

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510-AA89

Federal Government Participation in the Automated Clearing House

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Interim rule with request for comment.

SUMMARY: We're issuing an interim rule to amend our regulation at 31 CFR part 210 (part 210), which governs the use of the Automated Clearing House (ACH) system by Federal agencies. Part 210 adopts, 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. We're amending part 210 to address changes that NACHA has made to the ACH Rules during the past year. We are requesting public comment on all aspects of the interim rule.

DATES: The interim rule is effective July 7, 2003. Comments on the interim rule must be received by August 4, 2003. The incorporation by reference of the publication listed in the interim rule is approved by the Director of the Federal Register as of July 7, 2003.

ADDRESSES: You can download the interim rule at the following World Wide Web address: <http://www.fms.treas.gov/ach>. You may also inspect and copy the interim rule 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 Stephen M. Vajs, Director, Risk Management Division, Financial Management Service, U.S. Department of the Treasury, Room 423, 401 14th Street, SW., Washington, DC 20227.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

Part 210 governs the use of the ACH system by Federal 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 or to revise the regulation as otherwise appropriate.

We're 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 2002 rule book. The interim rule addresses the following seven NACHA rulemaking actions: (1) Voting on ACH Rule Amendments; (2) Rules Enforcement; (3) Accounts Receivable (ARC) Entry and Internet-Initiated (WEB) Entry Warranties; Re-presented Check (RCK) Entries Eligible Items; (4) Change Codes; ARC Stop Payments; ARC Individual Name Field; (5) Unauthorized Corporate Debits; Copies of Authorization; Definitions of Point-of-Purchase (POP) Entries and RCK Entries; Destroyed Check (XCK) Entry Check Serial Number Field; ACH Operator Edit Criteria; Elimination of Automated Return (RET) Entry Code; (6) Audit Requirements and (7) Telephone-Initiated (TEL) Reporting. We are requesting comment on all of these topics.

As discussed above, part 210 incorporates the ACH Rules, with certain exceptions. 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 published in NACHA's 2002 rule book that takes effect after March 15, 2002 will not apply to Federal government ACH entries unless we publish a notice of acceptance of the amendment in the **Federal Register**. 31 CFR 210.3(b)(2). NACHA published its 2003 rule book earlier this year. We're publishing this interim rule in order to incorporate in part 210 all of the amendments to the ACH Rules set forth in NACHA's 2003 rule book (including the supplement thereto approved February 27, 2003 and effective June 13, 2003), other than those relating to rules enforcement, ARC and WEB warranties, audit requirements, and TEL reporting.

We have not previously sought comment on the issues addressed in this interim rule. We are requesting comment on all aspects of the interim rule discussed below.

1. Voting on ACH Rule Amendments

NACHA has amended its rules by eliminating a provision that allows certain depository financial institutions that are members of a Regional Payments Association to vote directly with NACHA on amendments to the rules. Amendments to the ACH Rules will continue to be voted on by NACHA's Payments Association members and Direct Financial Institution members. This rule amendment became effective January 1, 2003.

Federal agencies do not vote on ACH Rule amendments and this rule change does not affect Federal agencies' use of the ACH system. There is no need to provide an exception to this ACH Rule for Federal agencies and we therefore are accepting this ACH rule change.

2. Rules Enforcement

NACHA has amended its rules regarding the enforcement process for violations of the ACH Rules, including the fines that may be imposed when a financial institution violates the ACH Rules. Specifically, this ACH Rule amendment:

- Eliminates the second warning provided to an alleged offender before a recurrence is considered for a fine;
- Increases the amounts of the fines assessed for violations of the ACH rules;
- Enables recurrences to be tracked not only to the Originating Depository Financial Institution (ODFI) and its Originator, but also to any third-party service provider that is responsible for the violation;
- Extends the time period for subsequent violations to be counted as recurrences of the initial violation;
- Requires that ACH Operators provide statistical data on ACH returns to NACHA on a monthly basis to address potential fraud; and
- Enables NACHA staff to present an alleged rules violation that significantly harms other financial institutions to the ACH Rules Enforcement Panel immediately for its review and consideration.

These changes became effective on June 14, 2002.

The national system of fines does not apply to ACH entries originated or received by Federal agencies. 31 CFR 210.2(d)(3). Accordingly, we are not incorporating in Part 210 these changes to the enforcement provisions of the ACH Rules.

3. ARC and WEB Warranties; RCK Eligible Items

NACHA has amended the ACH Rules to (1) clarify the warranty provisions associated with the ARC and WEB applications, and (2) clarify that items eligible to be re-presented as RCK entries must contain a pre-printed check serial number.

