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900 Nineteenth St. NW, Ste. 400

Washington, DC 20006

TEL: (202) 857-3100

FAX: (202) 296-8716

E-MAIL: info@acbankers.org

<http://www.acbankers.org>



August 10, 2001

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, DC 20552

Re: Study of Banking Regulations Regarding the Online Delivery of Financial Services
66 FR 31186 (June 11, 2001) Docket No. 2001-41

Dear Sir or Madam:

America's Community Bankers (ACB)¹ welcomes the opportunity to respond to the request for comment on the study of banking regulations relating to the online delivery of financial services issued by the Office of Thrift Supervision (OTS)². As required by the Gramm-Leach-Bliley Act (GLB),³ the OTS and the other federal banking regulators are studying their respective regulations governing the online delivery of financial services. GLB requires the agencies to report back to Congress with the findings of the studies and recommendations for appropriate legislative or regulatory action.

ACB Position

ACB commends the OTS for seeking input in its review of regulations and policies relating to the online delivery of financial services. Current OTS regulations authorize savings associations to engage in a wide range of activities through electronic means. While the current regulation is very flexible and provides opportunities for savings associations to engage in an array of services, we reiterate our prior comments that a very broad regulation coupled with interpretations and guidance is preferable to specific requirements. Savings associations must be able to compete with unregulated financial services providers while operating in a safe and sound manner.

Over the past several years the OTS and the other banking regulators have issued a number of Advisory Letters, Interpretations, and Bulletins relating to the use of technology by financial institutions. These documents provide helpful guidance, without imposing strict, inflexible regulatory requirements. We suggest that the OTS continue to use this approach as the primary mechanism for communicating guidance relating to the delivery of electronic financial services.

¹ ACB represents the nation's community banks of all charter types and sizes. ACB members pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities.

² 66 Fed. Reg. 31186-31189 (June 11, 2001).

³ P.L. 106-102, Title VII, Section 729.

We believe that the development of electronic delivery channels for financial services and products will continue to develop at a rapid pace and in unanticipated directions. This pace of change continues to be driven by four broad factors: (1) competition among insured institutions and their non-insured competitors; (2) advances in technology; (3) consumer demand for convenience and lower costs; and (4) financial institution management's demand for greater cost-effectiveness. Because of this rapid pace of change, ACB urges the OTS to apply two fundamental principles in contemplating regulations or supervisory policies in the area of electronic banking:

- The public and insured depository institutions will be best served during this period of rapid change, if statutory and regulatory restrictions are kept to a minimum. New services should be allowed to develop within an overall framework of consumer protection, safety and soundness statutes/regulations, and commercial law. Prematurely imposing overly restrictive operational standards could impede the development of improved financial services.
- It is important in a rapidly changing financial services marketplace that financial institutions be permitted to operate within a framework that permits them to compete effectively, not only with other regulated financial institutions, but with competing less regulated non-bank firms that are offering financial and related services to small businesses and consumers.

ACB Comments and Concerns

The OTS has requested comment on a variety of specific issues relating to the electronic delivery of financial products and services. The following are comments on some of the questions.

1. *Mitigating Burdens: Are there any regulations or supervisory policies that unreasonably interfere with the use of online technologies?*

ACB understands that the cost to savings associations of the ability to engage in activities through electronic means is not just the development of the technology, but the association also has an obligation to ensure that the activity is undertaken in a safe and sound manner and that customers are protected. Whatever product or service is offered using electronic technology must be done in a manner that does not cause undue risk to the association or to the customer. Since the enactment of GLB, the agencies have issued interagency guidance on Standards for Safeguarding Customer Information. This guidance became effective on July 1, 2001 and we suggest that the OTS and the other agencies use this framework to work with savings associations to ensure that the institution, the agency and customers each understand the risks of doing business through electronic means.

We believe that the implementation of the guidelines by savings associations and their use by examiners should be frequently reviewed to ensure that they appropriately measure the risks of the associations. If, as a result of a better understanding of technology and the risks to the institution, the guidelines need to be revised, we urge the agencies to revise them as necessary.

