DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510–AA39

Federal Government Participation in the Automated Clearing House

Editorial Note: Proposed rule document 98–2042 was originally published at 63 FR 5426–5445 in the issue of Monday, February 2, 1998. That publications contained a typographical error. For the convenience of the user, this reprint includes the correction to be published on Thursday, February 5, 1998.

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of the Treasury, Financial Management Service, proposes to revise its regulation governing the use of the Automated Clearing House (ACH) system by Federal agencies. Part 210 defines the rights and liabilities of Federal agencies, Federal Reserve Banks, financial institutions, and the public, in connection with ACH credit entries, debit entries, and entry data originated or received by a Federal agency through the ACH system. As a result of the enactment of recent legislation, the Service expects to introduce up to 600 million new transactions into the ACH system by January 1, 1999. The Service anticipates that the ACH system will provide the dominant, though not exclusive, EFT system used by Federal agencies. Part 210 will provide the regulatory foundation for use of the ACH system by Federal agencies.

DATES: Comments must be received no later than May 4, 1998.

ADDRESSES: Comments should be addressed to Cynthia L. Johnson, Director, Cash Management Policy and Planning Division, Financial Management Service, U.S. Department of the Treasury, Room 420, 401 14th Street, S.W., Washington, DC 20227. A copy of the proposed rule is available at the Service's web site at: http://www.fms.treas.gov/ach. Comments on the proposed rule will be available for public inspection and downloading on the Internet and for public inspection and copying at the Department of the Treasury Library, Room 5030, 1500 Pennsylvania Avenue, N.W., Washington, D.C. To make an appointment to inspect comments and transcripts, please call (202) 622–0990.

FOR FURTHER INFORMATION CONTACT: Diana Shevlin, Financial Program Specialist, at (202) 874–7032; Donna Wilson, Financial Program Specialist, at (202) 874–6799; Christine Ricci, Senior Analyst, or Cynthia L. Johnson, Director, Cash Management Policy and Planning Division, at (202) 874–6590; or Natalie H. Diana, Attorney-Advisor, at (202) 874–6827.

SUPPLEMENTARY INFORMATION:

I. Background

As the Federal Government's financial manager, the Financial Management Service (the Service) provides leadership and assistance to Federal agencies in cash management, payment policy, debt collection, and financial systems. The Service also collects and disburses funds for most Federal agencies. In fiscal year 1997, the Service issued over 856 million payments, totaling in excess of $1.1 trillion, and collected over $1 trillion on behalf of Federal agencies, representing a variety of taxes, duties, fees, and fines.

In fiscal year 1997, approximately 58% percent of Treasury payments were made through the Automated Clearing House (ACH) system. In addition, a growing number of transactions involving the collection of funds by Federal agencies are being made through the ACH system. The ACH system is a nationwide electronic funds transfer (EFT) system which provides for the interbank clearing of credit and debit transactions and for the exchange of information among participating financial institutions. The Federal Government is the largest single user of the ACH system, originating and receiving millions of transactions each month. In fiscal year 1997, the Service made 489 million payments through the ACH system. In addition, in fiscal year 1997, the Service collected over $711 billion in taxes and more than $28 billion in non-tax collections using the ACH system.

Federal agencies primarily use the ACH system to make recurring payments, such as salary payments. Federal agencies also use the ACH system to make non-recurring payments, such as travel reimbursements and tax refunds, as well as payments to vendors and to grant and program recipients. The ACH system also is used for non-tax collections, international funds settlement and for cash concentration from Treasury's more than 3,500 depositaries. The Service adopted a policy of accepting ACH credits to Treasury's General Account (TGA) in order to enable Federal agencies to collect payments such as fines, fees, and loan payments from the public by EFT.

In addition to transactions that are used by the Federal Government as well as the private sector, Federal agencies have worked with financial institutions and the National Automated Clearing House Association (NACHA), the rulemaking body for the ACH system, to develop two new ACH entries and formats specifically designed to meet the needs of Federal agencies: The Automated Enrollment Entry (ENR) replaces the paper form used for enrollment in the Direct Deposit program. The Death Notification Entry (DNE) allows a Federal agency, such as the Social Security Administration (SSA), to notify a financial institution promptly of the death of a Social Security recipient. The DNE has reduced significantly the total dollar amount of post-death payments that SSA seeks to recover annually from financial institutions.

Two recently enacted laws are increasing substantially the use of the ACH system by Federal agencies. Provisions in the North American Free Trade Agreement Implementation Act (NAFTA), Pub. L. No. 103–182, sec. 523 (codified at 26 U.S.C. 6302(h)), and provisions in the Debt Collection Improvement Act of 1996 (DCIA), Chapter 10 of the Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. 104–134, mandate the use of EFT for the collection of certain Federal taxes and for Federal payments other than payments under the Internal Revenue Code of 1986. The DCIA defines EFT as ''any movement of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account.'' DCIA, section 31001(x). EFT includes ACH, Fedwire, and transfers made at automated teller machines (ATMs) and point-of-sale (POS) terminals.

To meet the NAFTA requirements, the Service, in conjunction with the Internal Revenue Service and Federal Reserve Banks, implemented the Electronic Federal Tax Payment System (EFTPS) which enables taxpayers to pay Federal taxes by EFT. The Service will soon issue final amendments to 31 CFR part 203—Treasury Tax and Loan Depositaries. Part 203 addresses the rights and responsibilities of taxpayers, financial institutions, and Federal Reserve Banks in connection with EFTPS.

Section 31001(x) of the DCIA amends 31 U.S.C. 3332 to require Federal agencies to convert from checks to EFT in two phases. During phase one, which began on July 26, 1996, all recipients of Federal payments (other than payments under the Internal Revenue Code of 1986) who become eligible to receive those payments on or after July 26, 1996, must receive them electronically unless the recipient certifies that the recipient does not have an account at a

financial institution or an authorized payment agent.

Phase two covers the conversion from checks to EFT for all Federal payments, except payments under the Internal Revenue Code of 1986. The DCIA provides that, subject to the Secretary of the Treasury's authority to grant waivers, all such payments made after January 1, 1999, must be made by EFT.

