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August 20, 2001

Ms. Jennifer J. Johnson, Secretary
Board of Governors of the
Federal Reserve System
20th and C Streets, N.W.
Washington, D.C. 20551

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance
Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Attn: Comments/OESRe: Study of Banking Regulations Regarding the Online Delivery of
Financial Services FRB Docket R-1105, OTS Docket 2001-41, FDIC #FR 01-17666

Dear Sir and Madam:

The American Bankers Association ("ABA") is pleased to respond to the requests for comment on the studies by the Federal Reserve Board ("Board"), the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC") of banking regulations regarding the online delivery of financial services. The results of these studies, required by the Gramm-Leach-Bliley Act ("GLB Act"),¹ are to be reported to Congress together with any appropriate recommendations for legislative or regulatory action. Many of ABA's members, from the largest to the smallest banks and savings associations, offer their services online. The ABA brings together all categories of banking institutions to best represent the interests of this rapidly changing industry. Its membership -- which includes community, regional and money center banks and holding companies, as well as savings

¹ Pub. L. 106-102.

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associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country.

Summary Conclusion

At the outset, ABA commends the agencies for undertaking these surveys. They will serve to highlight issues of concern in this rapidly evolving mode of distribution, and we hope the agencies will continue these reviews in the future.

ABA believes that at this time it is premature to recommend any specific changes in regulations, policies, guidance or any other aspect of supervision. The financial services industry has just begun to grapple with the many issues involved in providing products and services online. As banking organizations² and their customers begin to use new modes of delivery, new issues continually arise and numerous solutions continually are found. The pace of this change and experimentation is so rapid that issues presented in six months or a year may not even be on the industry's radar screen today.

Nonetheless, one underlying theme is becoming evident, even at this early stage. In all of their pronouncements, regulators must be careful not to make the industry responsible for circumstances over which customers—not banking organizations—have control. A number of examples were discussed at length in ABA's June 5, 2001 response to the Board's request for comments on the Interim/Final rule on uniform standards for electronic delivery of disclosures required by various consumer protection regulations.³ ABA's response to the Interim/Final rule ("ABA comment letter") is incorporated by reference in this letter.

² As used in this letter, the term "banking organizations" includes all types of commercial banks, bank and savings and loan holding companies, and savings associations.

³ On March 30, 2001 and April 4, 2001, the Board sought comments on the Interim/Final rule establishing uniform standards for electronic delivery of disclosures required by Regulation B (the Equal Opportunity Act), Regulation E (the Electronic Fund Transfer Act), Regulation M (the Consumer Leasing Act), Regulation Z (the Truth in Lending Act) and Regulation DD (the Truth in Savings Act). 66 Federal Register 17322-17341, 17779-17804 respectively. The examples in ABA's comment letter concerned the definition of electronic commerce, the "clear and conspicuous" standard, the timing and effective delivery requirement, retainability of disclosures, and advertising.



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Background

A primary purpose of the GLB Act was to modernize the financial services industry and to enable banking organizations to compete no matter how the industry evolved in the future. To this end, Congress directed the agencies in section 729 of the Act⁴ to (1) study how particular statutes, regulations or supervisory policies specifically affect the use by banking organizations and their customers of new technologies and (2) determine whether any revisions are needed to facilitate the online delivery of products and services. In their requests for public comment, the Board, FDIC and OTS have raised a number of issues that are addressed below.

Banking and Supervisory Regulations and Policies

The agencies have asked how particular regulations or supervisory policies unreasonably interfere with or burden banking organizations' use of online technologies, and whether the agencies should clarify or revise their rules to address particular risks of online banking.

"Practical information resources" versus guidance. As banking organizations continue to experiment with different kinds of technologies and delivery methods, and gauge customer reactions and expectations, the agencies could provide valuable assistance to the industry by means of practical information resources. An example would be FDIC's recent issuances on outsourcing.⁵

The key here would be to avoid characterizing such issuances as "guidance" which too often is treated by examiners the same as regulations and by the industry as "the only acceptable way to proceed." Rather, practical information resources could bring together lessons learned collectively in the industry, thus permitting banking organizations to learn what has worked and not worked without themselves making the same mistakes. This would particularly benefit community banks that do not have the resources available for experimentation that larger institutions do.

