

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510-AA84

Federal Government Participation in the Automated Clearing House

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Final rule and interim rule with request for comment.

SUMMARY: These rules amend our regulation which governs the use of the Automated Clearing House (ACH) system by Federal agencies. We adopt, with some exceptions, the ACH rules (ACH Rules) developed by NACHA—The Electronic Payments Association (NACHA)—as the rules governing the use of the ACH system by Federal agencies.

This document includes two separate rulemaking actions. First, we're issuing a final rule to permit the conversion of checks to ACH debit entries at Federal agency (agency) points-of-purchase and at lockbox locations to which payments to agencies are mailed or delivered. The final rule also addresses the origination by agencies of ACH debit entries authorized over the Internet. We previously published a notice of proposed rulemaking requesting comment on the conversion of checks at points-of-purchase and lockboxes, and the origination of ACH debit entries authorized over the Internet. The final rule is discussed in Part I of this document.

Second, we're issuing an interim rule to address other changes that NACHA has made to the ACH Rules during the past year. We are requesting comment on all aspects of the interim rule, which is discussed in Part II of this document.

DATES: Both the final rule and the interim rule are effective May 13, 2002. Comments on the interim rule must be received by June 10, 2002. The incorporation by reference of the publication listed in the rules is approved by the Director of the Federal Register as of May 13, 2002.

ADDRESSES: You can download these rules at the following World Wide Web address: <http://www.fms.treas.gov/ach>. You may also inspect and copy these rules at: Treasury Department Library, Freedom of Information Act (FOIA) Collection, Room 1428, Main Treasury Building, 1500 Pennsylvania Ave., NW., Washington, DC 20220. Before visiting, you must call (202) 622-0990 for an appointment.

You may send comments on the interim rule electronically to the following address:

210comments@fms.treas.gov. You may also mail your comments to John Galligan, Director, Cash Management Policy and Planning Division, Financial Management Service, U.S. Department of the Treasury, Room 420, 401 14th Street, SW., Washington, DC 20227.

FOR FURTHER INFORMATION CONTACT: Walt Henderson, Senior Financial Program Specialist, at (202) 874-6705 or walt.henderson@fms.treas.gov; Natalie H. Diana, Senior Attorney, at (202) 874-6680 or natalie.diana@fms.treas.gov; or John Galligan, Director, Cash Management Policy and Planning Division, at (202) 874-6590 or john.galligan@fms.treas.gov.

SUPPLEMENTARY INFORMATION:**Background**

Part 210 governs the use of the ACH system by Federal agencies (agencies). The ACH system is a nationwide electronic fund transfer (EFT) system that provides for the inter-bank clearing of credit and debit transactions and for the exchange of information among participating financial institutions. Part 210 incorporates the ACH Rules adopted by NACHA, with certain exceptions. From time to time we amend Part 210 in order to address changes that NACHA periodically makes to the ACH Rules.

We're issuing a final rule addressing the conversion of checks to ACH debit entries at agency points-of-purchase and at lockbox locations where payments to agencies are sent and the origination by agencies of ACH debit entries authorized over the Internet. Last year we published a notice of proposed rulemaking requesting comment on these issues. The final rule is discussed in Part I of this document.

We're also issuing an interim rule amending part 210 to reflect certain changes that NACHA has made to the ACH Rules since the publication of NACHA's 2001 rule book. The interim rule addresses four topics: (1) Affidavit and electronic communication issues; (2) reinitiation of entries; (3) electronic authorization; and (4) electronic terminals. We are requesting comment on all of these topics, which are discussed in Part II of this document.

I. Final Rule

On April 12, 2001, we published a notice of proposed rulemaking (NPRM) to amend Part 210 in order to address the conversion of checks to ACH debit entries at agency points-of-purchase and

agency lockbox ¹ locations, as well as the origination by agencies of ACH debit entries authorized over the Internet. 66 FR 18888. We received 33 comments in response to the proposed rule. Commenting organizations included financial institutions, trade groups, and individuals. A significant number of the comments received were in response to our proposal to convert business checks received at point-of-purchase and lockbox locations. A significant number of comments also addressed authorization issues in connection with check conversion transactions.

We are adopting most of the provisions that we proposed without substantive changes. We have, however, modified certain provisions of the proposal in light of the comments we received. The most significant comments are discussed below.

A. Check Conversion Without Written Authorization

Point-of-Purchase Check Conversion

In the NPRM, we requested comment on a framework in which agencies would be permitted to convert checks presented at a point-of-purchase provided that (1) a sign posted at the cash register notifies customers that presenting a completed, signed check for payment constitutes authorization to convert the check and (2) customers also are given a written disclosure that they can retain. We requested input as to whether a posted notice at the point-of-purchase, either alone or in combination with a paper disclosure handed to consumers, is sufficient to ensure that consumers understand that by presenting a check for payment, they are authorizing the conversion of the check to an ACH debit entry. The ACH Rules governing point-of-purchase transactions require the merchant to obtain written authorization from the consumer prior to initiating the transaction. The ACH Rules also require the merchant to provide the consumer with a copy of the authorization and a receipt containing specific, minimum information relating to both the merchant and the transaction.

In the NPRM, we noted that consumer checks converted to ACH debit entries at agency points-of-purchase under our proposed approach would constitute EFTs covered by Regulation E. See Official Staff Commentary to Regulation E, section 205.3(b)–1(v). The authorization requirements of Regulation E are met if a consumer who presents a check at a point-of-purchase

¹ A post office box established by a financial institution for the purpose of receiving and processing paper-based payments to an agency.

receives notice that the transaction will be processed as an EFT and completes the transaction. See Official Staff Commentary, section 205.3(b)-3.