On July 26, 1996, the Service promulgated an interim rule, 31 CFR part 208, to implement those provisions of the DCIA that took effect on that date. 61 FR 39254. On September 16, 1997, the Service published for comment a proposed rule implementing the phase two requirements of the DCIA. 62 FR 48714.

As a result of the enactment of the DCIA and NAFTA, the Service expects to introduce up to 600 million new transactions into the ACH system by January 1, 1999. The Service anticipates that the ACH system will provide the dominant, though not exclusive, EFT system used by Federal agencies. Part 210 will provide the regulatory foundation for use of the ACH system by Federal agencies.

II. The 1994 Notice of Proposed Rulemaking

On September 30, 1994, the Service published a Notice of Proposed Rulemaking (NPRM) with respect to Part 210; that document is referred to herein as the 1994 NPRM. The purpose of the 1994 NPRM was ''to provide a regulatory basis for the broader use of the ACH system to meet the future payment, collection and information flow needs of the Government.'' 59 FR 50112.

The Service received fifty-one comments from Federal agencies, financial institutions, NACHA and its regional affiliates, and private sector organizations. All commenters expressed strong support of the Service's efforts to provide a regulatory basis for broader use of the ACH system and to make the regulations more consistent with financial industry rules. Specific comments on the NPRM are discussed in the section-by-section analysis below.

III. This Notice of Proposed Rulemaking

A. Introduction

After considering the comments received on the 1994 NPRM, and taking into account developments since the 1994 NPRM was issued, in particular the enactment of the DCIA and NAFTA, the Service believes it is appropriate to issue a new NPRM. While the organization and wording of this proposed rule is significantly different from the 1994 NPRM, the Service has not deviated from its determination, expressed in the 1994 NPRM, that the ACH Rules, which apply to private entries made through the ACH system, also should apply to credit and debit entries and entry data originated or received by Federal agencies (Government entries), subject to certain exceptions necessary to protect the interests of the Treasury, other Federal agencies, and the public. The use of private industry rules reduces the regulatory burden on financial institutions which otherwise might have to comply with conflicting or duplicative requirements.

Several commenters indicated that the 1994 NPRM did not explain clearly the relationship between the ACH Rules and Federal law or identify with sufficient clarity the ACH Rules which the Service was preempting with respect to Government entries. This NPRM clarifies that the Service proposes to adopt the ACH Rules as the rules governing all Government entries, with twelve exceptions discussed below, for which the Service proposes to establish special rules as a matter of Federal law.

Under Federal law, Treasury has the authority and the duty to disburse and collect funds on behalf of executive Federal agencies. *See* 31 U.S.C. §§ 321(b)(1), 3301, 3321, 3327 and 3335. Treasury consistently has taken the position that state law, such as the Uniform Commercial Code, is inapplicable to Federal payments and collections and that Federal law applies whenever Treasury engages in its sovereign function of collecting and disbursing public funds, regardless of the method used to carry out the function. The Supreme Court affirmed this position in *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943). In *Clearfield Trust*, the Supreme Court found that the rights and duties of the United States with respect to commercial paper that it issues are governed by Federal law, not state law. Treasury has defended successfully the *Clearfield Trust* doctrine in a number of cases. *See, e.g.*, *Alnor Check Cashing Co.* v. *Katz*, 821 F. Supp. 307, 311 (E.D. Pa. 1993), *aff'd* 11 F.3d 27 (3rd Cir. 1993); *Alaska National Bank of the North* v. *Federal Reserve Bank of San Francisco*, No. A87–156, slip op. at 10 (D. Alaska, Aug. 10, 1987).

In 1942, when the *Clearfield* case was decided, the Federal Government disbursed funds primarily in the form of Treasury checks. However, the use of an electronic funds transfer system, such as the ACH system, instead of paper checks, does not change the legal principle that the rights and duties of the United States are governed by Federal law.

Part 210, which relies upon and implements Treasury's statutory responsibility to collect and disburse public funds, regulates the rights and duties of parties to transactions originated or received by Federal agencies through the ACH system, just as other Treasury rules regulate the rights of parties to Treasury checks.[1]

The ACH Rules, which are developed and updated by NACHA, allocate rights and liabilities among participants to an ACH transaction. Financial institutions agree to be bound by the ACH Rules when they join an ACH association. The ACH Rules are structured upon the premise that five entities participate in the ACH system. They are: (1) The originator, which is the person or entity that agrees to initiate ACH entries in accordance with an arrangement with a receiver; (2) the originating depository financial institution (ODFI), which is the institution that receives payment instructions from the originator and forwards the entries to an ACH Operator; (3) the ACH Operator, which is a central clearing facility, operated by a Federal Reserve Bank or a private organization, that receives entries from ODFIs, distributes the entries to appropriate receiving depository financial institutions and performs the settlement function for the affected financial institutions; (4) the receiving depository financial institution (RDFI), which is the institution that receives ACH entries from the ACH Operator and posts them to the accounts of its depositors; and (5) the receiver, which is a natural person or organization that has authorized an originator to initiate an ACH entry to the receiver's account with the RDFI.

In initiating and receiving Government entries, Federal agencies, Federal Reserve Banks and the Service operate in unique capacities that differ from the roles contemplated by the ACH Rules. These differences are a result of the statutory authorities that govern Federal Government payments and collections and that distinguish Federal Government payments from commercial payments involving private parties and financial institutions.

Because the ACH Rules employ terminology that is based upon private industry financial institution-customer relationships, the definitions used in the ACH Rules do not address the roles of Federal agencies, the Service and the Federal Reserve Banks with respect to

[1] 31 CFR part 240.

the origination or receipt of an ACH entry. Due to the bifurcation of function between certifying and disbursing Federal agencies, Federal Government operations do not conform to the definitions in the ACH Rules. From a functional perspective, the Federal agency that certifies an ACH entry to the Service performs a function that is analogous to that of the originator of the entry for purposes of the ACH Rules. In disbursing the payment, the Service is acting as the ODFI and the Federal Reserve Bank is the originating ACH Operator with respect to the entry. Similarly, a Federal agency that receives a payment through the ACH system, functions as the receiver, while the Service functions as the RDFI, and the Federal Reserve Bank functions as the receiving ACH Operator for the entry.