2. *Internet Link Arrangements: Should the OTS create a regulation or other supervisory guidance setting forth standards in connection with hypertext links?*

OTS expressed concern over whether hypertext links that connect a savings association's customer on its Internet site to another entity's web site may create customer confusion over which products are offered by a federally insured institution. Such weblinking relationships may include the display of the savings association's logo and the preservation of the "look and feel" of the savings association's site, or may involve a completely separate site controlled by a third party. While ACB acknowledges the concern of the OTS that such linking could be confusing to the customer, we strongly urge OTS to refrain from promulgating any regulation in this area.

The online financial marketplace is undergoing an exciting period of growth and development. Establishing new regulations in this dynamic environment could have the unintended consequences of impeding the growth of online financial services, and benefiting less regulated entities that would not be subject to such regulations. The Office of the Comptroller of the Currency recently issued an advisory on weblinking⁴ outlining the risks associated with weblinking and providing some advice on how to mitigate this risk. Such guidance can provide useful information to savings associations without imposing unintended restrictions on their activities. ACB recommends that the OTS issue guidance to communicate any concerns the agency has.

3. *Location Consideration: Should the OTS address how "location" for purposes of any statute or regulation applies in the context of activities on the Internet?*

As a general matter, many of the statutes that are administered by the OTS and the other federal banking agencies will have to be interpreted more flexibly to take the advances in technology into account. The development of the Internet and the ability of insured institutions to do business, provide services, and engage in activities over a broad geographic area raises a number of issues, including activities restriction and Community Reinvestment Act concerns. Defining "location" too narrowly would unnecessarily restrict the ability of savings associations to determine how best to use the Internet to serve customers and compete with unregulated service providers. We urge the OTS to develop a uniform approach to define "location" that will permit savings associations enough flexibility to engage in activities and will not restrict where they can do business and with whom. We note that the OTS and the other federal banking agencies are looking at this issue in the context of the advance notice of proposed rulemaking on possible reform of the regulation that implements the Community Reinvestment Act. There are number of other areas that should be reviewed for consistency, including management interlocks and branching.

ACB believes that traditional institutions that begin to do some business using the Internet generally should be treated the same as institutions that have Internet-only operations. The 1995 revisions to the regulations implementing the Community Reinvestment Act⁵ may provide a framework for addressing the challenges of location specific regulations in today's banking environment. One of the options that became available to insured institutions at that time was the

⁴ Office of the Comptroller of the Currency, OCC Bulletin 2001-31 (July 3, 2001).

⁵ 60 Fed. Reg. 22155-22223 (May 4, 1995).

ability to develop a strategic plan developed with the input of community organizations and others. The appropriate regulatory agency would review and approve the plan and for the duration of the effectiveness of the plan, if the institution met the goals established, it would receive a satisfactory rating. This strategic plan option was developed as a reflection of the number of institutions that had begun to do business in novel and innovative ways; however, the ability to use the strategic plan alternative has been diminished due to the difficulty in getting these plans adopted. A similar strategic plan based approach for other operations may provide a flexible alternative for other location specific regulations.

4. *Appraisals: Does the requirement for written appraisals⁶ impair or impede online lending operations?*

Federal banking regulations specifically require a written appraisal in conjunction with certain real estate related transactions. This requirement effectively prevents the use of collateral valuation models of the most common automated underwriting systems, significantly impeding the efficiency of online lending operations. A similar regulatory requirement for a written appraisal does not exist for uninsured mortgage originators. The result creates a competitive inequity whereby uninsured mortgage originators companies can establish more streamlined and efficient mortgage processes than is possible for the mortgage operation of an insured depository. This results in cost savings for the uninsured mortgage originator that can be passed on to the consumer.

