

July 13, 2010

Mr. Bill Brushwood  
Financial Management Service  
401 14<sup>th</sup> Street, SW  
Room 400A  
Washington, DC 20227

Re: Financial Management Service Docket Number FISCAL-FMS-2009-0001,  
Federal government Participation in the Automated Clearing House; 75 Federal  
Register, 27239-27248; May 14, 2010

Dear Mr. Brushwood:

The American Bankers Association (ABA)<sup>1</sup> appreciates the opportunity to submit these comments on the Notice of Proposed Rulemaking (NPR) regarding Federal government participation in the Automated Clearing House.<sup>2</sup> The NPR proposes amending the Federal government's adoption of the ACH rules by affirming most of them while exempting the Federal government from others. The NPR also contains separate proposals intended to increase the efficiency of the Federal payments process associated with reclaiming funds paid out inadvertently after the death of the recipients and expanding the types of accounts that may receive Federal payments.

### Overview

This NPR would amend Title 31 CFR part 210 governing the Federal government's use of the ACH Network. The ACH Network is an electronic funds transfer system that provides for clearing of debit and credit transactions among participating financial institutions. The ACH Network rules are administered by the National Automated Clearing House Association (NACHA), a private, non-profit organization composed of users of the ACH Network. The Federal government is the largest originator of ACH transactions for payments such as employee salaries and benefit recipient payments. The Federal Management Service (FMS) has the authority to designate which ACH Network rules will apply to Federal government use of the system for its payment activity.

In the proposed rule, FMS clarifies that it would adopt, in a two stage process, the new

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<sup>1</sup> The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. The majority of ABA's members are banks with less than \$165 million in assets. Learn more at [www.aba.com](http://www.aba.com).

<sup>2</sup> 75 Fed. Reg. 27329 (May 14, 2010)

ACH Rule requirement to provide additional information with certain international ACH transactions that will be assigned the new SEC Code (IAT). The proposed rule also identifies two significant sections of the ACH system where FMS would exempt itself from requirements that would make it subject to a system of fines and from reporting Federal agencies that originate debit transactions resulting in unauthorized rates of return in excess of one percent.

FMS proposes four other significant changes to improve Federal payment processing, including (1) streamlining the process for reclaiming post-death benefit payments from financial institutions by allowing FMS to automate the debit reclamation process and reduce the amount of paper forms exchanged, (2) complying with the Payment Transactions Integrity Act of 2008 by requiring banks to provide the name and telephone numbers for account owners subject to a reclamation, and, (3) expanding the circumstances when Federal payments may be made to an account at a financial institution that is not in the name of the recipient (examples: nursing homes and religious orders), and (4) allowing Federal payments to be delivered to stored value, prepaid debit cards or similar card account that meet certain customer protection requirements.

#### International ACH Transactions

A NACHA rule change effective on September 18, 2009, requires that all Originating Depository Financial Institutions (ODFI) and Gateway Operators identify international ACH transactions using a new Standard Entry Class Code (IAT). The IAT transactions are also required to include specific information, similar to the Bank Secrecy Act's travel rule so that parties processing the transaction may better comply with the Office of Foreign Assets Control requirements to block transactions to and from certain parties.

FMS will accept the IAT rule for Federal payments immediately for transactions sent to Mexico, Canada, and Panama through the FedGlobal ACH Payment Service. For transactions to other countries, FMS proposes to be in compliance by January 1, 2012.

ABA supports the FMS decision to endorse the IAT rule for Federal payments to reach total compliance by January 1, 2012.

#### NACHA Rules Enforcement

Another recent NACHA rule change is found in Appendix 11 (the National System of Fines) requiring that an ODFI for an Originator or Third Party Sender provide additional information to NACHA upon request if it has a return rate exceeding one percent for unauthorized debit entries. The NACHA rules were changed in order to mitigate the risk that Originators may generate unauthorized debits on behalf of clients.

FMS proposes to exclude the Federal government from the requirements of Appendix 11 because the Federal government is prohibited from entering into arrangements that may create unfunded liabilities. In the summary accompanying this proposed rule, Treasury states that if any Federal agency were to generate a high number of

unauthorized transactions, FMS would work with that agency and NACHA to resolve the issue.

In a related matter, NACHA rules required as of March 9, 2009, that ODFIs provide NACHA with information on Originators or Third Party Senders who have return rates in excess of one percent for unauthorized debits. The same rule also requires ODFIs to reduce those high rates within 60 days.