Hyperlinks. The agencies have noted that it is becoming more common for banks to use hyperlinks on the websites to provide their customers with access to third-party providers of both financial and nonfinancial retail products or services. The agencies are concerned that customers may become confused about whose website they have accessed and who is

⁴ 12 U.S.C. § 4801 note.

⁵ FDIC Bank Technology Bulletin, June 4, 2001.



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actually offering the product or service, and have asked whether they should develop rules or guidance setting forth standards for the use of hyperlinks.

ABA believes it is premature to consider setting standards when technology and customer preferences are so in flux. Accordingly, ABA does not support the development of any rules or guidance at this time. However, it would be beneficial for the agencies to develop practical information resources as described above for banking organizations to use. Of course, any such resources or future regulations or guidance should be certain not to make banking organizations responsible for devices used by or actions *solely* within the control of the customer.

Electronic appraisals. The agencies have asked whether they should modify their appraisal regulations to foster the use of electronic appraisals and if so, what controls should be used to insure document authenticity and integrity. The requirement for written appraisals applies to “federally related transactions” in excess of \$250,000. The degree of authentication should be commensurate with the level of risk involved in the transaction. It is appropriate that the Federal Financial Institutions Examinations Council’s recent guidance on authentication⁶ leaves it to the individual institution to determine that the level of authentication needed on any given transaction is “appropriate and ‘commercially reasonable’ in light of the reasonably foreseeable risks in that application.”⁷ However, as above, it would be beneficial for the agencies to develop practical information resources for banking organizations to use.

Geography and Time Considerations

Geography. The agencies have asked whether rules that are predicated on conceptions of geography should be revised to accommodate the provision of banking products and services online. Again, because of the rapid pace of experimentation and technological change, ABA believes that changes are not warranted at this time.

However, when such changes are considered, the agencies must exercise caution because location designations may have implications beyond banking law, such as in taxation of Internet commerce. The amendment proposed by the Office of the Comptroller of the Currency⁸ demonstrates such caution. The proposal is framed in the negative—rather than trying to redefine “location” for Internet operations, it merely states that a bank is not

⁶ Authentication in an Electronic Banking Environment, July 30, 2001.

⁷ Id. at 3.

⁸ 66 Federal Register 34855 at 34860, July 2, 2001.



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located in a state just because its products and services can be accessed by state citizens through the Internet *and* because it has a server located there. This could be a formula for dealing with specific issues without trying to develop a definition of location in cyberspace to cover all situations.

Time Considerations. With respect to regulations, such as Regulation CC, that use terms such as “banking day,” ABA believes that, at least for the present time, the rules should *not* differentiate between accounts opened traditionally and accounts opened online. This area is evolving rapidly as new and existing customers become more comfortable using the Internet for their banking activities.

At present, customers may use all available means to access information about their accounts or to conduct transactions. ABA believes it would be unwise to establish different time requirements based on the particular mode used for any single transaction because it is not at all clear that banks’ information systems could currently track the differences. Nor should there be any consideration of establishing a separate set of rules for accounts that are opened online and conduct all activities online. Moreover, ABA is unaware of customers requesting a more rapid timing requirement for online accounts. Rather, it is likely that customers assume that the rules that apply in the paper world are equally applicable to online banking.

Banks’ computer systems may be capable of differentiating timing requirements on a transaction-by-transaction basis at some future time. However, at present, neither the business case nor technological capabilities warrant any change.

Similarly, customers may access up-to-date information online about their account activity at their convenience at any hour of the day. As discussed more fully in ABA’s comment letter, such transaction histories should not be deemed to be “periodic statements” under Regulations E, Z and DD. To do so would most likely discourage banking organizations from offering their customers this useful service. Moreover, ABA is not aware that customers are having any difficulty distinguishing periodic statements from transaction histories.

Electronic Signatures in Global and National Commerce Act

Although the Electronic Signatures in Global and National Commerce Act (“E-Sign Act”) clarified a number of issues with respect to the validity of electronic signatures, several key legal issues remain to be resolved with respect to the impact of the Act on mechanisms for



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providing electronically the disclosures required by the various consumer protection statutes.

