

1 **DEPARTMENT OF THE TREASURY**

2 **Office of Thrift Supervision**

3 **12 CFR Part 555**

4 **[No. 98-77]**

5 **RIN 1550-AB00**

6 **Electronic Operations**

7
8 **AGENCY:** Office of Thrift Supervision, Treasury.

9 **ACTION:** Supplemental notice of proposed rulemaking.

10 **SUMMARY:** On October 3, 1997, the Office of Thrift Supervision (OTS) published a
11 notice of proposed rulemaking (NPR) to streamline and update its electronic operations
12 regulations. Today's supplemental notice of proposed rulemaking (Supplemental NPR)
13 seeks comment on additional proposed rules that would require each savings association
14 to notify OTS before it establishes a transactional web site. Savings associations that
15 present supervisory or compliance concerns may be subject to additional procedural
16 requirements.

17 **DATES:** Comments must be received on or before [Insert 30 days from date of
18 publication].

19 **ADDRESSES:** Send comments to Manager, Dissemination Branch, Records
20 Management and Information Policy, Office of Thrift Supervision, 1700 G Street,
21 NW., Washington DC 20552; Attention Docket No. 98-77. These submissions may be

1 hand-delivered to 1700 G Street, NW., from 9:00 a.m. to 5:00 p.m. on business days;
2 they may be sent by facsimile transmission to FAX Number (202) 906-7555 or by e-
3 mail public.info@ots.treas.gov. Those commenting by e-mail should include their
4 name and telephone number. Comments will be available for inspection at 1700 G
5 Street, NW., from 9:00 a.m. until 4:00 p.m. on business days.

6 **FOR FURTHER INFORMATION CONTACT:** Richard Bennett, Counsel (Banking
7 and Finance), (202) 906-7409; Karen A. Osterloh, Assistant Chief Counsel, (202) 906-
8 6639; Paul D. Glenn, Special Counsel, Chief Counsel's Office, (202) 906-6203; Paul J.
9 Robin, Program Analyst, Compliance Policy, (202) 906-6648; or Paul R. Reymann,
10 Policy Analyst, Supervision Policy, (202) 906-5645, Office of Thrift Supervision, 1700
11 G Street NW., Washington, DC 20552.

12

13 **SUPPLEMENTARY INFORMATION:**

14 **I. Background**

15 On October 3, 1997, OTS published a notice of proposed rulemaking (NPR) to
16 streamline and update its regulations relating to electronic operations.¹ The NPR
17 followed an April 2, 1997 advance notice of proposed rulemaking (ANPR) seeking
18 comment on all aspects of banking affected by electronic operations.²

¹ 62 FR 51817 (October 3, 1997).

² 62 FR 15626 (April 2, 1997).

1 The ANPR was designed to elicit information to enhance OTS's understanding
2 of new electronic banking technologies and the impact of these technologies on the
3 regulation of Federal savings associations.³ The ANPR asked a series of questions
4 concerning the types of restrictions or requirements OTS should impose on electronic
5 operations, including Internet banking.⁴

6
7 Based on the information obtained through the ANPR, the NPR proposed to
8 amend OTS's electronic operations regulations to address advances in technology and
9 to permit prudent innovation through the use of emerging technology by Federal
10 savings associations. The NPR noted that OTS would continue to gain additional
11 experience with electronic technology and might issue more specific guidance
12 regulating particular elements of electronic operations.⁵

13
14 The comment period on the NPR closed on December 2, 1997. OTS received
15 nine comment letters on the NPR from five Federal savings associations, two trade
16 associations, and two technology firms. One commenter argued that OTS should
17 establish a procedure to review and approve new products or services, in order to

³ See 62 FR at 15631 and 15633.

⁴ See 62 FR at 15633.

⁵ 62 FR at 51820.

1 protect the safety and soundness of the industry. Another commenter urged OTS not to
2 require a Federal savings association to obtain the OTS's prior approval before
3 adopting new technologies "unless absolutely necessary to ensure industry-wide safety
4 and soundness."

5

6 After considering these comments and reflecting on its supervisory experience
7 and knowledge, OTS believes that safety and soundness and compliance considerations
8 currently warrant the agency receiving advance notice of industry use of one developing
9 technology – transactional web sites. Such web sites allow savings association
10 customers to use the Internet to conduct a wide variety of financial transactions. They
11 may, however, also pose particular security, compliance, and privacy risks, as
12 discussed more fully in Part II.A., below. The notice requirement will enable OTS to
13 better assist regulated institutions to deal with these risks. The same considerations
14 require that the Regional Offices have discretion to impose additional requirements in
15 appropriate circumstances.