When NACHA replaced the PPD Accounts Receivable Truncated Check Debit Entry pilot program with the ARC entry application, the legal foundation for the application was modified from a legal framework based on check law to one based on Regulation E. During development of the ACH Rules governing ARC entries, however, a key component of an ODFI's liability was omitted with regard to an ODFI's breach of warranty that causes a Receiving Depository Financial Institution (RDFI) to be out of compliance with Regulation E. NACHA therefore has amended the ACH Rule 2.9.3.5 (Liability for Breach of Warranty) to expand the subsection governing the ODFI's liability for breach of warranty for ARC entries to specifically include claims, demands, loss, liability, or expenses incurred by the RDFI resulting from its inability to comply with Regulation E because of a violation of the Rules by the ODFI.

Similarly, as a result of an oversight during the development of the ACH Rules governing WEB entries, no specific provision was included to explicitly address an ODFI's breach of liability associated with WEB entries. NACHA has amended ACH Rule 2.10.2 to specifically address ODFI liabilities for breaches of warranty associated with WEB entries.

NACHA also has amended the ACH Rules to clarify that an item that is truncated and transmitted as an RCK entry must contain a pre-printed check serial number. The ACH Rules related to electronic check applications (*i.e.*, ARC and POP entries) require that an eligible source document used for the application contain a pre-printed check serial number. However, no similar requirement was explicitly stated in the electronic check rules for RCK entries. To avoid operational problems and to provide consistency among electronic check applications, NACHA has added an explicit requirement that to be eligible for truncation and transmission as an RCK entry, an item must contain a pre-printed check serial number. These ACH Rules changes became effective on September 13, 2002.

Under part 210, the ACH Rules addressing warranties for ARC and WEB entries are not applicable to ACH entries originated or received by Federal

agencies. See 31 CFR 210.2(d)(6), (7) (excluding ACH Rule 2.9 and 2.10 from the definition of Applicable ACH Rules). The liability of Federal agencies to RDFIs in connection with the origination of unauthorized debit entries is set forth at 31 CFR 210.6(d). Pursuant to 31 CFR 210.6(d), an agency's liability in connection with the origination of an ACH debit entry is limited to the amount of the entry. Accordingly, we are not incorporating in part 210 NACHA's rule changes related to breach of warranties for ARC and WEB entries. We are, however, incorporating in part 210 the ACH Rule amendment requiring that an item that is truncated and transmitted as an RCK entry contain a pre-printed check serial number.

4. Change Codes; ARC Stop Payments; ARC Individual Name Field

NACHA has amended the ACH rules to remove certain codes, create a new return reason code for ARC entries and remove a requirement for ARC entries. Specifically, the amendment removed Notification of Change Codes C10 (Incorrect Company Name), C11 (Incorrect Company Identification), and C12 (Incorrect Company Name and Company identification), because these codes were seldom used by RDFIs.

The amendment also created new Return Reason Code R38 for a stop payment on the source document related to an ARC entry to separate it from Return Reason Code R08. Prior to the amendment, Return Reason Code R08 had two timeframes associated with its use: two days for a stop payment order placed on an ACH debit entry and sixty days for a stop payment order placed on a source document (check) related to an ARC entry. The use of two return time frames associated with one return reason code was confusing to many ACH participants and was inconsistent with other Return Reason Codes. Return Reason Code R08 (Stop Payment) will retain the standard two-day return time frame for stop payments placed on ACH entries.

The amendment also modified the Individual Name Field of the ARC Entry to make it optional to include the individual's name in this field. Prior to the amendment, the Individual Name Field was a required field for ARC entries. In an automated processing environment, where electronic capture of source document information is required, capture of the consumer's name is not possible without manual intervention. The purpose of the rule amendment was to decrease the manual processing required to originate ARC entries and to improve the efficiency with which ARC entries may be

originated by making the Individual Name Field in the ARC Entry an optional field, as is the case with POP entries.

These rule amendments became effective on March 14, 2003. We believe that these rule changes improve the operational efficiency of the ACH system and improve the consistency of the rules that govern the system. Therefore, we are incorporating all of these ACH Rule changes in part 210.