The agencies have asked whether it would be appropriate to develop regulations or guidance to help banking organizations comply. ABA feels strongly that a key factor in the lack of progress implementing digital signatures is a result of the complexity of the consumer consent provisions. As more experience is gained with online banking, ABA would like to work the agencies to foster development and use of these technologies by identifying classes of transactions that might be exempted from those provisions, keeping in mind appropriate levels of consumer protection.

For now, however, ABA believes it is simply too early for guidance or rules. This is a time of significant experimentation by both banking organizations and their customers as they try out various means of banking online, and the pace of change is dramatic. Under these circumstances, even guidance—however well intended—may be construed by banking organizations as limiting their options to experiment with new products and services and new technologies.

Electronic disclosures. The Board's Interim/Final rules require that electronic disclosures or an alert about such disclosures be sent to a public e-mail address. In addition, the rules require financial institutions to take "reasonable steps" to attempt redelivery using information in their files when an e-mail is returned as undeliverable, including sending the disclosures to a different e-mail address or postal address. As discussed in depth in ABA's comment letter, (attached) ABA strongly disagrees with both requirements. Requiring use of public e-mail address and requiring potential paper disclosures is not necessarily in the consumer's best interest, poses operational problems, and will stifle innovation and experimentation.

Many consumers do not wish to use a public e-mail address for privacy, security, convenience, and personal reasons. We are also concerned about the impact on on-line banking outreach programs. These programs allow those without personal computers to have access to online banking through special programs through mobile facilities, bank lobby computers, grocery store computers, and web-enabled ATMs. An e-mail address requirement will virtually eliminate many of these programs intended to bring technology to those with less access.

In addition, consumers frequently change e-mail addresses. Maintaining complete and updated information is very costly and, as a practical matter, impossible to achieve in even the vast majority of cases.

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The requirement to use another e-mail address or a postal address if the e-mail is undeliverable is especially onerous and presents significant operational challenges and costs. For example, home banking operations are separate from the operations that produce paper statements. To prompt production of a paper statement for a home banking account would require expensive and manual intervention each time an e-mail is returned as undeliverable. The alternative is to develop a new "bridge" to connect to the paper statement operations, an expensive proposition. At this time, the costs of either solution would most certainly outweigh any savings from electronic access, chilling development and expansion of electronic banking.

Many financial institutions, relying on existing rules, have developed programs that do not provide for e-mail delivery of account information or paper statements and we are not aware of any complaints about these accounts. These institutions will be at a competitive disadvantage as they will have to redesign their products and systems at significant expense. New entrants will also encounter higher costs. Profits on online accounts are already very marginal at best: increasing the cost by requiring new systems and costly maintenance will negatively impact online banking expansion by increasing their costs and lowering their availability.

ABA is currently engaged in discussions with Board staff concerning the redelivery requirement. We are optimistic that a solution acceptable to all parties will be produced.

Differing Legal Requirements

The agencies have asked whether there are any inconsistencies between federal and state laws or regulations that impede the use of online banking. The E-Sign Act, as the key federal law applicable to electronic signatures, may conflict with the Uniform Electronic Transaction Act ("UETA"), which has currently been enacted by twenty-seven states. However, each state is free to adopt modifications to its version of UETA, and there are numerous differences between the state-enacted versions and the model act. As a result, there is a significant amount of controversy as to when and to what extent the E-Sign Act preempts each state's UETA.

In addition, the Board has exempted certain consumer protection disclosures from the E-Sign Act's preemption provisions. However, state laws may continue to require that the consumer's consent be obtained. In such cases, the extent to which state laws are preempted is unclear.



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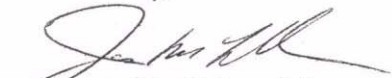
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Conclusion

In conclusion, ABA believes that at this time it is premature to recommend any changes in regulations, policies, guidance or any other aspect of supervision. The financial services industry has just begun to grapple with the many issues involved in providing products and services online, and changes are occurring rapidly. ABA also urges the regulators to be mindful in all of their pronouncements not to make the industry responsible for circumstances over which customers—not banking organizations—have control.

ABA looks forward to continuing to work with the agencies as new technologies and online banking evolve. If you have any questions, please do not hesitate to contact me.

Sincerely,



James D. McLaughlin

Enclosure