16

17 Because the safety and soundness and compliance considerations are similar for
18 state-chartered and federally-chartered institutions, this Supplemental NPR proposes to
19 require every savings association to notify OTS before it establishes a transactional web
20 site and comply with additional requirements that the Regional Offices may impose in

1 appropriate circumstances. Since the ANPR and NPR did not specifically discuss these
2 requirements and the ANPR and NPR applied only to Federal savings associations,
3 OTS has concluded that additional public comment would assist in the promulgation of
4 a final rule.

5

6 This Supplemental NPR supplements, rather than supersedes the NPR. OTS
7 intends to promulgate one final rule implementing the NPR and the Supplemental NPR.
8 However, rather than codifying the final rule in part 545 as OTS had proposed, OTS is
9 proposing to codify the final rule in a new part 555. The reason is that part 545 only
10 applies to Federal savings associations while the new requirements proposed would
11 apply to all savings associations. When OTS publishes the final rule, it intends to take
12 the provisions designated as subpart B to part 545 in the NPR and redesignate them, in
13 final form, as subpart A to the new part 555 proposed today. As explained in proposed
14 § 555.100, subpart A to part 555 would apply only to Federal savings associations,
15 whereas subpart B to part 555 would apply to all savings associations.

16

17 **II. Supplemental Proposed Provisions**

18

19 A. Must I inform OTS before I use electronic means or facilities? (Proposed

20 § 555.300

1 Proposed § 555.300(a) sets forth the general rule that a savings association does
2 not have to inform OTS in advance when it plans to use electronic means and facilities
3 except under two circumstances. OTS encourages a savings association to consult with
4 the appropriate Regional Office before it begins activities using electronic means or
5 facilities, even where not required to inform OTS in advance. As with other activities,
6 OTS will continue to rely on its existing supervisory examinations and application
7 processes to ensure the savings association's ability to engage in new activities in a
8 safe, sound, secure, and compliant manner.⁶

9
10 The proposed rule contains two exceptions to this general rule. First, proposed
11 § 555.300(b) would require every savings association to notify OTS before it
12 establishes a transactional web site. OTS proposes to define a "transactional web site"
13 for purposes of this rule as an Internet site that enables users to conduct financial
14 transactions such as accessing an account, obtaining an account balance, transferring
15 funds, processing bill payments, opening an account, applying for or obtaining a loan,
16 or purchasing other products or services.

⁶ OTS reviews the safety and soundness of new activities, the appropriateness of the internal controls and security precautions, and compliance with applicable laws and regulations on a case-by-case and institution-by-institution basis in connection with applications and through the examination process. For institutions subject to an application process (e.g., *de novo* applications), these initial safety and soundness and compliance determinations will be made in the application review. After application approval or where no application is required, safety and soundness and compliance will generally be assessed as a part of the examination process. This process will review and assess the institution's identification of risks of the activity, the steps it has taken to mitigate these risks, the testing it has undertaken to ensure safety and soundness, and its compliance monitoring process.

1 OTS believes that using a web site to conduct such activities raises safety and
2 soundness and compliance concerns not present when the activities are conducted
3 through more established technologies. OTS has been, and continues to be, concerned
4 with the adequacy of firewalls to prevent hackers from breaking into an association's
5 computer systems and thereby jeopardizing the association's security.⁷ However, OTS
6 is also concerned about other operational and compliance risks presented by Internet
7 banking and intends to increase its monitoring of web sites for compliance with
8 disclosure laws and regulations. Additionally, OTS is concerned about protecting the
9 privacy of individuals submitting information (or about whom information has been

⁷ Statistics from the United States Senate's Permanent Investigations Subcommittee indicate that banking, insurance and securities firms collectively lost more than \$800 million in 1996 to computer crimes. This figure is expected to grow as more financial services firms conduct business over the Internet. Susana Schwartz, Internet Security: The Bane of Electronic Commerce?, 22 Insurance & Technology 40 (Sept. 1997). A 1996 survey by the Computer Security Institute and the Federal Bureau of Investigations found that of 428 corporations, government agencies, financial institutions, and universities surveyed, 53 percent reported having been victims of computer viruses and 42 percent acknowledged unauthorized use of their computer systems in the prior 12 months. Id. In 1995, the FBI estimated that computer criminals cost United States businesses \$7.5 billion a year. Losses ranged from outright industrial espionage and willful destruction of files and data to the cost of fixing security problems. David H. Freedman et al., Cracker, 122 U.S. News & World Report 56 (June 2, 1997).

1 submitted).⁸ The collection of baseline information on transactional web sites is an
2 important and integral part of OTS efforts to enhance its supervision of Internet
3 banking activities.