The ACH Rules generally require ODFIs and RDFIs to assume responsibility for entries originated and received by their customers. ODFIs and RDFIs must make certain warranties with respect to entries originated and received by their customers and are liable to other participants in the ACH system for breach of those warranties. The ACH Rules do not impose direct liability upon originators and receivers; any losses resulting from an act or omission by an originator or receiver are imposed on the ODFI or RDFI. The ODFI or RDFI can seek recourse against the originator or receiver if it has the right to do so under the contract between the parties and/or applicable state law.

The Service does not believe that it is appropriate to assume liability arising from the acts and omissions of Federal agencies originating and receiving ACH entries. Accordingly, although it is the Service's view that Federal agencies operate as originators and receivers and the Service operates as an ODFI and RDFI from a functional perspective, the Service believes it is appropriate to impose upon Federal agencies that originate or receive ACH entries the obligations and liabilities imposed on ODFIs and RDFIs, respectively, for purposes of the ACH Rules. Proposed part 210 therefore is structured on the premise that Federal agencies are subject to all of the obligations and liabilities imposed on ODFIs and RDFIs under the ACH Rules, except as otherwise provided in part 210.

The Service has reviewed the ACH Rules and determined that, given the special nature of Government entries, and the importance of protecting public funds, it is in the best interest of the public for the Service to preempt in part or in whole twelve provisions of the ACH Rules. The twelve provisions that the Service proposes to preempt in part or in whole are described briefly below, and are discussed in more detail in the section-by-section analysis. There are five provisions of the ACH Rules that the Service proposes to preempt completely. The following five ACH Rules are preempted entirely and are excluded specifically from part 210's definition of ''applicable ACH Rules'' (see proposed § 210.2(d)):

1. ACH members. Proposed part 210 preempts the limitation on the applicability of the ACH Rules to members of an ACH association.

2. Compensation. Proposed part 210 preempts the compensation rules set forth in the ACH Rules.

3. Arbitration. Proposed part 210 preempts the requirement under the ACH Rules that disputes among participants be settled by arbitration procedures set forth in the ACH Rules.

4. Reclamation. The reclamation provisions of Subpart B preempt all ACH Rules related to the reclamation of entries and the liability of participants that otherwise would apply to benefit payments.

5. Timing of Origination. Proposed part 210 preempts the requirement set forth in the ACH Rules that a credit entry be originated no more than two banking days before the settlement date of the entry.

In addition to the foregoing five provisions of the ACH Rules which proposed part 210 entirely preempts through the definition of ''applicable ACH Rules,'' seven other provisions of the ACH Rules are preempted in part by operation of specific sections of proposed part 210. Those provisions are:

1. Verification of identity of recipient (see proposed §§ 210.4(a), 210.8(c)(2)). Under the ACH Rules, a receiver must authorize an entry before the entry may be originated and the ODFI must warrant that the authorization is valid. The ODFI thus bears the ultimate liability for any loss resulting from a forged authorization under the ACH Rules. Proposed part 210 imposes a different rule for Government entries. Specifically, under proposed § 210.4(a), a financial institution that accepts an authorization from a recipient must verify the identity of the recipient. The financial institution is liable to the Federal Government for all entries made in reliance on a forged authorization that the institution has accepted. Thus, proposed part 210 preempts the ODFI warranty and liability provisions of the ACH Rules by allocating liability to the RDFI if it accepts a forged authorization.

2. Authorization for debit entries to Federal agencies (see proposed §§ 210.4(a)(2), 210.8(c)(1)). Proposed part 210 preempts the ACH Rules with respect to the form of authorization required to initiate debit entries to a Federal agency. The ACH Rules require that every entry be authorized by the receiver, but only require that the authorization be in writing in the case of debit entries to a consumer account. Under proposed § 210.4(a), no person or entity (including any financial institution) may initiate or transmit a debit entry to a Federal agency unless the agency has expressly authorized in writing (or through a similarly authenticated authorization) the origination of the entry by that particular originator. An ODFI transmitting an entry in violation of this requirement would be liable for the amount of the transaction, plus interest, under proposed § 210.8(c)(1).

3. Prenotifications (see proposed §§ 210.6(b), 210.8(a)). The Service is proposing to preempt the ACH Rules in two respects in connection with prenotifications. In order to reduce the potential for misdirected entries, proposed § 210.8(a) requires a financial institution that receives a prenotification relating to Government entries to verify the account number and at least one other identifying data element in the prenotification. This requirement supersedes the ACH Rules which specifically permit financial institutions to rely on the account number alone in posting payment to an account.

Second, the origination of a prenotification is optional for all entries under the ACH Rules. Proposed § 210.6(b) preempts the ACH Rules by requiring that a Federal agency originate a prenotification before initiating a debit entry to a recipient's account. Prenotification is optional for all credit entries.

4. Liability of the Federal Government. (a) Amount of damages (see proposed § 210.6). In general, the ACH Rules impose liability on an RDFI or ODFI for all losses, liabilities or claims incurred by another depository financial institution (DFI), ACH Operator or Association as a result of the RDFI's or ODFI's breach of any warranty. Thus, under the ACH Rules, a Federal agency that originates payments, would be liable for all losses resulting from any breach by it of an applicable warranty under the ACH Rules. Similarly, a Federal agency that receives payments, would be liable for all losses resulting from any breach by it of an applicable warranty under the ACH Rules.

Proposed § 210.6 limits a Federal agency's liability to the amount of the

entry whether it is originating or receiving ACH entries. Therefore, a Federal agency would not be liable to a DFI, ACH Operator or an ACH association for interest, attorneys' fees, or other consequential damages. In addition, in certain circumstances, a Federal agency's liability may be reduced further by the amount of the loss caused by the financial institution's negligence.

