Proposed Rules

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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 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

[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).

[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]

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

[10] Pub. L. 106–2299, 114 Stat. 464 (June 30, 2000).

[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 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.

[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).

[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.

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 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 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

[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.)

[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 (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 key [34] 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] OCC Conditional Approval No. 361 (Mar. 3, 2000).

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 (CCH) ¶ 83,625 (June 28, 1885); unpublished letter from William Glidden (June 6, 1986); unpublished letter from Stephen Brown (Dec. 20, 1989); and OCC Conditional Approval No. 361 (Mar. 3, 2000).

[32] *See* OCC Interpretive Letter No. 888 (Mar.14, 2000).

[33] 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).

[34] 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.

[35] *See* OCC Conditional Approval No. 267 (Jan. 12, 1998).

[36] *See, e.g.,* OCC Conditional Approval No. 289 (Oct. 2, 1998); OCC Interpretative 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). However, the preamble to the proposal to simplify the rule stated that ''the Office wishes to make clear that it does not intend to indicate any change in its position regarding the permissibility of data processing services.'' *Id.* Since 1982, the risk of confusion and misinterpretation of a regulation has significantly diminished due to, among other reasons, the substantial number of interpretive letters the OCC has issued on permissible data processing that can provide a context for understanding the proposed rule if it is adopted.

[37] *See, e.g.,* OCC Conditional Approval No. 369 (Feb. 25, 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 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]
- 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

[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* [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).

[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.

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

[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.

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.

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:

(1) Acting as an electronic finder by:

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

(ii) 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;

(iii) 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;

(iv) 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 presentment 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. Shilts, 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), (RShilts@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]

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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