4
5 While collecting this information will impose a minimal burden on savings
6 associations, it will also allow individual associations, and the industry as a whole, to
7 reap important benefits. OTS will be better able to assist associations that are
8 contemplating or already conducting Internet operations to identify and address the
9 risks that accompanying such activities. This will help institutions avoid problems and
10 protect consumers. The information will also broaden the agency's awareness of trends
11 in Internet banking operations, which it can share with institutions.

⁸ OTS has been studying compliance and privacy issues relating to savings association web sites and notes that a number of industry and governmental studies have reported on these issues. For example, two recent industry studies reported a significant number of potential violations of advertising and disclosure requirements on the web sites of banks and other financial service providers, though these studies did not focus on savings associations. The identified problems included failure to: (1) use the term "annual percentage rate" or "APR" and provide advertising disclosures required by Regulation Z (Truth in Lending Act), (2) include the Equal Housing Lender logotype and legend as required by the Fair Housing Act, (3) post annual percentage yields as required by the Truth In Savings Act, and (4) provide disclaimers that non-insured products are not insured by the Federal Deposit Insurance Corporation as required by FDIC regulations. See Richard Insley, Click Here To Violate the Law (visited July 30, 1998) <<http://www.moneypage.com/features/RegZWebsiteViolations.htm>>; Jo Ann S. Barefoot, Don't Get Your Compliance Record Tangled in the Web, ABA Banking Journal 26-30 (June 1998). Similarly, a recent Federal Trade Commission report included an analysis of 125 web sites operated by financial service providers. It found that while 97 percent of the sites collected personal information, only 17 percent of those sites contained appropriate disclosures such as a privacy policy notice or an information practice statement. See Federal Trade Commission, Privacy Online: A Report to Congress (June 1998) at 22, 24, 27.

The industry and FTC reports identified only those compliance problems that could be readily observed by viewing the web site. These studies raise serious and legitimate concerns regarding both informational and transactional web sites. Because savings associations could perform a broad range of activities through transactional web sites, OTS believes that transactional web sites are likely to raise other more complex compliance and privacy issues, in addition to those identified in the studies.

1 At this time, OTS is not proposing to require a notice under § 555.300(b) for
2 any activities using electronic means or facilities other than transactional web sites. For
3 example, a savings association would not be required, under this paragraph, to notify
4 OTS before it establishes an informational web site (i.e., a non-transactional web site)
5 such as a web site limited to advertising and fee and rate posting.⁹ OTS, however,
6 expects savings associations to inform the Regional Office of the informational web site
7 address (the Uniform Resource Locator or “URL”).¹⁰ This will assist OTS to obtain
8 the information it needs for efficient supervision, particularly in the compliance area.¹¹
9 As technologies emerge, OTS may revise the rule to require notice of activities other
10 than establishing a transactional web site. As technologies mature and the industry and
11 OTS gain additional experience, OTS may revise the rule to no longer require notice
12 before establishing a transactional web site.
13

⁹ Of course, before a savings association could change an informational web site to a transactional web site by adding features enabling users to conduct financial transactions on the web site, the savings association would have to file a notice with OTS.

¹⁰ OTS is currently considering whether to require this information as part of the Thrift Financial Report reporting process.

¹¹ OTS is aware that the advertising and disclosure problems identified by the industry studies cited in footnote 8 above apply equally to transactional and informational web sites. OTS believes, however, that the need for advance notice is greater where such concerns are combined with the other compliance, security, and privacy issues applicable to transactional web sites. To minimize regulatory burden, OTS is proposing to limit the advance notice requirement to transactional web sites. However, OTS will continue to examine both types of web sites for operational and compliance problems.

1 Second, a filing may also be required in the circumstances described in proposed
2 § 555.300(c). If the OTS Regional Office has informed a savings association of
3 supervisory or compliance concerns that may affect the savings association's use of
4 electronic means or facilities, the savings association must follow any additional
5 procedures the Regional Office has imposed in writing.

6

7 B. How do I notify OTS? (Proposed § 555.310)

8

9 Proposed § 555.310 describes the notice procedures applicable to notices
10 required by § 555.300(b). Because establishing a transactional web site is the only
11 activity that would require such a notice, the notice procedures have been tailored to
12 that activity.

13

14 Proposed § 555.310(a) would require a savings association to provide a written
15 notice to the appropriate Regional Office at least 30 days before establishing a
16 transactional web site. OTS does not propose to prescribe any particular form for the
17 notice, but contemplates that it may be brief. The proposed regulation would simply
18 require that a savings association describe the transactional web site, indicate the date
19 the transactional web site will become operational, and list a contact familiar with the
20 deployment, operation, and security of the transactional web site. Upon receipt of the

1 notice, the Regional Office may determine that additional information is required to
2 ensure that the savings association will operate the transactional web site in a safe,
3 sound, secure, and compliant manner.