(b) Liability of Federal Reserve Banks (see proposed § 210.7(a)). Proposed part 210 preempts article 11.5 of the ACH Rules, which provides that a Federal Reserve Bank is not the agent of an RDFI or ODFI. Proposed part 210 provides that Federal Reserve Banks are Fiscal Agents of the Treasury and are not liable to any party other than the Treasury for their actions under part 210.

5. Liability of financial institutions (see proposed § 210.8(c)). Proposed part 210 preempts the provisions of the ACH Rules that would operate to make a financial institution liable to the Federal Government for any loss, liability or claim relating to an entry in an amount exceeding the entry. As previously indicated, the ACH Rules impose liability on an RDFI or ODFI for all losses, liabilities or claims incurred by another DFI, ACH Operator or Association as a result of the RDFI's or ODFI's breach of any warranty. Under proposed part 210, a financial institution would not be liable to the Federal Government for interest, attorneys' fees, or other consequential damages, except in the case of an unauthorized debit to a Federal agency, as discussed above.

6. Reversals (see proposed § 210.6(g). Proposed part 210 requires Federal agencies initiating reversals to certify that the reversal does not violate applicable law or regulations. This requirement is not imposed under the ACH Rules. In addition, proposed part 210 applies to the Federal Government the ACH Rules relating to indemnification, but limits the extent of the indemnification to the amount of the individual entry(ies) being reversed.

7. Account requirements for benefit payments (see proposed § 210.5). Proposed part 210 imposes a requirement with respect to ACH credit entries representing benefit payments that is not imposed under the ACH Rules, i.e., that such payments be deposited to an account at a financial institution ''in the name of'' the recipient, with two exceptions discussed in the section-by-section analysis. The term ''account'' for purposes of proposed § 210.5 is intended to mean a deposit account and not a loan account or general ledger account. The Service is aware that NACHA has approved a change to the ACH Rules, which will become effective in March 1999, to permit the crediting of ACH credits to a financial institution general ledger account or to a loan account. The Service does not intend to accept this ACH Rule with respect to certain benefit payments.

In addition to preempting the provisions of the ACH Rules listed above, Part 210 also establishes, as a matter of Federal law, certain rights and obligations that are not addressed in the ACH Rules. For example, the ACH Rules generally do not address the rights and liabilities between receivers and originators, nor do the ACH Rules address rights and liabilities between ODFIs and originators, or between RDFIs and receivers. Under the ACH Rules, an ODFI is responsible for entries originated by its customers. The ODFI must make certain warranties with respect to any entry originated by its customer, and is liable for breach of those warranties. The ODFI's ability to seek recourse against the originator in the event of a loss for which the ODFI is liable under the ACH Rules is beyond the purview of the ACH Rules and would be governed by the contract between the ODFI and originator and applicable state law.

The Service is proposing to establish some of these rights in part 210 with respect to Federal agencies vis-a-vis originators or receivers of Government entries. For example, proposed Part 210 provides that a Federal agency will be liable to a recipient for any loss sustained by the recipient as a result of the Federal agency's failure to originate a credit or debit entry in accordance with part 210, and limits that liability to the amount of the entry. Neither the basis nor the extent of an originator's liability to a receiver is addressed in the ACH Rules. In addition, the ACH Rules do not address the circumstances in which an entry, in fact, is ''authorized.'' The determination of whether a valid authorization exists ordinarily would depend on the contract between the parties and applicable state law. Proposed part 210 establishes certain circumstances in which an entry shall be deemed to be unauthorized.

B. Vendor Payments, Enrollment, and Relationship to Other Regulations

In this NPRM, the Service is soliciting comment on two issues of general interest: vendor payments and enrollment.

Although the Service has encouraged companies doing business with Federal agencies to receive payment through the ACH system, participation by vendors has been low. Of the 16 million vendor payments disbursed by Treasury in fiscal year 1997, only 27% were made by EFT.

The Service understands that the primary reason vendors do not use EFT is the non-receipt of remittance data with their payments, i.e., payments are credited to the vendor's deposit account without information indicating the purpose of the payment. Absent identifying information, it is difficult for vendors to reconcile their accounts receivable. The Service seeks public comment on this matter and on what actions could be taken, in particular by the financial industry, to make improvements. Specifically, the Service seeks comment on the following:

- What factors contribute to the non-receipt of remittance data (e.g., customer demand, costs)?
- What are the key reasons why electronic data interchange (EDI) has not been adopted widely by the financial industry?
- Does the approved amendment to the NACHA ACH Rules (effective September 18, 1998), which requires the RDFI to provide remittance information upon request, adequately address vendors' concerns?
- What alternative approaches/ solutions are there to remedy this problem?

With respect to enrollments, the Federal Government actively is promoting the use of automated enrollment for all payments. The Service has received many comments on how to improve the current process for enrolling vendors in EFT. The Service seeks public comment on how to expand the use of automated enrollment and what steps the Federal Government could take to improve the process.

C. Future Changes to Subpart B

As discussed in greater detail in the section-by-section analysis below, the Service proposes in this NPRM to reorganize and rewrite Subpart B in order to allow for the increasing use of automated processes to effect reclamations, rather than requiring reclamations to be conducted on the basis of paper-driven procedures. The Service also is seeking to clarify in this NPRM the obligations and liabilities imposed on financial institutions under current subpart B. The Service is not proposing to change significantly those obligations and liabilities at this time. However, the Service is actively considering ways in which the reclamation process might be restructured in the future to operate more efficiently as a fully automated process. Because the Service recognizes

that many Federal agencies are not in a position to move to an automated reclamation process at this time, proposed Subpart B preserves the basic structure of the current paper-oriented process.

The current reclamation process is a cumbersome and labor-intensive manual process involving a complicated formula for the allocation of liability. As the volume of Federal benefit payments made through the ACH system increases, the number of reclamations also will increase, significantly increasing the processing burden on both the Federal Government and financial institutions. The Service believes it would be in the best interests of the Federal Government and financial institutions to develop a more cost-effective and efficient reclamation process by simplifying the formula for allocating liability and eliminating the manual processing requirements upon which the current reclamation process is based.

