



OCC 2000-5

Subject: Electronic Banking
Date: March 2, 2000

**To: Chief Executive Officers of All National
Banks, Department and Division Heads, and All
Examining Personnel**

Description: Advance Notice of Proposed Rulemaking

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2000. The comment period for the ANPR closes on April 3, 2000.

The ANPR builds on a number of steps the OCC has already taken in this important area to facilitate bank use of technology and to improve its supervision of new banking activities. The ANPR references significant OCC opinions that have enabled national banks to utilize electronic technologies more broadly. For example, the OCC has already issued opinions that permit national banks to operate "virtual malls" i.e., bank-hosted collections of Web pages with links to third party vendors' Web sites organized as to product type and to host commercially enabled Web sites for small retailers. The ANPR also describes the recent "Internet Banking" booklet of the Comptroller's Handbook, which addresses the risks presented by Internet banking activities.

The ANPR invites public comment on a wide range of issues intended to facilitate bank use of emerging technologies. Specifically, the ANPR asks:

How should the OCC adapt its regulations or supervisory policies to facilitate national banks' use of electronic technology, consistent with safety and soundness?

What statutes administered by the OCC could be interpreted more flexibly to accommodate new technologies?

How can the OCC enhance the operational flexibility of banks engaging in electronic banking, consistent with safety and soundness?

The OCC expects to issue a notice of proposed rulemaking, proposing changes to the OCC's regulations to aid national bank involvement in electronic banking activities, after comments submitted in response to this ANPR have been considered.

For further information, contact Stuart Feldstein, assistant director, or Karl Betz, attorney, Legislative and Regulatory Activities Division, at (202) 874-5090; James Gillespie, assistant chief counsel, at (202) 874-5200; or Clifford Wilke, director, Bank Technology, at (202) 874-5920.

Julie L. Williams
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Related Links

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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) sites \1\ present new opportunities and challenges for national banks.

\1\ As of mid-September 1999, 541 national banks had transactional Web sites.

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\

\2\ This Handbook and others in the Comptroller's Handbook series are available on the OCC's Web site at www.occ.treas.gov.

\3\ OCC 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.

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

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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\

\4\ OCC Interpretive Letter No. 742, [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) para. 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) para. 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) para. 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. 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) para. 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) para. 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) para.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).

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 comment or issue additional supervisory guidance.\7\

 \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 Sec. 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).

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\

 \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.

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 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

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

\9\ E.g., 12 U.S.C. 24 (Eighth) (charitable contributions), 29 (real estate holding period), 72 (directors' residency requirement), 75 (impact of legal holiday on shareholders' meeting), 85 (allowable interest rate), 90 (pledging security for deposits of state funds),

92 (insurance sales), 92a (fiduciary powers), 95 (state-declared bank holidays), 182 (publication of notice of voluntary liquidation), 214a & 214c (national bank conversions and mergers into state banks) & 215a (national bank and state bank mergers into national banks); 28 U.S.C. 1348 (citizenship of state for federal court jurisdiction).

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 Sec. 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 Sec. 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\

\10\ The 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).

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.

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