Some commenters expressed support for the "notice equals authorization" approach, noting that it is consistent with the Federal Reserve's revised Official Staff Commentary on Regulation E, provided that any notice is prominently displayed for the customer to see. However, a majority of the organizations that commented on this "notice equals authorization" approach were opposed to the conversion of checks without first obtaining a separate, written authorization. Many commenters support the signature requirement, believing it best enables the consumer to understand that the transaction will be processed as an EFT. Consumer confusion was cited as a concern presented by the approach we proposed, since authorization requirements for point-of-purchase transactions at agencies would differ from private sector authorization requirements. Several financial institutions also commented that, without the written authorization requirement, customers confused by the transaction would contact their financial institutions, thereby resulting in increased customer inquiries made to Receiving Depository Financial Institutions (RDFIs).

Notwithstanding these concerns, pilot applications of point-of-purchase check conversion at agency locations have demonstrated that obtaining a separate, written authorization from the customer, and providing the customer with a copy of that authorization (as required by the ACH Rules), are major obstacles to the use of this technology. In our pilot programs, it took significantly more time at the point-of-purchase to convert checks to ACH debit entries than to process paper check transactions. The additional time is a result of the need to explain the check conversion process to the customer and the requirement to have the customer sign an authorization. Despite the cost savings to the Federal government of converting checks to ACH debit entries, agencies are reluctant to use any method of payment collection that would result in longer, slower check-out lines.

Although the initial introduction of any new payment technology will naturally generate questions for some period of time, we believe that the public will come to understand and accept check conversion as the use of the technology becomes more widespread. The Federal government's customer base and transaction types are,

in some respects, different from private sector retail establishments. For example, most checks are presented for payment at agency locations for mandatory fees, fines, taxes, or other distinct services, or in closed military environments where the payment methods can be easily limited. Our pilots indicate that customers are receptive to check conversion. Moreover, we believe that Regulation E ensures that consumers' interests are protected.

For all these reasons, we do not believe that the lack of current customer familiarity with the check conversion process is a reason to forgo or delay the benefits of moving to a more cost-saving and efficient method of collecting public monies. The use of a "notice equals authorization" approach for point-of-purchase check conversion will make the use of this technology attractive to agencies and result in efficiencies for the Federal government. Accordingly, we are modifying in part 210 the ACH Rules governing check conversion to provide that presentment to an agency of a completed and signed check, following notice that the check will be converted, constitutes authorization for the conversion of the check to an ACH debit entry. We are also permitting agencies to use a "notice equals authorization" approach to initiate an ACH debit entry to collect a service fee for an entry initiated at a point-of-purchase that has been returned for insufficient funds. This does not create for agencies the authority to impose a service fee; rather, it allows an agency that has the authority to impose such a fee to collect the fee by ACH debit without a written authorization.

In order to address commenters' concerns about potential customer confusion, we have developed standard disclosures that agencies will be required to use for point-of-purchase check conversion. We believe that consistent and uniform disclosure language across agencies will be helpful to customers. The disclosure language that we have developed is designed to help customers understand the conversion process and to advise consumers of the fact that they have rights under Regulation E, as well as to help them identify these transactions on account statements provided by financial institutions. Agencies must ensure that the notice of conversion set forth at appendix A to part 210 (Posted Notice) is posted conspicuously at the cash register, and that the disclosure set forth at appendix B to part 210 (Pamphlet or Brochure) is available from the cashier upon request.

Accounts Receivable (Lockbox) Check Conversion

The NPRM proposed an approach toward lockbox conversion in which an agency could convert all checks received at a lockbox to ACH debit entries if the agency provided prior written notice of this policy to payors. Because the provision of notice would require that agencies redesign and reprint forms, or develop and mail special notices, we requested comment on how useful the notice of lockbox check conversion is for consumers, and how it might best be provided.

At the time we published the NPRM, the ACH Rules required an Originator² that wanted to convert checks at a lockbox to provide the consumer with notice of the check conversion policy. This notice had to be provided under one of two scenarios: (1) The consumer authorizes the entry by a writing that is signed or similarly authenticated ("opt-in"); or (2) the consumer is notified that if the consumer does not provide the Originator with written notice not to convert the item, the item will be converted ("opt-out"). The NPRM requested comment on the extent to which (if any) payors would be disadvantaged if their checks were converted without making available this opt-in/opt-out procedure.

In the NPRM, we noted that consumer checks converted to ACH debits at agency lockboxes under our proposed approach would constitute EFTs covered by Regulation E. See Official Staff Commentary to Regulation E, section 205.3(b)-1(v). The authorization requirements of Regulation E are met if a consumer who mails a check to a lockbox receives notice that the transaction will be processed as an EFT and completes the transaction. See Official Staff Commentary, section 205.3(b)-3.

Many of the organizations commenting on lockbox check conversion, primarily large financial institutions, were opposed to FMS' proposal to eliminate the opt-in or opt-out requirement. Most of these organizations stated that customers would not understand what was happening to their checks if the opt-in/opt-out requirement were eliminated, thereby resulting in increased customer inquiries to financial institutions.

Several organizations commenting on this issue were supportive of the proposal to eliminate the opt-in/opt-out requirement. These organizations indicated that removing the opt-in/opt-

²In an ACH debit transaction, the Originator is the person or entity receiving a transfer of funds from a payor's account.

out requirement would streamline the check conversion process because it would eliminate the need for two separate workflows at agency lockbox locations.

Several organizations also responded to our request for comment on whether providing notice to consumers of lockbox check conversion was meaningful. All respondents to this issue indicated that notice is meaningful if the disclosure language is clear, concise, and included on an invoice or on the forms associated with the government service. These respondents explained that a clear and concise notice would improve customers' understanding of the process and thereby reduce the number of customer inquiries made to financial institutions. A few financial institutions recommended that FMS and other Federal agencies utilize public service announcements and magazine and newspaper articles to provide additional notice to consumers of check conversion.