In order to begin formulating a preliminary approach to implementing an automated reclamation process, the Service is soliciting comment on the considerations which financial institutions and Federal agencies believe are important with respect to reclamations. For example, because the average number of payments involved in a reclamation is 1.5, the Service questions whether the protection afforded to financial institutions by the limited liability provisions of Subpart B is outweighed by the processing costs of handling reclamations. The Service thus is interested in comment on an approach in which an RDFI would be liable for the amount of any post-death entries received, regardless of whether the RDFI had actual or constructive knowledge of the death. This liability structure would make it possible to streamline the reclamation process by eliminating the certification and informational requirements, thereby eliminating the need for the Federal Government and financial institutions to research and verify the circumstances of each reclamation. In addition, the Service welcomes comments on other possible ways in which the current reclamation process could be simplified.

D. Section-by-Section Analysis

The Service proposes to change the title of this Part to ''Federal Government Participation in the Automated Clearing House'' to reflect the broadened scope of the regulation to cover all types of activities that are handled, or may in the future be handled, over the ACH system.

This proposal contains two subparts. Subpart A sets forth rules applicable to all ACH credit and debit entries and entry data originated or received by a Federal agency which are defined in the proposed rule as ''Government entries.'' Subpart B contains the rules for the reclamation of benefit payments. Current part 210 contains an additional subpart, subpart C, dealing with discretionary salary allotments. In addition, the 1994 NPRM proposed to add a new subpart D dealing with savings allotments. The Service has determined that subparts C and D are unnecessary because they are redundant of rules that appear elsewhere. For example, regulations issued by the Office of Personnel Management, at 5 CFR part 550, address the circumstances under which salary and savings allotments may be made. Under 31 CFR part 208, Federal agencies are required to make all Federal payments, including allotments, by EFT. Subpart A of Part 210 sets forth the rules governing all ACH credit entries made by a Federal agency, including savings and salary allotment payments. Therefore, subparts C and D are deleted from proposed part 210.

Section 210.1—Scope; Relation to Other Regulations

Current part 210 covers only ACH payments made by the Federal Government. In the 1994 NPRM, the Service proposed to broaden the scope of part 210 to cover all entries and entry data originated or received by a Federal agency through the ACH system. Entry data includes prenotifications, returned entries, adjustment entries, notifications of change and other notices or data transmitted through the ACH system. Thus, part 210 would apply to collections and the information entries which can now be handled through the ACH system, as well as to Federal payments made through the ACH system.

Proposed part 210 establishes the general legal and operational framework applicable to all ''Government entries'' as defined in the proposed rule. Federal tax payments made by ACH debit or credit are governed by part 203, which sets forth the rights and responsibilities of taxpayers, financial institutions, and Federal Reserve Banks in connection with EFTPS. ACH credits and debits originated by the Bureau of Public Debt to pay principal or interest on, and to collect payment for the purchase of, United States securities are governed by 31 CFR part 370.

Both part 203 and part 370 impose certain requirements with respect to the payments subject to those regulations that are inconsistent with the provisions of proposed part 210. For example, under proposed part 210 a Federal agency is required to originate a prenotification before originating an ACH debit entry to an account; in contrast, under part 370, a prenotification need not be originated before originating an ACH debit entry to an account. In this example, as a result of the operation of proposed § 210.1, a prenotification would not be required before the Federal Government originates an ACH debit entry to an account for the purpose of collecting payment for the purchase of a United States security.

Section 210.1 of the 1994 NPRM referenced the relationship of part 210 to the savings allotment provisions of 31 CFR part 209. Effective January 27, 1997, the Service deleted part 209 because it was obsolete. 61 FR 68155. Therefore, the reference to part 209 has been deleted from proposed part 210.

Section 210.2—Definitions

The Service proposes to revise this section to explain that any term not defined in part 210 shall have the meaning given to that term in the ACH Rules. In addition, for clarity and simplification, the Service proposes to add, remove, or redesignate certain other terms, as indicated below.

The Service proposes to delete certain definitions that appear in current part 210 and in the 1994 NPRM because proposed part 210 uses these terms in the same way as the ACH Rules. Thus, the definitions of the terms ''banking day,'' ''business day,'' ''erroneous payment,'' ''prenotification'' and ''receiver'' have been deleted.

Other terms defined in current part 210 have been deleted because they are not used in proposed part 210. The terms ''allotment'' and ''allotter,'' which are defined both in current part 210 and the 1994 NPRM, and the terms ''discretionary allotment'' and ''employee'' in current part 210, have been removed because the terms are used only in Subparts C or D. The terms ''payment'' and ''payment date'' in current part 210 have been replaced by the ACH terms ''entry'' or ''credit'' (rather than ''payment'') and ''settlement date'' (rather than ''payment date''). The term ''payment instruction'' has been deleted as unnecessary in proposed part 210.

The definition of ''Federal Reserve Bank'' in current part 210 and the definition of ''Government'' in the 1994 NPRM also are deleted as unnecessary.

The Service proposes to add a definition of ''ACH Rules'' in proposed § 210.2(a). This definition explains that the ACH Rules consist of the NACHA

Operating Rules and the NACHA Operating Guidelines.

The Service also proposes to add a definition of ''actual or constructive knowledge'' at proposed § 210.2(b). This phrase is used in subpart B in connection with determining a financial institution's liability for post-death and post-legal incapacity payments. The addition of this definition is intended to clarify that in reference to the death or legal incapacity of a recipient of benefit payments or the death of a beneficiary, the RDFI is deemed to have actual knowledge of the death or legal incapacity upon the receipt by whatever means of any information of the death or legal incapacity. Moreover, if the RDFI would have discovered the death or legal incapacity if it had followed commercially reasonable business practices, the RDFI will be deemed to have constructive knowledge of the death or legal incapacity. For example, an RDFI would have actual knowledge of a death or legal incapacity through a communication with an executor of the deceased recipient's or beneficiary's estate, a family member, another third party, or the Federal agency issuing the benefit payment. On the other hand, if an RDFI misplaced a letter sent through the mail containing notice of death or legal incapacity, or failed to open or read the letter, the RDFI would be deemed to have constructive knowledge of the death even though it did not have actual knowledge.