5. Unauthorized Corporate Debits; Copies of Authorization; Definitions of POP and RCK Entries, XCK Check Serial Number Field; ACH Operator Edit Criteria; Elimination of RET Code

NACHA has amended the ACH Rules to (1) revise Return Reason Code R29 (Corporate Customer Advises Not Authorized); (2) clarify the right of an RDFI to request a copy of a Receiver's authorization both before and after receiving an entry; (3) establish a 10-banking day timeframe for an ODFI to provide an RDFI with a copy of an authorization when requested by the RDFI; (4) clarify that an ODFI must provide a copy of an authorization to the RDFI without charge; (5) clarify the definitions of POP and RCK entries to define them as Single-Entry transactions; (6) modify the Check Serial Number Field within the XCK format to make it a mandatory field; (7) update the ACH Operators' batch rejection edit criteria regarding valid transaction codes to incorporate loan and general ledger transactions; and (8) eliminate the RET Standard Entry Class Code.

Return Reason Code R29

This rule amendment clarified Return Reason Code R29, Corporate Customer Advises Not Authorized. The prior description of Return Reason Code R29 stated, "the RDFI has been notified by the Receiver (non-consumer) that the Originator of a given transaction has not been authorized to debit the Receiver's account." Some ACH participants were misinterpreting the intended use of this return reason code because of its wording. Return Reason Code R29 is used to return a specific ACH debit entry that was not authorized by the corporate Receiver. NACHA did not intend that this return reason code be used to revoke a corporation's authorization for all future ACH debit entries. This amendment clarified Return Reason Code R29 by removing the reference in the description to the Originator of the entry, stating, "the RDFI has been notified by the Receiver (non-consumer) that a specific transaction has not been authorized by the Receiver."

Right to Request a Copy of Authorization

This rule amendment clarified that an RDFI may request a copy of an authorization both before AND after receiving an ACH entry, by removing the phrase "Prior to acting as an RDFI for a Receiver" from Article Four, Subsection 4.1.1 (Right to Information Regarding Entries). Prior to the amendment, Article Four, Subsection 4.1.1 stated that "Prior to acting as an RDFI for a Receiver, the RDFI may request, in writing, that an ODFI provide a copy of the Receiver's authorization * * *" NACHA's intent was that under this section, in addition to requesting a copy of an authorization after an RDFI has received an ACH entry, an RDFI may also request a copy of an authorization prior to receiving the first ACH entry. NACHA has reworded the section because some ODFIs misinterpreted it, believing that an RDFI is only permitted to request a copy of an authorization prior to receiving an ACH entry.

Time Frame to Produce Copy of Authorization

NACHA has amended the ACH rules to require that the ODFI provide a copy of an authorization within 10 banking days of receiving a written request for the copy from the RDFI. Prior to the amendment, the ACH Rules did not define a specific time frame for an ODFI to provide a copy of an authorization to the RDFI.

Copy of Authorization to RDFI Without Charge

NACHA has amended the ACH Rules to clarify that an ODFI may not charge the RDFI for providing either the original or a copy of an authorization. Prior to this amendment, the ACH Rules did not explicitly state that the ODFI must provide either the original or a copy of an authorization to the RDFI without charge.

Single-Entry Transactions

This rule amendment modified the ACH Rules to define POP and RCK entries as Single-Entry transactions. Prior to the amendment, the ACH Rules defined specific one-time debits (*i.e.*, ARC entries, TEL entries, and certain WEB entries) as Single-Entry debits. Other one-time debit transactions (*i.e.*, RCK and POP), which were developed prior to use of the defined term "Single Entry," were described as non-recurring debits. This amendment provides consistency among the definitions of similar one-time debit entries.

Check Serial Number Field

This rule amendment modified the Check Serial Number Field of the XCK format to make this a mandatory field, making it consistent with other electronic check applications. The amendment also requires that the information in this field for an XCK entry be included by the RDFI on a consumer's periodic statement. Prior to this amendment, the Check Serial Number Field for XCK was optional, not edited by the ACH Operators, and not required to be included on the consumer's periodic statement.

Automatic Batch Rejection Edit

This rule amendment updated the description of the ACH Operator edit concerning transaction codes for Notifications of Change to reflect all applicable transaction codes. Specifically, the transaction codes 41, 46, 51, and 56 were added for Standard Entry Class Code COR. Prior to the amendment, in Appendix Three, Section 3.5 (Automatic Batch Rejection) of the ACH Rules, the description of the ACH Operator edit for valid transaction codes for Notifications of Change did not list the transaction codes for general ledger or loan entries (series 40 and 50).

RET Standard Entry Class Code

This rule amendment eliminated the RET Standard Entry Class Code because of the low volume of paper return conversion currently performed by the ACH Operators and the low volume of entries processed using this SEC Code. The RET Standard Entry Class Code was used by ACH Operators to convert paper returns into electronic format on behalf of an ACH participant when the original SEC Code was unavailable. The ACH Operators currently require that the original Standard Entry Class Code be provided. As a result, use of the RET Standard Entry Class Code for converted returns became unnecessary.