Since we published the NPRM, NACHA has amended the ACH Rules for lockbox check conversion. Under the revised ACH Rules, which become effective on March 15, 2002, presentment of a signed check at a lockbox following notice that the check will be converted constitutes authorization for the conversion of the check. The ACH Rules do not, however, prevent Originators from using an opt-in or opt-out authorization model for lockbox conversion.

Requiring an opt-in/opt-out procedure would impose substantial costs and inefficiencies on the processing of checks at Federal lockboxes. Checks that are eligible for conversion because consumers have consented to conversion would have to be segregated from checks for which consent to convert has not been obtained. This would require the duplication of lockboxes and maintenance of separate processing systems. These costs are likely to offset any cost-savings and efficiencies that would otherwise be available through check conversion. As a result, we are accepting the ACH Rules regarding accounts-receivable consumer check conversion. These rules will allow agencies to convert checks after providing notice of conversion, but would not preclude an agency from using an opt-in/opt-out procedure if it chose to do so.

In order to address commenters' concerns about potential customer confusion, we have developed standard disclosures that agencies will be required to use for lockbox check conversion. Agencies must ensure that

the notice of conversion set forth at appendix C to part 210 is provided to payors before their checks are converted. See Section-By-Section Analysis, discussion of § 210.6(h).

B. Conversion of Business Checks

In the NPRM we requested comment on proposed rules that would allow agencies to convert business checks received at points-of-purchase and lockboxes to ACH debit entries. The ACH Rules currently do not allow for the conversion of business checks, and thus do not support Standard Entry Class (SEC) codes appropriate for these transactions. NACHA is in the process of developing proposed changes to the ACH Rules to allow the conversion of business checks to ACH debit entries. However, at this time, it is unclear as to whether these proposed rule changes would be supported by the industry and approved by NACHA's voting membership.

In the NPRM we proposed to require agencies to use the Prearranged Payment and Deposit (PPD) SEC code for business checks converted at lockboxes and the Cash Concentration or Disbursement (CCD) SEC code for business checks converted at the point-of-purchase. We requested comment on the issues raised by using the PPD SEC code for business checks converted at lockboxes, including whether it would be appropriate to extend the consumer and RDFI recredit and adjustment protections³ to business account-holders whose checks are converted at agency lockboxes and to their RDFIs.

A majority of the commenting organizations expressed concern about the conversion of business checks to ACH debit entries at points-of-purchase and lockbox locations. The common theme was that the conversion of business checks to ACH debit entries may interfere with various cash management tools in place to protect some business accounts and that, as a result, ACH debit entries would be returned and negatively impact business customers. The Association for Financial Professionals (AFP) asked both FMS and NACHA to withdraw any proposals to convert business checks due to the potentially negative impact on corporate cash management. AFP's concern is that converting business checks may limit the effectiveness of

³ The ACH Rules require an RDFI to recredit a consumer's account if the consumer has notified the RDFI of an unauthorized debit within fifteen days after receiving his statement. See ACH Rule 7.6.1. The RDFI may then send an adjustment entry to the ODFI, as long as the adjustment entry is sent within 60 days of the settlement date of the debit at issue. See ACH Rule 7.7.1.

controlled disbursement and positive pay systems because reconciliation could not occur between the converted item and a corporation's disbursement files. These systems would expect payments originated as checks to be presented for payment as checks, not as ACH debit entries. It was also noted that there would be a negative impact on automated corporate account reconciliation mechanisms.

Many of the larger financial institutions indicated that in order to facilitate the conversion of business checks to ACH debit entries they would need to engage in extensive system changes so that back-end check processing systems could communicate internally with ACH systems. This would allow items originated by check, and subsequently converted to ACH debit entries, to be recognized as such, interact with various cash management tools, and properly post to business accounts with no negative impact on the business customer.

We recognize that the conversion of business checks issued by large businesses may interfere with cash management tools until financial institution check processing and ACH systems are integrated. However, our check conversion pilot experience indicates that many of the business checks presented at agency points-of-purchase are issued by small businesses with accounts that do not employ these types of cash management tools. Indeed, we believe that it is unlikely that most business checks presented over-the-counter to agencies are drawn on accounts that employ these systems. In its comment letter, NACHA indicated that checks drawn on business accounts with debit blocks and/or positive pay verification may, in all likelihood, involve too cumbersome a check issuance process to be candidates for over-the-counter purchases at merchants and, thus, ACH conversion. Statistics from our check conversion pilot with a large Federal agency support this position. During the two-year pilot with this agency over 10,000 business checks were presented at the point-of-purchase of which 99.86% of these transactions were successfully converted to ACH debit entries.

We do not anticipate that check conversion at agency points-of-purchase, in the manner we plan to use it, is likely to significantly disrupt corporate cash management. Moreover, it is important to note that our rules do not require agencies to use check conversion; rather, the rules provide a legal framework for check conversion for those agencies that wish to use this technology. Therefore, if a particular

agency receives a significant number of checks issued by large corporations, the agency may choose not to engage in check conversion. FMS will work closely with agencies to implement check conversion technology and will provide guidance to help agencies determine the appropriateness of this technology for various cash flows.

We are aware that, until check and ACH systems are integrated, a debit entry to a business account utilizing a debit filter or positive pay system may be returned. To address this possibility, we are planning to handle debits to business accounts that are returned by generating a paper draft on the account, using the stored check image. These transactions, which are governed by the Uniform Commercial Code, will be settled through the check processing system. We also are aware that authorization issues can arise in connection with converting business checks at points-of-purchase. For example, it is possible that an individual presenting a business check to an agency may not have authority to act with respect to the account on which the check is drawn. We believe that the ACH Rules incorporated in part 210 provide an adequate framework to enable a Receiver⁴ to pursue recovery of an unauthorized debit to the Receiver's account.⁵ Moreover, we have not found in our pilot programs that Receivers have challenged or attempted to disavow ACH debits resulting from the conversion of business checks.