Neither current part 210 nor the 1994 NPRM contain a definition of ''actual or constructive knowledge,'' but the reclamation provisions of subpart B of current part 210 provide that a financial institution is deemed to have knowledge of the death or legal incapacity of a recipient or the death of a beneficiary if the financial institution would have discovered the death or legal incapacity if it had exercised due diligence. The Service does not intend to change that standard in this NPRM, but proposes to add this definition to clarify that the basis for determining whether a financial institution has constructive knowledge of the death or legal incapacity is whether commercially reasonable business practices would have resulted in discovery of the information.

The Service proposes to add a definition of ''agency'' in § 210.2(c) to mean any department, agency, or instrumentality of the Federal Government, or a corporation owned or controlled by the Federal Government. Current part 210 uses the term ''program agency.'' The proposed change is not intended to alter the scope of current part 210. The proposed definition is identical to the definition of agency in part 208, which sets forth rules governing the mandatory use of EFT by agencies, except that the definition of agency for purposes of part 210 does not include a Federal Reserve Bank.

For purposes of subpart B, which governs reclamations, ''agency'' means the agency that certified the benefit payment(s) being reclaimed.

Section 210.2(d) of proposed part 210 defines the term ''applicable ACH Rules'' to mean the ''1997 ACH Rules,'' including all rule changes published therein with an effective date on or before September 19, 1997, which are made applicable to ''Government entries'' pursuant to proposed § 210.3. Proposed part 210 completely preempts those ACH Rules that: govern claims for compensation, arbitration, or reclamation of benefit payments; limit the applicability of the ACH Rules to members of an ACH association; or require that a credit entry be originated no more than two banking days before the settlement date of the entry. Therefore, these ACH Rules have been excluded from the term ''applicable ACH Rules.'' As discussed above in the Introduction to this NPRM, proposed part 210 also preempts certain other provisions of the ACH Rules through operation of particular sections of part 210.

It should be noted that any technical or timing requirements imposed upon DFIs under the ACH Rules constitute applicable ACH Rules, and will be binding on agencies and financial institutions, unless preempted. Thus, for example, agencies will be subject to the timing requirements for notifications of change and returns. Agencies would not be subject to the requirement that credit entries be originated no more than two banking days before the settlement date of the entry, since this requirement is excluded from the definition of applicable ACH Rules.

The Service proposes to add a definition of ''authorized payment agent'' at § 210.2(e) in connection with the account requirements for benefit payments set forth at proposed § 210.5. The definition is identical to the definition of ''authorized payment agent'' for purposes of part 208. In the case of a beneficiary who is physically or mentally incapable of managing his or her payments, proposed § 210.5 would permit an authorized payment agent to receive the payments on behalf of the beneficiary.

The Social Security Act, Veterans' Benefits Act, and the Railroad Retirement Act contain provisions permitting a benefit payment to be made to an individual or organization other than the beneficiary when doing so is in the best interest of the beneficiary.[2] SSA and the Railroad Retirement Board use the term ''representative payee'' to refer to individuals and organizations that have been selected to receive benefits on behalf of a beneficiary who is ''legally incompetent or mentally incapable of managing benefit payments.'' The Department of Veterans Affairs uses the term ''fiduciary'' to refer to individuals or organizations appointed to serve in similar circumstances. The definition of the term ''recipient'' in current § 210.2 refers to representative payees and fiduciaries.

Other agencies also may provide for payment to representative payees and fiduciaries. While not specifically mentioned by name, the phrase ''or other agency'' in the proposed definition is intended to refer to such agencies.

In fiscal year 1997, approximately 10 percent of Social Security benefit payments (61 million payments) were made to approximately five million representative payees. SSA, the Railroad Retirement Board, and the Department of Veterans Affairs have issued detailed regulations addressing the qualifications and duties of representative payees and fiduciaries.[3] The rules governing these representational relationships are longstanding and well established. Therefore, the Service believes that it is appropriate to rely on existing agency regulations in defining the term ''authorized payment agent.''

The Service proposes to add a definition of ''Automated Clearing House or ACH'' in § 210.2(f) to make it clear that the electronic fund transfers that are subject to part 210 are limited to those effected through an electronic fund transfer system that has adopted the ACH Rules.

The proposed definition of ''beneficiary'' in § 210.2(g) has been reworded slightly from the definition in current part 210 to reflect the addition of a definition of benefit payment, but substantively is unchanged from the definition in current part 210. Although the 1994 NPRM did not define specifically a beneficiary as a person other than a recipient, the term beneficiary was used in the 1994 NPRM as meaning a party other than a recipient.

The definition of ''benefit payment'' in proposed § 210.2(h) is similar to the definition in current part 210. In the

[2] *See* 42 U.S.C. 1383(a)(2)(A)(ii)(I); 38 U.S.C. 5502(a)(1); 45 U.S.C. 231k, respectively.

[3] *See* 20 CFR Parts 404, 410, 416, 266, and 348; and 38 CFR Part 13, respectively.

1994 NPRM, the Service had proposed to move the specific classes of benefit payments enumerated in the definition to the Green Book. Several commenters objected to this proposed change and requested that the specific classes of benefit payments continue to be enumerated in the regulation itself. In light of these comments, the Service proposes to retain in the regulation a listing of several types of benefit payments for purposes of convenience and illustration. It should be noted, however, that the term ''benefit payment'' includes, but is not limited to, the specific examples set forth at proposed § 210.2(h).

The Service proposes to add to part 210 a definition of ''Federal payment.'' The proposed definition in § 210.2(i) is identical to the definition of that term in part 208 except that the definition of Federal payment in part 208 excludes payments under the Internal Revenue Code of 1986, whereas the term ''Federal payment'' in proposed § 210.2(i) includes those payments. Payments under the Internal Revenue Code of 1986 are excluded in part 208 because the DCIA expressly provides that payments under the Internal Revenue Code of 1986 are not subject to the DCIA's mandatory EFT requirements. However, payments that the Internal Revenue Service elects to make using the ACH system would be subject to part 210 and thus are included within the definition of Federal payment at proposed § 210.2(i).

