPERATIONS

1. The authority citation for part 545 continues to read as follows:

Authority: 12 U.S.C. 1462a, 1463, 1464, 1828.

2. Section 545.92 is amended by revising paragraph (a) to read as follows:

§ 545.92 Branch offices.

(a) **General.** A branch office of a Federal savings association is any office other than its home office, agency office,

administrative office, data processing office, or an electronic means or facility under part 555 of this chapter.

* * * * *

§§ 545.138 through 545.142 [Removed]

3. Sections 545.138 through 545.142 are removed.

4. Part 555 is added to read as follows:

PART 555—ELECTRONIC OPERATIONS

Sec.

555.100 What does this part do?

Subpart A—Authority of Federal Savings Associations to Conduct Electronic Operations

555.200 How may I use or participate with others to use electronic means and facilities?

555.210 What precautions must I take?

Subpart B—Requirements Applicable to All Savings Associations

555.300 Must I inform OTS before I use electronic means or facilities?

555.310 How do I notify OTS?

Authority: 12 U.S.C. 1462a, 1463, 1464.

§ 555.100 What does this part do?

Subpart A of this part describes how a Federal savings association may provide products and services through electronic means and facilities. Subpart B of this part contains requirements applicable to all savings associations.

Subpart A—Authority of Federal Savings Associations to Conduct Electronic Operations

§ 555.200 How may I use or participate with others to use electronic means and facilities?

(a) **General.** A federal savings association ("you") may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices.

(b) **Other.** To optimize the use of your resources, you may market and sell, or participate with others to market and sell, electronic capacities and by-products to third-parties, if you acquired or developed these capacities and by-products in good faith as part of providing financial services.

§ 555.210 What precautions must I take?

If you use electronic means and facilities under this subpart, your management must:

(a) Identify, assess, and mitigate potential risks and establish prudent internal controls; and

(b) Implement security measures designed to ensure secure operations. Such measures must be adequate to:

(1) Prevent unauthorized access to your records and your customers' records;

(2) Prevent financial fraud through the use of electronic means or facilities; and

(3) Comply with applicable security devices requirements of part 568 of this chapter.

Subpart B—Requirements Applicable to All Savings Associations

§ 555.300 Must I inform OTS before I use electronic means or facilities?

(a) *General.* A savings association ("you") are not required to inform OTS before you use electronic means or facilities, except as provided in paragraphs (b) and (c) of this section. However, OTS encourages you to consult with your Regional Office before you engage in any activities using electronic means or facilities.

(b) *Activities requiring advance notice.* You must file a written notice as described in § 555.310 before you establish a transactional web site. A transactional web site is an Internet site that enables users to conduct financial transactions such as accessing an account, obtaining an account balance, transferring funds, processing bill payments, opening an account, applying for or obtaining a loan, or purchasing other authorized products or services.

(c) *Other procedures.* If the OTS Regional Office informs you of any supervisory or compliance concerns that may affect your use of electronic means or facilities, you must follow any procedures it imposes in writing.

§ 555.310 How do I notify OTS?

(a) *Notice requirement.* You must file a written notice with the appropriate Regional Office at least 30 days before you establish a transactional web site. The notice must do three things:

(1) Describe the transactional web site.

(2) Indicate the date the transactional web site will become operational.

(3) List a contact familiar with the deployment, operation, and security of the transactional web site.

(b) *Transition provision.* If you established a transactional web site after the date of your last regular onsite OTS safety and soundness examination but before January 1, 1999, you must file a notice describing your activity by February 1, 1999.

PART 559—SUBORDINATE ORGANIZATIONS

5. The authority citation for part 559 continues to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1828.

6. Section 559.3 is amended by revising paragraph (o)(2) to read as follows:

§ 559.3 What are the characteristics of, and what requirements apply to, subordinate organizations of federal savings associations?

* * * * *

(o) (2) A service corporation is subject to examination by OTS.

* * * * *

Dated: November 20, 1998.

By the Office of Thrift Supervision.

Ellen Seidman,

Director.

[FR Doc. 98-31746 Filed 11-27-98; 8:45 am]

BILLING CODE 6720-01-P

FEDERAL HOUSING FINANCE BOARD

12 CFR Parts 900, 922, 931, 932, 933, 934, and 941

[No. 98-47]

RIN 3069-AA55

Election of Federal Home Loan Bank Directors

AGENCY: Federal Housing Finance Board.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Board (Finance Board) is amending its regulations on the election of Federal Home Loan Bank (Bank) directors. The final rule devolves responsibility for determining the eligibility of elective directors and administering the election process from the Finance Board to the Banks. The final rule is part of the Finance Board's continuing effort to transfer management and governance responsibilities to the Banks and is consistent with the goals of the Regulatory Reinvention Initiative of the National Performance Review.

EFFECTIVE DATE: The Final Rule will become effective on December 30, 1998.

FOR FURTHER INFORMATION CONTACT:

Patricia L. Sweeney, Program Analyst, Compliance Assistance Division, Office of Policy, 202/408-2872, or Roy S. Turner, Jr., Attorney-Advisor, Office of General Counsel, 202/408-2512, Federal Housing Finance Board, 1777 F Street, NW, Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

Pursuant to section 7 of the Federal Home Loan Bank Act (Act), which sets forth the eligibility requirements and the procedures for electing and appointing Bank directors, and regulations promulgated thereunder, the Finance Board's predecessor, the former Federal Home Loan Bank Board (FHLBB), determined the eligibility of all Bank directors, administered the Bank director elections, and appointed public interest directors. See 12 U.S.C. 1427 (1989); 12 CFR part 522 (1989). After Congress abolished the FHLBB in 1989, see Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. 101-73, sec. 401, 103 Stat. 183 (Aug. 9, 1989), the Finance Board adopted the FHLBB regulations on Bank directors, without change. See 54 FR 36757 (Sept. 5, 1989), codified at 12 CFR part 932. The Finance Board subsequently amended its regulations to implement the changes FIRREA made to the eligibility requirements for, and to apply the conflicts of interest limitations FIRREA imposed on, Bank directors. 55 FR 1393 (Jan. 16, 1990); 56 FR 55205 (Oct. 25, 1991); see FIRREA, secs. 707, 710(b)(4), 103 Stat. 417, 418, codified at 12 U.S.C. 1427.

Since the enactment of FIRREA the Finance Board has determined the eligibility of all Bank directors, has administered the election of Bank directors, and has appointed public interest directors. As part of its policy of removing itself from the management and governance functions of the Banks and devolving those responsibilities to the Banks, the Finance Board is transferring the administration of the elections, including the responsibility to determine the eligibility of elective directors, to the Banks. This action does not affect the appointment of public interest directors for the Banks, who will continue to be appointed in the sole discretion of the Finance Board.

The final rule amends, redesignates, or eliminates various provisions of part 932, and includes conforming amendments to parts 900, 931, 933, 934, and 941. The Finance Board also is repealing the current conflict of interest and financial disclosure requirements established by part 922 of its regulations for the appointed members of the Board of Directors of the Finance Board. All of the changes are consistent with the goals of the Regulatory Reinvention Initiative of the National Performance Review. See E.O. 12861, 58 FR 48255 (Sept. 11, 1993).