ACB acknowledges the importance of the appraisal process, and the challenges associated with documenting the authenticity and credibility of real property valuations in light of new technology. In order to address this situation, ACB suggests that the banking agencies establish an exception to the "written appraisal" requirement for loans that have been processed using an automated underwriting system selected pursuant to an institution's required board approved real estate lending standards⁷. Automated underwriting systems use sophisticated Automated Valuation Models (AVMs) to assess the market value of properties processed through the underwriting systems. These AVMs analyze each property based on its history, market value comparable sales, regional indicators and other factors. A separate physical report is not produced, nor is a dollar value assigned to the collateral. Rather the purchase price or stated value is accepted, if the analysis finds the represented value consistent with the findings. These systems are emerging as industry standards that have increased the efficiency of the mortgage origination process and significantly reduced lending costs. By amending regulations on written appraisal requirements, regulators can help improve the efficiency of the mortgage process, and create a level playing field for insured depositories and non-bank mortgage originators.

A related issue is the \$250,000 regulatory threshold for loans requiring the use of state licensed or certified appraisals. The current regulation waives the requirement for an appraisal performed by a state licensed or certified appraiser on most real estate transactions \$250,000 or less. This exception threshold is less than the current Fannie Mae and Freddie Mac (GSE) loan purchase limit of \$275,000 (for most parts of the country) resulting in a range of loans between the

⁶ 12 CFR Part 564.

⁷ 12 CFR Part 560.101.

regulatory threshold of \$250,000 and the conforming loan limit for which the use of the efficiencies provided by automated underwriting and valuation technology may be unavailable. When the \$250,000 threshold was established through regulation in 1994⁸, the prevailing conforming loan limit was \$203,150. The current loan limit reflects real estate market trends and ACB strongly believes that the appraisal requirement threshold should be increased. Rather than issue periodic revisions to this threshold that will require compliance with the procedures of the Administrative Procedure Act, ACB recommends that the regulations be amended to provide that the \$250,000 appraisal threshold be changed to current conforming GSE loan limit.

5. *Electronic Signatures: What issues are savings associations facing as a result of the Electronic Signatures in Global and National Commerce Act (E-Sign Act⁹) and how should the OTS help address these issues?*

The OTS seeks comment on the challenges savings associations are facing in implementing the E-Sign Act. The electronic signature marketplace is continuing to develop. It is difficult to predict its eventual structure and what issues will emerge. Institutions are just now beginning to grapple with issues such as how consent is received, how individuals are authenticated, and what to do when an email is sent to a consumer that comes back to the savings association as undeliverable. ACB recommends that OTS allow the E-Signature environment to further develop before issuing any regulation or supervisory guidance.

6. *Differing Legal Requirements: Are there any inconsistencies between Federal and State laws or regulations that impede the electronic provision or use of financial products and services?*

OTS recognizes that the variety of federal, state, and foreign laws that govern the use of electronic technologies present a challenge to financial institutions operating in multiple jurisdictions. Of significant concern to ACB is the risk that a conflicting patchwork of state and federal privacy laws could significantly impede a financial institution's ability to serve its customers in multiple jurisdictions. Many states are actively considering legislation that would impose significantly stricter privacy requirements on financial institutions than imposed by the new federal requirements under the GLBA¹⁰. For example, California is close to passing the most restrictive privacy law in the country that would require financial institutions to receive affirmative consent in order to share consumer information with affiliates. Such a law would place a huge burden on financial institutions that are already working tirelessly to comply with new federal privacy law requirements. To whatever extent practicable, ACB urges the OTS to advocate that both Congress and state governments should refrain from enacting new privacy laws until the federal protections can be fully implemented and evaluated.

Conclusion

ACB appreciates the opportunity to provide input into the OTS on its ongoing study of regulations governing the online activities of savings associations. As further developments occur, it is

⁸ 59 Fed. Reg. 29482-29503 (June 7, 1994).

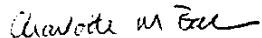
⁹ P.L. 106-229.

¹⁰ P.L. 106-102, Title V.

critically important that savings associations have the maximum flexibility possible to serve customers and compete with unregulated financial services providers.

If you have any questions, please contact Rob Drozdowski at (202) 857-3148, or via email at rdrozdowski@acbankers.org.

Sincerely,



Charlotte M. Bahin
Director of Regulatory Affairs and
Senior Regulatory Counsel