The proposed definition of ''financial institution'' in § 210.2(j) is identical to the definition contained in Part 208 except that the Service proposes to add a sentence noting that, in proposed part 210, a financial institution may be referred to as an Originating Depository Financial Institution (ODFI) or a Receiving Depository Financial Institution (RDFI), depending on whether it is originating or receiving entries to or from its ACH Operator.

The proposed rule defines ''financial institution'' to mean a depository institution as defined in 12 U.S.C. 461(b)(1)(A), excluding subparagraphs (v) and (vii), and an agency or branch of a foreign bank as defined in 12 U.S.C. 3101. Under this definition, banks, savings banks, credit unions, savings associations, and United States-based foreign bank branches would be considered ''financial institutions.'' This definition has been designed to reflect the class of entities that can participate directly in the ACH system, i.e., financial institutions that are authorized by law to accept deposits.

The term ''Government entry'' is defined in § 210.2(k) as an ACH credit or debit entry or entry data originated or received by an agency. As noted above, current Part 210 applies only to credit entries originated by an agency for the purpose of making payments. Proposed Part 210 has a broader scope; it applies to all entries originated or received by an agency, whether made for the purpose of payments, collections or for information purposes.

The Service proposes to add a definition of the Green Book in § 210.2(l) to clarify that financial institutions that originate or receive Government entries are subject to the procedures and guidelines which are published in the Green Book, as provided at proposed § 210.3(c).

The Service proposes to define the term ''notice of reclamation'' at proposed § 210.2(m) to mean a notice issued by the Federal Government in a paper, electronic, or other form in order to initiate a reclamation. This definition clarifies that the Federal Government is not limited to a paper-based means of communication and opens the way for an automated reclamation procedure. The definition of notice of reclamation is moved to the definition section of proposed part 210 from § 210.13(a) of current Part 210.

The Service proposes to preserve the definition of ''outstanding total'' in current Part 210 without substantive change.

The proposed definition of ''recipient'' in § 210.2(o) is substantially similar to the corresponding definition in Part 208. The term would include an authorized payment agent that receives a payment on behalf of a beneficiary.

The Service proposes to add the term ''Service'' to mean the Financial Management Service, Department of the Treasury.

The Service proposes to add a definition of the Treasury Financial Manual in § 210.2(q) to clarify that the Service may publish procedures and guidelines applicable to Government entries in the Treasury Financial Manual. The Treasury Financial Manual contains procedures to be observed by all agencies with respect to central accounting, financial reporting, and other Federal Government-wide fiscal responsibilities of the Treasury. The proposed definition is substantially unchanged from the definition set forth in the 1994 NPRM.

Section 210.3—Governing Law

Proposed § 210.3(a) provides that the rights and obligations of the United States and the Federal Reserve Banks with respect to all Government entries are governed by Part 210, which has the force and effect of Federal law. As discussed above, this approach is consistent with cases such as *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), and its progeny.

Proposed § 210.3(b) provides that Part 210 incorporates by reference the applicable ACH Rules in effect on September 19, 1997, as modified by this part. Since the publication of the 1994 NPRM, a number of amendments to the ACH Rules have been adopted. The Service will be bound by all amendments adopted since the publication of the 1994 NPRM up to and including those which took effect on September 19, 1997, except the rule that makes prenotifications optional for all payment types, which the Service is proposing to modify. In addition, as noted above, NACHA has approved an amendment to the ACH Rules that, effective March 19, 1999, will permit the crediting of entries to non-deposit accounts. The Service does not intend to accept this amendment for benefit payments subject to proposed § 210.5.

Proposed § 210.3(b)(2) describes how subsequent amendments to the ACH Rules will be handled. The 1994 NPRM stated that Government entries would be governed by any amendment to the ACH Rules that became effective after a specified date only if the Service accepted the amendment by publishing notice to that effect. Twenty-six members of one ACH association were among the thirty-six commenters who urged the Service to change this position. Several financial institutions also recommended that the Service provide that amendments to the ACH Rules are deemed accepted unless the Service expressly rejects the amendment by publishing notice to that effect in the **Federal Register**. In contrast, one agency commented that ''* * * Federal agencies should be prohibited from implementing NACHA proposed amendments until specifically sanctioned by the Treasury Department for agency use.''

Although the Service recognizes that its proposed policy may impose some additional burden on financial institutions that must track the status of ACH Rule amendments, the Service believes that the interests of the Federal Government outweigh these concerns. Amendments to the ACH Rules could have a significant effect on individual agencies and on the Federal Government as a whole. The Service believes that in order to assess the impact of an amendment on agencies, the Federal Government, and the public, the Service must review the amendments and consult with other agencies. Moreover, Federal regulations require that any changes to a

publication incorporated by reference in a **Federal Register**.[4]

For the above reasons, proposed part 210 states that amendments effective after September 19, 1997, will not apply to Government entries unless the Service expressly accepts such amendments by publishing notice of acceptance in the **Federal Register**. In addition, proposed § 210.3(b)(2) provides that with respect to any future amendment that the Service determines to accept, the date of applicability of the amendment to Government entries will be the effective date of the rulemaking specified by the Service in the **Federal Register** document that expressly accepts the amendment.

The Service proposes to clarify at § 210.3(c) of proposed part 210 that any person or entity that originates or receives a Government entry must comply with the instructions and procedures issued by the Service, including the Treasury Financial Manual and the Green Book. As indicated in various places in this NPRM, the Service is proposing to remove to the Green Book and the Treasury Financial Manual certain requirements that currently are set forth in the regulation itself. Particularly in light of the proposed relocation of these provisions, the Service believes it is important to make explicit in the regulation the Service's longstanding policy that the requirements set forth in the Green Book and the Treasury Financial Manual are binding upon financial institutions and agencies to the same extent as the regulation itself.