With regard to lockbox check conversion, we continue to believe, as discussed in the NPRM, that providing for two separate workflows at lockbox locations would be costly and burdensome, and that the full benefits of this technology cannot be realized unless all checks received at lockbox locations are converted. However, we plan to operate lockbox check conversion pilots in such a manner as to minimize the concerns voiced by commenters. For example, we anticipate that alternate payment methods will be made available for any lockbox at which all checks are converted, so that remitters have the option of making payment by ACH credit or another means if they do not want their checks

converted. In addition, we will work with agencies to focus check conversion on cash flows consisting of payments from primarily small and medium-sized businesses that are less likely to use sophisticated cash management tools.

Based on the concerns expressed by financial institutions with regard to extending consumer re-credit provisions to business customers, we have determined that it would be more appropriate to use the CCD SEC code rather than the PPD SEC code for business checks converted at lockboxes and points-of-purchase. In order to accommodate the use of appropriate SEC codes at lockboxes, we plan to analyze agency cash flows and implement pilot programs initially only at lockboxes where either consumer checks or business checks (but not both) are sent. By distinguishing consumer lockboxes from business lockboxes, we can ensure that the CCD SEC code is used to convert business checks and the Accounts Receivable Entry (ARC) SEC code is used to convert consumer checks.

C. Other Check Conversion Issues

Although the NPRM did not address the retention of check information and destruction of paper checks converted at lockboxes, we received comments on these issues. Since we published the NPRM, NACHA has amended the ACH Rules for lockbox check conversion. Under the revised ACH Rules, a check is used as a source document to initiate an accounts receivable (lockbox) entry. A check converted to ACH debit entry in this manner at a lockbox is to be copied or imaged. The copied or imaged check information is to be retained for a minimum of 7 years. The original check is to be destroyed no later than 14 calendar days after the settlement date of the accounts receivable entry. This requirement is to protect against the risk that by human error the check (source document), in addition to being presented as an ACH debit entry, might subsequently be entered into the check processing system for payment as a check.

Commenters urged us to adopt these provisions of the ACH Rules. We agree with these comments and are accepting the ACH Rules regarding check retention and destruction as they apply to checks presented by the public for payment at agency lockbox locations.⁶

⁶ Checks received at certain Federal lockboxes are subject to court orders mandating the preservation of the original checks. As discussed above, we plan to implement check conversion only at lockboxes where conversion is appropriate in light of the nature of the checks received. We will not implement check conversion at lockboxes where

D. Internet-Initiated ACH Debits

The NPRM proposed to incorporate in Part 210 the ACH Rules that allow the use of the Internet-Initiated Entry (WEB) SEC code to initiate ACH debit entries for purchases made over the Internet, with two exceptions. First, we proposed not to adopt the requirement that Originating Depository Financial Institutions (ODFIs) establish exposure limits for Originators of Internet-initiated debit entries. Second, we proposed to allow agencies to originate WEB entries to corporate accounts as well as to consumer accounts.

The purpose of establishing exposure limits is to ensure that ODFIs will verify the identity and creditworthiness of their merchant customers and to ensure that the volume and dollar amount of the transactions that merchants originate are appropriate. We do not believe that it would be appropriate for FMS, which functions as an ODFI for agencies, to establish transaction limits for Federal agencies. We also do not believe that such limits are necessary, because the collection of payments by agencies over the Internet does not raise the merchant creditworthiness concerns that have emerged in the private sector. Most respondents were supportive of our position on this issue.

In addition, we proposed to permit agencies to initiate WEB entries to business accounts in order to provide businesses with a convenient and cost-beneficial way to make payments to agencies. Because, under the ACH Rules, the use of the WEB SEC code for an entry signifies that the entry is a debit to a consumer account, allowing agencies to use the WEB code for a debit entry to a business account raises the issue of whether the RDFI can or must provide the business customer with the right of recredit available to consumers under the ACH Rules. See ACH Rule 7.6.1, ACH Rule 7.7.1. We proposed to extend to business Receivers of WEB entries, and their RDFIs, the same re-credit and adjustment rights, respectively, that apply to debits to consumer accounts.

The majority of commenters, primarily large financial institutions and trade associations, were opposed to the use of the WEB SEC code for business entries. Several respondents argued that the WEB SEC code was designed solely for consumer entries and that WEB entries to business accounts would likely be rejected. Additionally, most dissenters were opposed to the extension of re-credit and adjustment rights to business

the checks received are subject to court-mandated preservation requirements.

⁴ In an ACH debit transaction, the Receiver is the person or entity making the payment (i.e., the payor) by authorizing a debit to an account. In this document, we may refer to a person or entity making a payment to a Federal agency as a payor, a Receiver, a customer, or a consumer, as appropriate.

⁵ For example, under the ACH Rules, the ODFI warrants that a debit entry has been authorized by the Receiver and must provide a copy of the Receiver's authorization upon the RDFI's request. See ACH Rules 2.2.1.1 and 4.1.1.

corporate entries. Many commenters wrote that a better approach to this issue is to use standard SEC codes, such as the CCD or Corporate Trade Exchange (CTX), for business Internet entries.

Our pilot experience underscores the importance of the commenters' concerns that operational discrepancies may occur if the WEB SEC code is used for corporate items. Many corporations employ cash management tools on their accounts that would reject and return these entries. In view of this experience and the comments received, and because it appears to be possible to use CCD SEC code for Internet-initiated ACH debits without compromising the efficiency of Internet systems, we will use the WEB SEC code for consumer entries and the CCD SEC code for business entries. Use of the CCD SEC code for business entries means that consumer re-credit provisions will not apply to business entries.