The foregoing eight amendments to the ACH Rules became effective on March 14, 2003. We believe that these rule changes improve the operational efficiency of the ACH system and improve the clarity and consistency of the rules that govern the system. Therefore, we are incorporating all of these ACH Rule changes into part 210.

6. Audit Requirements

NACHA has updated the rules compliance audit requirements of Appendix Eight of the ACH Rules to include (1) provisions related to new ACH products and applications, and (2) additional provisions designed to strengthen the audit requirements. This

rule amendment became effective on March 14, 2003.

Federal agencies are not subject to the audit requirements of Appendix Eight, 31 CFR 210.2(d)(3). Accordingly, we are not incorporating these changes to the audit requirements into part 210.

7. TEL Reporting

NACHA has amended the ACH Rules to allow NACHA, in cases where the return rate for unauthorized TEL transactions appears to exceed 2.5%, the right to request an ODFI to provide NACHA with specific information relating to Originators of those TEL entries. Under the new rule, ODFIs are obligated to provide the requested information within 10 banking days of receipt of NACHA's written request to the Chief Operating Officer of the financial institution. Failure to provide the requested information in a timely manner will constitute willful disregard of the ACH Rules and will subject ODFIs to applicable fines. This amendment becomes effective on June 13, 2003.

We are not incorporating this ACH Rule change into part 210. We do not believe that Federal agencies are experiencing excessive return rates for unauthorized TEL transactions. Moreover, Federal agencies are subject to various requirements regarding the privacy of information they maintain, including the Privacy Act, which restrict the disclosure of information regarding individuals who enter into TEL transactions.

II. Section-by-Section Analysis

Section 210.2(d)

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 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," with certain exceptions. We are amending § 210.2(d) to refer to the ACH Rules with an effective date on or before June 13, 2003.

The effect of this amendment to § 210.2(d) is to incorporate in Part 210 the following changes to the ACH Rules:

- Voting on ACH Rule Amendments;
- RCK Eligible Items;
- Change Codes; ARC Stop Payments; ARC Individual Name Field; and
- Unauthorized Corporate Debits; Copies of Authorization; Definitions of POP and RCK Entries, SCK Check Serial Number Field; ACH Operator Edit Criteria; Elimination of RET Code.

We are also adding a new subsection (7) to § 210.2(d), which excludes ACH

Rule 2.11.3 from the definition of applicable ACH rules. The effect of this amendment is to provide an exception to NACHA's TEL reporting requirements for Federal agencies. Because the ACH Rules relating to rules enforcement, ARC and WEB warranties, and audit requirements are already excluded from the definition of applicable ACH Rules, no change to part 210 is necessary in order to exclude from Part 210 NACHA's amendments to those ACH Rules.

Section 210.3(b)

We are amending subsection 210.3(b), "Incorporation by reference—applicable ACH Rules," by replacing the references to the ACH Rules as published in the 2002 rule book with references to the ACH Rules as published in the 2003 rule book.

III. Procedural Requirements

Request for Comment

We invite public comment on all aspects of this interim rule.

Request for Comment on Plain Language

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 to make the interim 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 rule are clear; or (3) whether there is something else we could do to make the rule easier to understand.

Notice and Comment and Effective Date

We find that good cause exists for issuing the interim rule without prior notice and comment. 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.

Executive Order 12866

The interim rule does 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

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

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. Although the Unfunded Mandates Reform Act of 1995 does not apply to the interim rule, we have determined that it 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.

Executive Order 13132—Federalism Summary Impact Statement

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 rule 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 June 13, 2003, as published in Parts II, III, and IV of the "2003 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH Network," including the supplement thereto approved February 27, 2003 and effective June 13, 2003, 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);

(6) ACH Rule 2.10.2.2 (requiring that originating depository financial

institutions (ODFIs) establish exposure limits for Originators of Internet-initiated debit entries); and

(7) ACH Rule 2.11.3 (requiring reporting regarding unauthorized Telephone-initiated entries).

* * * * *

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

* * * * *

(a) *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 June 13, 2003, as published in Parts II, III, and IV of the “2003 ACH Rules: A Complete Guide to Rules & Regulations Governing the ACH

Network,” including the supplement thereto approved February 27, 2003 and effective June 13, 2003. 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 “2003 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, NW., Suite 700, Washington, DC 20002; and the Financial Management Service, 401 14th Street, SW., Room 420, Washington, DC 20227.

(2) Any amendment to the applicable ACH Rules that takes effect after June 13, 2003, 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.

Dated: May 29, 2003.

Richard L. Gregg,
Commissioner.

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