4

5 A typical notification might include the following text:

6 [Name of savings association] plans to establish a transactional web site
7 on the Internet at [URL]. It will be operational on [Date]. The site will
8 contain mortgage loan applications that can be transmitted securely to our
9 loan processing office. For further information contact: [Name at
10 telephone number, e-mail].

11

12 This notification requirement would further the approach in the ANPR and NPR
13 by facilitating OTS's ability to obtain information on the industry's use of transactional
14 web sites. It would also efficiently allow OTS to keep abreast of significant changes in
15 the way particular savings associations interact with their existing or potential
16 customers to enable OTS to issue appropriate guidance. Finally, it would respond to
17 the concern raised by the comments on the NPR that OTS should be vigilant about new
18 electronic operations raising safety and soundness concerns, by assisting OTS to
19 supervise effectively the electronic operations of savings associations.

20

1 Proposed § 555.310(b) contains a transition provision applicable to the notice
2 requirement in § 555.310(a). It provides that if a savings association established a
3 transactional web site after the date of its last regular onsite OTS safety and soundness
4 examination but before the effective date of the final rule, it would have to file a notice
5 describing its activity within 30 days from the effective date of the final rule. OTS
6 notes that if a savings association began the activity before its last regular onsite OTS
7 safety and soundness examination, § 555.310 would not apply to that activity.

8

9 **III. Request for Comments**

10

11 OTS invites comments on all aspects of this Supplemental NPR, but requests that
12 commenters limit their comments to new matters raised by this Supplemental NPR,
13 rather than matters addressed in the NPR. OTS solicits specific comment on the
14 following questions:

15 1. Should OTS require a notice before an association establishes a
16 transactional web site? Why or why not?

17 2. Is OTS's proposed definition of a "transactional web site" appropriate?
18 Are there alternative terms or definitions that are commonly used and understood in the
19 industry that should be substituted? Is the difference between a transactional web site
20 and an informational web site clear and appropriate?

1 3. Should OTS require a notice for any other activities such as establishing
2 any type of web site on an in-house server, providing e-mail access for the public, or
3 collecting personal information through an interactive web site tool such as a mortgage
4 calculator?

5 4. What information should be required in the notice filed with OTS?
6 Should OTS require the savings association to provide additional information such as:
7 (a) how it will conduct an activity, including descriptions of security and internal
8 controls (e.g., the encryption level used, the testing that has been performed), or
9 (b) how it will ensure compliance with laws and regulations (e.g., disclosure
10 requirements)?

11 5. Is it appropriate for OTS to require the notification 30 days before a
12 savings association begins an activity?

13

14 **IV. Executive Order 12866**

15 The Director of OTS has determined that this proposed rule does not constitute a
16 “significant regulatory action” for the purposes of Executive Order 12866.

17

18 **V. Paperwork Reduction Act of 1995**

19 OTS invites comment on:

1 (1) Whether the proposed information collection contained in this proposal is
2 necessary for the proper performance of OTS's functions, including whether the
3 information has practical utility;

4 (2) The accuracy of OTS's estimate of the burden of the proposed information
5 collection;

6 (3) Ways to enhance the quality, utility, and clarity of the information to be
7 collected;

8 (4) Ways to minimize the burden of the information collection on respondents,
9 including through the use of automated collection techniques or other forms of
10 information technology; and

11 (5) Estimates of capital and start-up costs of operation, maintenance and
12 purchases of services to provide information.

13

14 Respondents are not required to respond to this collection of information unless
15 it displays a currently valid OMB control number.

16

17 The collection of information requirements contained in this proposal have
18 been submitted to the Office of Management and Budget for review in accordance with
19 the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the
20 collections of information should be sent to the Office of Management and Budget,

1 Paperwork Reduction Project (1550), Washington, DC 20503, with copies to the
2 Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift
3 Supervision, 1700 G Street, NW., Washington, DC 20552.

4

5 The collection of information requirements in this proposed rule are found in 12
6 CFR 555.300 and 555.310. OTS requires this information for the proper supervision
7 of electronic operations by savings associations. The likely respondents/recordkeepers
8 are savings associations.