II. Interim Rule

A. Background

As discussed above, part 210 incorporates (with certain exceptions) the ACH Rules, which NACHA periodically updates. Each year NACHA publishes a new rule book that reflects the changes to the ACH Rules that have been approved since the publication of the previous rule book. Part 210 currently provides that any amendment to the ACH Rules, as published in NACHA's 2001 rule book, that takes effect after September 14, 2001, will not apply to Federal government ACH entries unless we publish notice of acceptance of the amendment in the **Federal Register**. 31 CFR 210.3(b)(2). NACHA recently published its 2002 rule book. We're publishing this interim rule in order to incorporate in Part 210 all of the amendments to the ACH Rules that NACHA adopted within the last year, other than those relating to accounts receivable entries, which are addressed in our final rule.

Unlike the final rule discussed in Part I of this document, we have not previously sought comment on the issues addressed in this interim rule. We therefore are requesting comment on all aspects of the interim rule discussed below.

B. Changes to ACH Rules

The ACH Rules published in NACHA's 2002 rule book reflect changes to the ACH Rules published in NACHA's 2001 rule book related to four topics in addition to accounts receivable entries. Those four topics are: (1) Affidavit and electronic communication issues; (2) reinitiation; (3) electronic

authorization; and (4) electronic terminals. By amending § 210.2 (d) and § 210.3 (b), we are incorporating these four ACH rule changes into the interim rule.

In order to incorporate these ACH Rule changes in Part 210, the only revision necessary to the current regulation is to replace references to the 2001 rule book with references to the 2002 rule book.

1. Affidavit and Electronic Communication Issues

NACHA has adopted a rule to facilitate the use of electronic agreements and the electronic storage of records in conformance with the Electronic Signatures in Global and National Commerce Act (E-Sign Act). This rule amendment will allow any agreement, authorization, affidavit or other record (e.g., notices, disclosures, etc.) required by the ACH Rules to be executed in an electronic form. It is not a requirement of the ACH Rules that these documents be executed in electronic form; this rule amendment simply provides another option for ACH participants. In addition, this rule amendment would change the term "affidavit" to "written statement under penalty of perjury" in order to clarify that, for purposes of the ACH Rules, such a declaration need not be notarized. RDFIs, at their option, can continue to use affidavits and/or require notarization. This rule amendment became effective March 15, 2002.

FMS, as well as the Federal government as a whole, supports regulations and policies that facilitate electronic commerce, including those that support the validity of electronic signatures. As a result, we are accepting this change to the ACH Rules.

2. Reinitiation Issues

NACHA has adopted a rule to limit the number of times that an ACH entry returned using Return Reason Code R01 (Insufficient Funds) or R09 (Uncollected Funds) may be reinitiated to a maximum of two reinitiation attempts following the return of the original entry. This limitation applies to all SEC codes except RCK (Re-presented Check Entry), which has a distinct limit. This rule amendment became effective March 15, 2002.

FMS supports the consistency that this change to the ACH Rules brings to ACH return items. As a result, we are accepting this change to the ACH Rules.

3. Electronic Authorization

NACHA has adopted a rule revising the language concerning the similarly authenticated standard for consumer

authorizations to be consistent with the recent revisions to the Federal Reserve Board's Official Staff Commentary on Regulation E. This revised language states that electronic authorization that is similarly authenticated by the consumer will satisfy the necessary standards by being in compliance with the requirements of the E-Sign Act. The authorization process chosen must evidence both the consumer's identity and his assent to the transaction. This rule amendment became effective January 1, 2002.

FMS supports consistency between the ACH Rules and Regulation E. As a result, we are accepting this change to the ACH Rules.

4. Terminal Location

Under Regulation E, a point-of-purchase terminal used to capture data electronically for purposes of initiating an EFT constitutes an "electronic terminal" even if no access device is used to originate the transaction, such as when a check is used to capture information to initiate a one-time EFT. Therefore, when a check is used as a source document at a point-of-purchase and is run through a terminal to capture the account information from the check (as is the case with the POP entry), the requirements of Regulation E with respect to electronic terminals apply. These requirements include the provision of a receipt for POP entries that includes the terminal location, as well as the inclusion of the terminal location on the consumer's bank account statement, as provided in Regulation E, § 205.9(b)(1)(iv).

NACHA has adopted a rule to require that (1) an Originator of POP entries include information within the POP entry to identify the city and state in which the electronic terminal used for the transaction is located; (2) the Originator include the Terminal City and Terminal State on the receipt provided to the consumer at the point-of-purchase; and (3) RDFIs expand the information provided on the consumer's monthly bank account statement to include the city and state where the terminal is located. This rule amendment became effective January 1, 2002.

We recognize that this rule change, which is necessary to conform to the requirements of Regulation E, provides consumers with useful transaction information. As a result, we are accepting this change to the ACH Rules.

III. Section-by-Section Analysis

Section 210.2(d) [Interim amendment]

We are amending the definition of “applicable ACH rules” at § 210.2(d). Current § 210.2(d) defines applicable ACH rules to mean the ACH Rules with an effective date on or before September 14, 2001, as published in Parts II, III, and IV of the “2001 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network,” with certain exceptions. We are amending § 210.2(d) to refer to the ACH Rules with an effective date on or before March 15, 2002. The effect of this amendment is that the changes to the ACH rules addressed in our interim rule are incorporated by reference in part 210.

To implement our adoption of a final rule governing accounts receivable check truncation and Internet-initiated debit entries, we are deleting the exceptions in paragraphs (d)(6) (accounts receivable check truncation) and (d)(7) (Internet-initiated debit entries). The deletion of these paragraphs reflects our adoption of the ACH rules governing those transactions, with certain exceptions that are addressed in § 210.2(d)(6) and § 210.6(h). Section 210.2(d)(6) excludes ACH Rule 2.10.2.2 from the definition of applicable ACH rules. ACH Rule 2.10.2.2 requires ODFIs to establish exposure limits for Originators of Internet-initiated debit entries. Section 210.6(h) sets forth the requirements for accounts receivable check truncation by agencies.