FMS proposes to exclude the Federal government from this rule change's requirements stating that if a Federal agency were to originate transactions resulting in excessive return rates, FMS would coordinate with NACHA to address the situation.

ABA prefers that ACH operating rules be consistent for all users; however we accept FMS' assertion that it will work to resolve excessive return rates involving a Federal agency.

### Reclamations

The current process where FMS reclaims benefits made on behalf of beneficiaries after those beneficiaries have died is cumbersome, but the process is well established and well understood by the banking industry. In general a bank receiving government benefits on behalf of a customer is liable to FMS for all of the payments to that account after the death of the customer. A bank may limit its liability to the total amount of payments sent within 45 days of the customer's death if:

- It can certify that it had no actual or constructive knowledge of the recipients death when the payments were received,
- It returns all post-death benefit payments it receives after it learns of the death,
- It responds to Notice FMS-132, Notice of Reclamation within 60 days of the date of the notice, and
- FMS debits the bank for the 45-day amount minus any amount the bank has already returned.

According to FMS, 85% of all reclamation notices sent to banks are for payments made within 45 days after the death or loss or legal incapacity of the individual. Of this 85% figure, banks return the full 45-day amount 89% of the time. The FMS proposal would streamline the process for the large majority of reclamation transactions.

FMS seeks to streamline the process by proposing a rule change to allow FMS to debit banks automatically for the 45-day amount (less any amount collected by the paying agency) following a 30-day advance notice of the debit. This would reduce the manual exchange of paperwork between the Treasury and banks. However, banks would retain the option of protesting debits it believes are improper prior to the debit being made or within 90 days after the debit is transacted. FMS would then have 60 days to respond to the protest.

The automated process would be applied to reclamations that are limited to the 45-day amount or less. Larger reclamation requests, approximately 15% of the total number of transactions, would continue to use the existing paper-based manual process.

ABA recognizes that the changes outlined in the proposal may result in an increase in efficiency and a decrease in burden to banks.

However, ABA also recognizes that the current process, while labor intensive, works well and has an established set of procedures that each bank knows well, and changes to a process that are made in the interest of increased speed do not always result in greater efficiency. Most importantly, the current process allows banks to reconcile detailed information associated with each reclamation transaction. The changes proposed do not provide enough detail regarding how banks will be able to match up the automated debits with the associated reclamations. Speeding up the movement of funds without a similar improvement in the exchange of information that explains why the funds are being debited will not improve the reclamation process and risks making it less efficient.

ABA agrees that there is potential to improve the reclamation process through automation, but recommends that FMS publish a more detailed and mature plan for consideration regarding how the data associated with the reclamations will be transmitted to banks before instituting an automated debit process that does not clearly describe the information transfer protocol. Incomplete or unclear changes that institute an automated process may result in a less efficient process than exists in the current manual environment. ABA recommends that:

- The first Notice of Reclamation be transmitted to the banks electronically in human readable format and by a method that is convenient, inexpensive, and fully available to banks of all sizes;
- Any automated debit to banks for the “45-day Amount” be accompanied by another electronic transmission that will allow the bank to reconcile the automated debit amount with the associated reclamations on whose behalf the debit is made; and
- The electronic transmission of information to banks be fully developed and tested with bank participants before the reclamation streamlining process is implemented. This electronic transmission may be best adopted as a .pdf file, html, or EDI format, but ultimately, more information is needed to determine the best appropriate format prior to any final decisions being made. It may be worthwhile to explore the possibility of leveraging the Centralized Reclamation Application being developed by the Federal Reserve Banks.

ABA would be glad to assist FMS as it develops automated processes to improve the reclamation process. Our membership encompasses a broad range of banking institutions enabling us to provide valuable feedback as FMS refines the new protocol.

When the proposed automation process has been developed and tested ABA recommends that FMS embark on an extensive campaign to educate the banking industry of the impending changes. ABA would be glad to assist FMS in reaching out to its membership when the process has been completed.

#### Payment Transactions Integrity Act of 2008

Currently, the FMS rule requires banks to provide the name and address of customers who have withdrawn or were authorized to withdraw funds from an account subject to reclamation. The Payment Transactions Integrity Act of 2008 has expanded the type of information that can be requested to include telephone numbers of those targeted customers.

The proposed rule would require that banks provide customer names, last known addresses, and telephone numbers related to accounts subject to reclamation. A mitigating factor to consider is that these requests would be limited to the 15% of reclamations outstanding if the other 85% were handled in the automated fashion described in the prior proposal.

