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August 31, 2001

Office of the Comptroller of the Currency  
Public Information Room  
250 E Street, S.W.  
Mail Stop 1-5  
Washington, D.C. 20219  
Attention: Docket No. 01-15

Re: Notice of Proposed Rulemaking - Electronic Banking  
66 Federal Register 34855, July 2, 2001

Dear Sir or Madam:

The American Bankers Association ("ABA") is responding to the request for comments by the Office of the Comptroller of the Currency ("OCC") on its proposed amendments to facilitate national banks' ability to conduct business using electronic technologies. 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 associations, trust companies and savings banks -- makes ABA the largest banking trade association in the country. Many of our members are leaders in innovative technologies and services provided electronically; the vast majority of our members have informational websites and are exploring the business case for offering additional services electronically.

At the outset, ABA commends OCC for its many forward-looking interpretations of the "business of banking" under the National Bank Act and its regulations, and for its many efforts to help national banks remain competitive with nonbank financial services providers. ABA supports the proposed revisions because they reflect national banks' use of new technologies and will provide clearer and simpler guidance for national banks providing products and services electronically.

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## Background

OCC has long supported national banks' efforts to use new technologies to deliver their products and services. To ensure that such activities are conducted in a safe and sound manner, OCC has provided guidance on the risks of Internet Banking and has approved a variety of individual applications that involve the use of innovative electronic technology. To further facilitate the provision and marketing of banking services through electronic distribution channels, on February 2, 2000, OCC published an advance notice of proposed rulemaking ("ANPR") seeking input on, among other things, ways in which its regulations could be revised to remove impediments to electronic banking.<sup>1</sup>

In response to the comments received on the ANPR, OCC published this proposal to amend its regulations to incorporate the use by national banks of new delivery technologies and to provide clearer guidance for national bank involvement in such activities. For clarity, OCC grouped the revisions into three categories: national banks powers, location with respect to conducting electronic activities, and safety and soundness requirements for shared electronic "space."

## Discussion

### **1. National Bank Powers**

The proposal would codify OCC's long-held position that national banks are authorized to engage in finder activities as part of the business of banking. It would provide examples to illustrate the scope of finder activities as envisioned by OCC. ABA supports this change.

The proposal would also create a new Subpart E to Part 7 to collect regulations pertaining to electronic activities. Subpart E sets out the scope of OCC's authority to regulate electronic banking activities and enumerates the factors the agency uses to determine whether a particular electronic activity is part of or incidental to the business of banking. As part of this re-grouping effort, the proposal would:

- move OCC's so-called "transparency" and "excess electronic capacity" doctrines from 12 C.F.R. 1019 to Subpart E and add examples of permissible activities;
- codify OCC's authorization of activities based on "composite authority;"

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<sup>1</sup> 65 Federal Register 4895.





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- codify OCC's position that national banks are authorized to act as certification authorities for issuing digital certificates;
- codify OCC's interpretations that national banks may collect, process, transcribe, analyze and store banking financial and economic data for themselves and their customers; and
- codify OCC's interpretations with respect to correspondent banking.

ABA believes that collecting the electronic banking provisions in a single subpart will enable banks to more readily locate the necessary authorities and examples when determining whether to engage in an electronic banking activity. ABA supports this change.

Digital certificates. With respect to the extent to which national banks are issuing digital signature certificates or digital authority or financial capacity certificates, this is an area that, while evolving rapidly, remains in its infancy. At this time, it is premature to make any conjectures about the extent to which banks may participate in this technology in the future or any risks that such participation may entail. For your information, we have attached a copy of our response to the requests for comments from the Federal Deposit Insurance Corporation, the Federal Reserve Board (the "Board"), and the Office of Thrift Supervision on their online banking studies being conducted pursuant to section 729 of the Gramm-Leach-Bliley Act.<sup>2</sup>

Nonfinancial data processing. With respect to promulgating a safe harbor for banks to provide nonfinancial data processing services as incidental to their financial data processing services, ABA would strongly support such a safe harbor. ABA believes that processing nonfinancial data is functionally and operationally no different than processing financial, economic and banking data. More and more, data processing services inextricably intertwine purely financial and other activities to the point that drawing a line between the two becomes nearly impossible. For example, electronic data interchange includes not only financial terms, but also inventory information, shipping information, *etc.* Under the Board's Regulation Y, any bank holding company may currently derive up to 30 percent of its data processing revenues from processing nonfinancial data by bank holding companies. At present, the Board is considering whether to raise that limit to 49 percent.<sup>3</sup> At minimum, ABA urges OCC to track Regulation Y in its current form.

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<sup>2</sup> Pub. L. 106-102.

<sup>3</sup> Proposed Amendments to Regulation Y - Data Processing  
65 Federal Register 80384, December 21, 2000.



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## 2. Location

ABA believes that electronic banking will have a significant impact on concepts of "location" for various purposes. When such changes are considered, ABA urges the agencies to exercise caution because location designations may have implications beyond banking law, such as in taxation of Internet commerce. OCC's proposed amendment 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 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.

## 3. Shared Electronic Space

OCC's proposal would extend to shared or co-branded space on websites the same principles that currently apply to leasing space, *etc.* National banks would be required to take reasonable steps so that customers can distinguish between banks' products or services and those of affiliated or nonaffiliated parties. The proposal does not mandate a specific type of disclosure, but rather requires only that they be conspicuous, simple and readily understandable. ABA believes that disclosure requirements of this type are appropriate in electronic banking because it is critical that banks are not inadvertently made responsible for situations that are in the sole control of the consumer. See ABA's attached comment letter for a fuller discussion of this issue.

## Conclusion

In conclusion, ABA supports OCC's proposal because it will provide clearer and simpler guidance for national banks seeking to provide products and services electronically. ABA looks forward to working with OCC as these new technologies evolve. If you have any questions, please do not hesitate to call me.

Sincerely,

James D. McLaughlin

Attachment