Section 210.3(b) [Interim amendment]

We are amending § 210.3(b), “Incorporation by reference—applicable ACH Rules,” by replacing the references to the ACH Rules as published in the 2001 rule book with references to the ACH Rules as published in the 2002 rule book.

Section 210.6(g) [Final amendment]

To implement the part of our final rule that addresses the conversion of checks at agency points-of-purchase, we are amending § 210.6, which sets forth the obligations and liabilities of agencies that initiate or receive Government entries. We are adding a new paragraph (g) to address the conversion of checks to ACH debit entries at agency points-of-purchase. Paragraph (g) permits agencies to convert to ACH debit entries both consumer and business checks presented at agency points-of-purchase. The term “point-of-purchase” is intended to mean any location where an agency accepts checks as payment in connection with a contemporaneous

transaction or any location where an agency cashes checks for employees or the public. Thus, an actual purchase need not take place at a “point-of-purchase.”

ACH Rule 2.1.2 requires that a Receiver authorize the Originator to initiate an entry to the Receiver’s account. In the case of a debit entry to a consumer account, the authorization must be in writing, signed or similarly authenticated by the consumer. ACH Rule 3.4 requires that an Originator provide a Receiver with a copy of the Receiver’s authorization for a debit entry initiated to a consumer account. Under § 210.6(g), these requirements are met if the agency posts a notice containing the disclosure set forth at Appendix A and makes available to the customer, in a form that the customer can retain, the disclosure set forth at Appendix B. It is not necessary that the cashier actually hand the customer the Appendix B disclosure; it is sufficient that the disclosure is made available if the customer requests it. Agencies that convert checks at points-of-purchase must use the standard disclosures at Appendices A and B—they may not modify the disclosures except where indicated by brackets.

ACH Rules 3.10 and 4.1.1 require, respectively, that the Originator retain the original or a copy of the Receiver’s authorization for two years and that the ODFI provide a copy of the Receiver’s authorization to an RDFI upon request. Under § 210.6(g), these requirements can be met by providing a copy of the Receiver’s check plus a copy of the notice that was posted at the cash register.

Section 210.6(h) [Final amendment]

To implement the part of our final rule that addresses the conversion of checks at lockboxes, we are adding a new paragraph (h) to § 210.6. Section 210.6(h)(1) allows an agency to originate an accounts receivable entry if the agency has first provided the disclosure set forth at Appendix C to the consumer. Like the point-of-purchase disclosure, Appendix C contains a standard disclosure that agencies may not modify except as indicated by brackets. The disclosure need not appear on the invoice document itself, but should be provided in such a way that the Receiver can be expected to have read the disclosure before sending in a check. For example, it would be appropriate to include the disclosure with remittance instructions.

Section 210.6(h)(2) allows agencies to convert business checks received at a

lockbox or dropbox⁷ to ACH debit entries using a CCD SEC code. Under section 210.6(h)(2), the authorization requirements of the ACH Rules are met if, and only if, the agency has provided the disclosure set forth in Appendix C prior to converting the check. For purposes of the document retention and availability requirements of ACH Rules 3.10 and 4.1.1, a copy of the notice and a copy of the Receiver’s source document together constitute a copy of the authorization.

Section 210.6(i) [Final amendment]

To implement the part of our final rule that addresses the origination of a service fee for returned transactions in connection with conversion of checks at points-of-purchase and lockboxes, we are adding a new subsection (i) to § 210.6. The ACH Rules do not allow merchants to initiate an ACH debit entry to collect a service fee for an entry that has been returned for insufficient funds except where the Receiver has, in writing, authorized the collection of the fee. Section 210.6(i) overrides this restriction for Federal agencies and allows an agency to collect by ACH debit, without the Receiver’s written authorization, a one-time service fee in connection with any entry originated by converting a check at a point-of-purchase or lockbox that is returned unpaid. The agency must have provided the disclosures set forth at Appendices A and B (for point-of-purchase entries) or Appendix C (for lockbox entries) in order to collect the service fee by ACH debit. This subsection does not create for agencies the authority to impose a service fee; rather, it allows an agency that has the authority to impose such a fee to collect the fee by ACH debit without a written authorization.

Appendices A, B and C

We are adding appendices A, B and C to the regulation to set forth the disclosures required in our final rule for point-of-purchase check conversion and lockbox check conversion.

IV. Procedural Requirements

Request for Comment on Interim Rule

We invite comment on all aspects of the interim rule.

Request for Comment on Plain Language—Interim and Final Rules

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how

⁷ A dropbox is similar to a lockbox except that a payor delivers a payment to a dropbox in person rather than mailing the payment.

to make either the interim rule or the final rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rules are clear; or (3) whether there is something else we could do to make these rules easier to understand.

Notice and Comment and Effective Date—Interim Rule

We find that good cause exists for issuing the interim rule without prior notice and comments. Under the Administrative Procedure Act, an agency is permitted to issue a rule without prior notice and comment when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest. 5 U.S.C 553(b)(B). We believe that it is important to address the publication of new ACH Rules as quickly as possible in order to mitigate the uncertainty and inconvenience to financial institutions and agencies that would result from a time lag in responding to NACHA's rule changes. When we proposed to address changes to the ACH Rules by reviewing and responding to rule changes on an annual basis, we received many comments expressing concern over the potential consequences of such a time lag.

Those consequences include uncertainty as to the rules governing government ACH transactions, as well as the inability of financial institutions to segregate the processing of those transactions. We have published a notice, and considered the comments received, on those provisions of NACHA's rule changes that we believe are significant or controversial, and we are addressing those rule changes in our final rule.