ABA recognizes the advantages to be gained by including telephone numbers with the information supplied to FMS during reclamation inquiries. Banks often collect this information when accounts are opened. However, banks do not have telephone numbers for each account, and further, they are unable to verify that telephone numbers they possess remain accurate.

ABA supports including telephone numbers of account holders in the data provided to FMS when that information is available. ABA recommends the requirement be limited to producing a telephone number if it is contained in the bank's account records. FMS should acknowledge that there is no obligation to verify the accuracy or current functionality of the telephone number in the account records.

#### Expansion of the "In The Name Of The Recipient" Requirements

In general, Federal payments, with the exception of vendor payments, must be made to an account in the name of the recipient at a financial institution. This means that the name of the recipient must appear in the account title. This is a consumer protection policy and the intent is to ensure that payments meant for an individual are actually received by an individual.

FMS proposes to expand the number of exceptions to this policy to include:

- Accounts held by nursing facilities,
- Accounts for members of religious orders who have taken vows of poverty, and
- Prepaid debit and stored value accounts.

FMS proposes to allow an exception to the "in the name of the recipient requirement" to include payments to resident trust or patient trust accounts at established nursing facilities. FMS notes that nursing facilities are heavily regulated entities, and they

currently maintain fiduciary accounts on behalf of patients subject to detailed regulation mandated by the Center for Medicare and Medicaid Services (CMS). Under CMS rules these accounts must place personal funds in excess of \$50 into interest bearing accounts, maintain separate accounting for each resident's funds, and allow them access to account records. Nursing facilities must notify patients when the fund balance reaches \$200 less than the dollar amount that may cause that patient lose eligibility for medical assistance or benefits. Nursing facilities are required to purchase security bonds to assure the security of all personal funds.

ABA supports the expansion of the types of accounts allowed to receive Federal payments to include nursing facilities. FMS should clarify in the final rule that these nursing facilities are governed by the Federal Nursing Home Reform Act and other laws that provide oversight of patient financial arrangements by CMS, and that FMS considers these safeguards to be "...extensive protections provided to residents of nursing facilities whose funds are maintained in resident trust or patient fund accounts."

FMS proposes to allow an exception to the "in the name of the recipient requirement" to include payments to be deposited to an account established by a religious order where the recipient has taken a vow of poverty. FMS notes that a recent Social Security Administration (SSA) Federal Register notice sought comment on master accounts created by religious orders on behalf of their members who have taken vows of poverty. The comments received did not identify any problems with these practices, and the commenters were in favor of allowing this type of master/sub account. The Treasury would rely on guidance issued by the Internal Revenue Service (IRS), Publication 517 (2008) that addresses the treatment of individuals who have taken a vow of poverty.

ABA supports the expansion of the types of accounts allowed to receive Federal payments to include religious orders.

FMS proposes to allow delivery of payments to prepaid debit and stored value card accounts if certain conditions are met. Currently, Federal payments may not be made to these types of accounts. However, given the increase in the use of prepaid card products by persons who do not have traditional bank checking accounts, FMS is considering whether these types of accounts should be allowed to receive Federal payments if certain conditions are met. The conditions include:

- The account records of the insured depository institution must disclose the existence of the agency or custodial relationship,
- The records of the insured depository institution or the records of the custodian must disclose the identities of the actual owners and the amount owned by each owner,
- The funds in the account must be owned by the purported owners and not the custodian or any other party,
- The card used to access the account bears the account holder's name,

- The account accessed by the card is held at an insured depository institution and funds are FDIC insured, and
- The account meets the definition in 12 CFR 205.2(b) such that it has the consumer protections of Regulation E.

ABA supports the expansion of the types of accounts allowed to receive Federal payments to include prepaid debit and stored value card accounts if the prior conditions are met. The integrity of the payment system is of the utmost importance to ABA members, and it is vital that the security of Federal payments on behalf of their recipients be maintained. The use of prepaid debit and stored value cards has increased dramatically in recent years, and payments to those instruments should be allowed and simultaneously held to the same high standard that conventional bank accounts must meet.

We appreciate your consideration of these views and would be happy to provide any additional information that you would find helpful. We would also like to reiterate the offer of our assistance, and the input of our member banks, in developing an improved, automated reclamation process that would result in a more efficient process than currently exists.

Sincerely,



Stephen K. Kenneally  
Vice President  
Center for Regulatory Compliance