9

10 Estimated average annual burden hours per respondent: 2 hours.

11 Estimated number of respondents: 100 respondents.

12 Estimated total annual reporting burden: 200 hours.

13 Start up costs to respondents: None.

14

15 **VI. Regulatory Flexibility Act Analysis**

16 Pursuant to section 605(b) of the Regulatory Flexibility Act, OTS certifies that
17 this proposed rule will not have a significant impact on a substantial number of small
18 entities. In conjunction with the NPR, this Supplemental NPR should make it easier for
19 savings associations, including small institutions, to engage in electronic operations.

20 While it imposes a notice requirement on savings associations using one particular type

1 of electronic means or facility (i.e., a transactional web site) and allows Regional
2 Office to impose case-by-case restrictions for supervisory or compliance reasons, these
3 requirements are the minimum necessary for proper supervision, and should not have a
4 significant impact on a substantial number of small institutions.

5

6 **VII. Unfunded Mandates Act of 1995**

7 Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4
8 (Unfunded Mandates Act), requires that an agency prepare a budgetary impact
9 statement before promulgating a rule that includes a Federal mandate that may result in
10 expenditure by state, local, and tribal governments, in the aggregate, or by the private
11 sector, of \$100 million or more in any one year. If a budgetary impact statement is
12 required, section 205 of the Unfunded Mandates Act also requires an agency to identify
13 and consider a reasonable number of regulatory alternatives before promulgating a rule.
14 OTS has determined that the proposed rule will not result in expenditures by state,
15 local, or tribal governments or by the private sector of \$100 million or more.
16 Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates
17 Act.

18

19

1 **List of Subjects 12 CFR Part 555**

2 Accounting, Consumer protection, Credit, Electronic funds transfers,
3 Investments, Reporting and recordkeeping requirements, Savings associations.

4

5 Accordingly, the Office of Thrift Supervision proposes to amend chapter V, title
6 12 of the Code of Federal Regulations as set forth below:

7

8 1. Part 555 is added to read as follows:

9

10 **PART 555 - ELECTRONIC OPERATIONS**

11 Sec.

12 555.100 What does this part do?

13 **Subpart A—Authority of Federal Savings Associations to Conduct Electronic**
14 **Operations [Reserved]**

15 **Subpart B—Requirements Applicable to All Savings Associations**

16 555.300 Must I inform OTS before I use electronic means or facilities?

17 555.310 How do I notify OTS?

18 **Authority:** 12 U.S.C. 1462a, 1463, 1464.

19

1 **§ 555.100 What does this part do?**

2 Subpart A of this part describes how a Federal savings association may provide
3 products and services through electronic means and facilities. Subpart B of this part
4 contains requirements applicable to all savings associations.

5

6 **Subpart A—Authority of Federal Savings Associations to Conduct Electronic**
7 **Operations [Reserved]**

8

9 **Subpart B—Requirements Applicable to All Savings Associations**

10

11 **§ 555.300 Must I inform OTS before I use electronic means or facilities?**

12 (a) General. A savings association (“you”) are not required to inform OTS
13 before you use electronic means or facilities, except as provided in paragraphs (b) and
14 (c) of this section. OTS encourages you to consult with your Regional Office before
15 you engage in activities using electronic means or facilities in circumstances not
16 covered by paragraphs (b) or (c) of this section.

17 (b) Activities requiring advance notice. You must file a written notice as
18 described in § 555.310 before you establish a transactional web site. A transactional
19 web site is an Internet site that enables users to conduct financial transactions such as
20 accessing an account, obtaining an account balance, transferring funds, processing bill

1 payments, opening an account, applying for or obtaining a loan, or purchasing other
2 products or services.

3 (c) Other procedures. If the OTS Regional Office has informed you of any
4 supervisory or compliance concerns that may affect your use of electronic means or
5 facilities, you must follow any procedures it has imposed in writing.

6

7 **§ 555.310 How do I notify OTS?**

8 (a) Notice requirement. You must file a written notice with the appropriate
9 Regional Office at least 30 days before you establish a transactional web site. The
10 notice must do three things:

11 (1) Describe the transactional web site.

12 (2) Indicate the date the transactional web site will become operational.

13 (3) List a contact familiar with the deployment, operation, and security of the
14 transactional web site.

15 (b) Transition provision. If you established a transactional web site after the
16 date of your last regular onsite OTS safety and soundness examination but before
17 [Effective date of final rule], you must file a notice describing your activity by [30 days
18 after effective date of final rule].

19

20

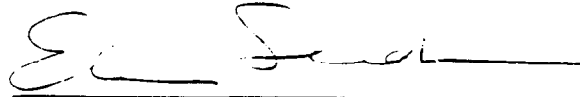
1 DATED: August 7, 1998

2

By the Office of Thrift Supervision.

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6

Ellen Seidman

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Director