Executive Order 12866—Interim and Final Rules

The interim and final rules do not meet the criteria for a "significant regulatory action" as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act Analysis—Interim and Final Rules

It is hereby certified that the final rule will not have a significant economic impact on a substantial number of small entities. [The conversion to ACH debits of checks remitted by small entities to Federal agencies is not expected to result in increased costs to those entities. Similarly, there should be no economic impact to small entities as a result of allowing Federal agencies to

originate ACH debits authorized by small entities over the Internet. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required. Because no notice of proposed rulemaking is required for the interim rule, it is not subject to the provisions of the Regulatory Flexibility Act.

Unfunded Mandates Act of 1995—Interim and Final Rules

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the 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 the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives. Although the Unfunded Mandates Reform Act of 1995 does not apply to the interim rule, we have determined that it will not result in such expenditures.

Executive Order 13132—Federalism Summary Impact Statement—Interim and Final Rules

Executive Order 13132 requires Federal agencies, including FMS, to certify their compliance with that Order when they transmit to the Office of Management and Budget (OMB) any draft final regulation that has federalism implications. Under the Order, a regulation has federalism implications if it has "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." In the case of a regulation that has federalism implications and that preempts State law, the Order imposes certain specific requirements that the agency must satisfy, to the extent practicable and permitted by law, prior to the formal promulgation of the regulation.

In general, the Executive Order requires the agency to adhere strictly to Federal constitutional principles in

developing rules that have federalism implications; provides guidance about an agency's interpretation of statutes that authorize regulations that preempt State law; and requires consultation with State officials before the agency issues a final rule that has federalism implications or that preempts State law.

The interim and final rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 31 CFR Part 210

Automated Clearing House, Electronic funds transfer, Financial institutions, Fraud, and Incorporation by reference.

Authority and Issuance

For the reasons set forth in the preamble, part 210 of title 31 of the Code of Federal Regulations is amended as follows:

PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

2. Revise § 210.2(d) to read as follows:

§ 210.2 Definitions.

* * * * *

(d) *Applicable ACH Rules* means the ACH Rules with an effective date on or before March 15, 2002, as published in Parts II, III, and IV of the "2002 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network," except:

- (1) ACH Rule 1.1 (limiting the applicability of the ACH Rules to members of an ACH association);
- (2) ACH Rule 1.2.2 (governing claims for compensation);
- (3) ACH Rule 1.2.4; 2.2.1.10; Appendix Eight and Appendix Eleven (governing the enforcement of the ACH Rules, including self-audit requirements);
- (4) ACH Rules 2.2.1.8; 2.6; and 4.7 (governing the reclamation of benefit payments);
- (5) ACH Rule 8.3 and Appendix Two (requiring that a credit entry be originated no more than two banking days before the settlement date of the entry—see definition of "Effective Entry Date" in Appendix Two); and
- (6) ACH Rule 2.10.2.2 (requiring that originating depository financial institutions (ODFIs) establish exposure

limits for Originators of Internet-initiated debit entries).

* * * * *

3. Revise § 210.3(b) to read as follows:

* * * * *

(b) *Incorporation by reference—applicable ACH Rules.*

(1) This part incorporates by reference the applicable ACH Rules, including rule changes with an effective date on or before March 15, 2002, as published in Parts II, III, and IV of the “2002 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network.” The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of the “2002 ACH Rules” are available from NACHA—The Electronic Payments Association, 13665 Dulles Technology Drive, Suite 300, Herndon, Virginia 20171. Copies also are available for public inspection at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, D.C.

(2) Any amendment to the applicable ACH Rules that takes effect after March 15, 2002, shall not apply to Government entries unless the Service expressly accepts such amendment by publishing notice of acceptance of the amendment to this part in the **Federal Register**. An amendment to the ACH Rules that is accepted by the Service shall apply to Government entries on the effective date of the rulemaking specified by the Service in the **Federal Register** notice expressly accepting such amendment.

4. Add new paragraphs (g), (h) and (i) to § 210.6 to read as follows:

§ 210.6 Agencies.

* * * * *

(g) *Point-of-purchase debit entries.* An agency may convert to an ACH debit entry a check drawn on a consumer or business account and presented at a point-of-purchase. Agencies shall use the Point-of-Purchase (POP) Standard Entry Class (SEC) code for entries to consumer accounts and the Cash Concentration or Disbursement (CCD) SEC code for entries to business accounts. The requirements of ACH Rules 2.1.2 and 3.4 shall be met for such an entry if the Receiver presents the check at a location where the agency has posted a conspicuous notice at the point-of-purchase containing the disclosure set forth at Appendix A to this part and makes available to the Receiver, in a form that the Receiver can retain, the disclosure set forth at Appendix B to this part. For purposes of ACH Rules 3.10 and 4.1.1, authorization shall consist of a copy of

the notice and a copy of the Receiver's source document.

(h) *Accounts receivable check conversion.*

(1) Conversion of consumer checks. The notice and authorization requirements of ACH Rules 2.1.4 and 3.6.1 shall be met for an accounts receivable entry only if an agency has provided the Receiver with the disclosure set forth at Appendix C to this part.

(2) Conversion of business checks. An agency may convert to an ACH debit a check drawn on a business account that is received via mail or at a dropbox location if the agency has provided the Receiver with the disclosure set forth at Appendix C. The agency shall use the CCD SEC code for such entries, which shall be deemed to meet the requirements of ACH Rule 2.1.2 if the agency has provided the disclosure set forth at Appendix C. For purposes of ACH Rules 3.10 and 4.1.1, authorization shall consist of a copy of the notice and a copy of the Receiver's source document.

(i) *Returned item service fee.* An agency may originate an ACH debit entry to collect a one-time service fee in connection with an ACH debit entry originated pursuant to paragraph (g) or (h) of this section that is returned due to insufficient funds. An entry originated pursuant to this paragraph shall meet the requirements of ACH Rules 2.1.2 and 3.4 if the agency has complied with the disclosure requirements of paragraph (g) or (h), as appropriate. For purposes of ACH Rule 3.10 and 4.1.1, authorization shall consist of a copy of the notice provided under paragraph (g) or (h), as applicable, and a copy of the Receiver's source document.

5. Add new Appendices A, B, and C to Part 210 to read as follows:

Appendix A to Part 210—Standard Disclosure for Point-of-Purchase Conversion—Posted Notice

Notice to Customers Presenting Checks

Conversion of Checks—If you are presenting a check to the cashier, your check will be converted into an electronic fund transfer. When you hand your completed, signed check to the cashier, your check will be copied. The account information from your check will be used to make an electronic fund transfer from your account in the amount of the check. The cashier will void the check and return it to you.

Insufficient Funds—The electronic fund transfer from your account will usually occur within 24 hours, which is faster than a check is normally processed. Do not present a check to the cashier unless there are sufficient funds available in your checking account. If the electronic fund transfer cannot

be completed because of insufficient funds, we may try to make the transfer up to two more times [and we will charge you a one-time fee of \$ _____, which we will also collect by electronic fund transfer].

Authorization—By reading this notice and handing your check to the cashier, you authorize the conversion of your check into an electronic fund transfer. If the electronic fund transfer cannot be processed for technical reasons, you authorize us to process the copy of your original check.

More Information—A pamphlet with more information about this process, including information about your rights under Federal law, is available from the cashier. [You may also call _____ or visit our Internet site at _____ for detailed information.]

Note: This notice must be conspicuous. This means that the notice should be printed on a sign that is prominently posted at the location where checks are presented to a cashier, in such a way that it is clearly visible from several feet away to customers waiting to present checks.

Appendix B to Part 210—Standard Disclosure for Point-of-Purchase Conversion—Brochure or Pamphlet

What is point-of-purchase check conversion? Point-of-purchase check conversion is the process of converting checks that customers present to cashiers into electronic fund transfers. “Electronic fund transfer” is the term used to refer to the process in which we electronically instruct your financial institution to transfer funds from your account to our account, rather than processing your check. When you hand a check to the cashier, your check is copied and the account information from your check is used to make an electronic fund transfer from your account. The cashier voids your check and returns it to you. By presenting your check at a location where a sign notifies you that your check will be converted, you authorize the conversion of your check into an electronic fund transfer in this manner.

How quickly will funds be transferred from my account? The electronic fund transfer from your account will usually occur within 24 hours, which is faster than a check is normally processed. Therefore, you should be sure that there are sufficient funds available in your checking account when you present your check. If the electronic fund transfer cannot be completed because there are insufficient funds in your account, we may try to make the transfer up to two more times [and we will impose a one-time fee of \$ _____ against your account, which we will also collect by electronic fund transfer].

Will the electronic fund transfer appear on my account statement? The electronic fund transfer from your account will be on the account statement that you receive from your financial institution. However, the transfer may be in a different place on your statement than the place where your checks normally appear. For example, it may appear under “other withdrawals” or “other transactions.” The electronic fund transfer should be identified on your statement as “[insert].”

What if there is a problem with the electronic fund transfer? You should contact

your financial institution immediately if you believe that the electronic fund transfer reported on your account statement was not properly authorized or is otherwise incorrect. Consumers have protections under a Federal law called the Electronic Fund Transfer Act for an unauthorized or incorrect electronic fund transfer.

What if the electronic fund transfer cannot be processed? In rare instances, an electronic fund transfer cannot be processed for reasons other than insufficient funds. In these cases, we will process the copy of your original check. Different rights apply to the processing of the copy of the check than apply to an electronic fund transfer.

[More detailed information about this process is available on our Internet site at _____ or by calling _____.]

Note: This disclosure must be conspicuous. This means that it should be printed in reasonably large typeface. If this disclosure is combined with other information, it should be set off by contrasting color, by surrounding it with a box, or by using other means to ensure that it is prominently featured.

Appendix C to Part 210—Standard Disclosure for Lockbox Conversion—Notice

Notice to Customers Making Payment by Check

Authorization to Convert Your Check—If you send us a check to make your payment,

your check will be converted into an electronic fund transfer. “Electronic fund transfer” is the term used to refer to the process in which we electronically instruct your financial institution to transfer funds from your account to our account, rather than processing your check. By sending your completed, signed check to us, you authorize us to copy your check and to use the account information from your check to make an electronic fund transfer from your account for the same amount as the check. If the electronic fund transfer cannot be processed for technical reasons, you authorize us to process the copy of your check.

Insufficient Funds—The electronic fund transfer from your account will usually occur within 24 hours, which is faster than a check is normally processed. Therefore, make sure there are sufficient funds available in your checking account when you send us your check. If the electronic fund transfer cannot be completed because of insufficient funds, we may try to make the transfer up to two times [and we will charge you a one-time fee of \$ _____, which we will also collect by electronic fund transfer].

Transaction Information—The electronic fund transfer from your account will be on the account statement you receive from your financial institution. However, the transfer may be in a different place on your statement than the place where your checks normally appear. For example, it may appear under “other withdrawals” or “other transactions.” You will not receive your original check back

from your financial institution. For security reasons, we will destroy your original check, but we will keep a copy of the check for recordkeeping purposes.

Your Rights—You should contact your financial institution immediately if you believe that the electronic fund transfer reported on your account statement was not properly authorized or is otherwise incorrect. Consumers have protections under a Federal law called the Electronic Fund Transfer Act for an unauthorized or incorrect electronic fund transfer.

Note: This disclosure must be conspicuous. This means that it should be printed in reasonably large typeface. If this disclosure is combined with other information, it should be set off by contrasting color, by surrounding it with a box, or by using other means to ensure that it is prominently featured.

Dated: April 5, 2002.

Richard L. Gregg,
Commissioner.

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