Some commenters on the 1994 NPRM were concerned that the Service would alter the substantive rights of parties to a Government entry through amendments to the Treasury Financial Manual, the Green Book and other operating guidelines. The commenters requested that such changes be made through amendments to part 210 and be published for public comment. The Treasury Financial Manual and the Green Book, as well as other operating guidelines published by the Service, provide specific operational directions and procedures that implement the regulatory requirements of part 210. The requirements set forth in the Green Book and the Treasury Financial Manual, including those provisions that the Service is proposing to relocate from the regulation to the Green Book or Treasury Financial Manual, are procedural, rather than substantive, in nature. Changes to the substantive rights and liabilities of parties to a Government entry will be made through amendments to part 210 itself in accordance with administrative rulemaking requirements. However, as discussed above, agencies and financial institutions should be aware that the Service has the authority to issue binding procedures and guidance to implement part 210 and that the Service will enforce the requirements set forth in the Treasury Financial Manual and the Green Book in the same manner that it enforces regulations.

Section 210.4—Authorizations and Revocations of Authorizations

Proposed § 210.4(a) provides that each debit and credit entry subject to proposed part 210 must be authorized in accordance with the applicable ACH Rules and the additional requirements set forth in this section. The liability of a financial institution for failing to comply with the authorization requirements is set forth at proposed § 210.8(c)(2).

Proposed § 210.4(a)(1) provides that the agency or RDFI that accepts the recipient's authorization shall verify the identity of the recipient and, in the case of a written authorization that bears the recipient's signature, the validity of the signature. Traditionally, recipients of benefit payments such as Social Security and Veterans benefits enrolled in Direct Deposit by completing a Form 1199A with the assistance of their financial institution. In order to encourage recipients to use Direct Deposit, in recent years, SSA and other agencies have become directly involved in the enrollment process by accepting Direct Deposit authorizations over the phone with the assistance of trained customer service representatives. Proposed part 210 acknowledges that the enrollment process may be completed by the recipient's financial institution or by the agency. In addition, proposed § 210.4(a) encourages automated enrollments by removing the requirement that the financial institution sign the authorization form. Proposed § 210.4(a) recognizes that signature verification may not be possible or practical in an automated enrollment.

The 1994 NPRM required that financial institutions exercise due diligence in verifying the identity of recipients. Commenters requested clarification of this standard. The Service proposes to delete the requirement that financial institutions exercise due diligence to verify the recipient's identity. Instead, proposed part 210 imposes an absolute requirement that the RDFI or agency accepting the authorization verify the recipient's identity and, where appropriate, the recipient's signature. The Service proposes to leave to the discretion of the financial institution or agency accepting an authorization the steps it will take to verify the recipient's identity. The Service continues to believe that the authorization process represents an opportunity to reduce fraud which could otherwise result in significant losses to the Federal Government. Because the party that accepts the authorization is in the best position to detect potential fraud, the Service believes it is appropriate to hold that party strictly liable for the identity of the recipient.

Under proposed § 210.4(a)(2), which is substantially similar to § 210.3(a)(6) of the 1994 NPRM, an originator and an ODFI would be prohibited from initiating a debit entry to an agency without the express permission, in writing or similarly authenticated, of the agency. The Service has conducted pilot programs to test the initiation of debit entries to the Federal Government. These pilots indicate that the use of debit entries to the Federal Government is a cost-efficient payment mechanism that benefits both the Federal Government and the payee-recipient. However, in order to protect the interests of the Federal Government, the Service believes that it is appropriate to require the prior written (or similarly authenticated) authorization, just as the ACH Rules require prior written authorization in the case of debits to a consumer account. In the case of recurring entries, the agency would give authorization only once, prior to the first entry.

Proposed § 210.4(b), which is based on § 210.3(b) of the 1994 NPRM and § 210.4(b) of current part 210, specifies the terms to which a recipient agrees by executing an authorization for an agency to initiate an ACH entry. Under § 210.4(b)(1), a recipient agrees to be bound by part 210 and, under § 210.4(b)(2), the recipient agrees to provide accurate information.

Proposed § 210.4(b)(3) provides that the recipient agrees to verify the recipient's identity to the satisfaction of the party that accepts the authorization, whether this is the RDFI or the agency. The imposition of this requirement on recipients complements the duty of the party accepting the authorization to verify the recipient's identity.

Proposed § 210.4(b)(4) provides that a new authorization supersedes any already existing authorization that is inconsistent with the new authorization. This provision is reworded, but substantively unchanged, from § 210.3(b)(4) of the 1994 NPRM.

[4] See 1 CFR § 51.11.

Under proposed § 210.4(b)(5), the recipient agrees that the Federal Government may reverse any duplicate or erroneous entry as provided in § 210.6(g).

The 1994 NPRM proposed that an authorization would be revoked in the event the RDFI was unable to process an item properly because of incorrect transaction instructions. The Service proposes to delete this provision in light of comments received indicating that the common practice by RDFIs that receive an item that cannot be processed is to return the item. This affords the ODFI an opportunity to correct erroneous information and resubmit the item. The Service agrees that the return and resubmission process is an appropriate mechanism to deal with such items.

The Service also proposes to eliminate the provision contained in the 1994 NPRM that an authorization was revoked upon a determination by the Federal Government that the conditions of authorization have changed. Several commenters questioned the breadth and vagueness of this provision. The Service agrees that this provision is not necessary.

In addition, the Service proposes to delete the provision in § 210.4(e) of current part 210 and § 210.3(d) of the 1994 NPRM that states that, except as authorized by law or other regulations, part 210 shall not be used to effect an assignment of a payment. The Service believes that a prohibition against assignments is not appropriate in part 210. Other Federal laws, such as the Social Security Act, govern the assignment of benefits.

The Service also proposes to delete the provision in the 1994 NPRM that an authorization would terminate upon a failure by the recipient to meet any of the conditions specified in the terms of the authorization. This provision was intended to address circumstances in which a recipient failed to comply with a duty imposed on the recipient in the authorization under any applicable agency regulation, guideline, or agreement. Upon further consideration, the Service does not believe that this issue needs to be addressed in part 210, because the circumstances in which a recipient's right to receive benefit payments terminates as a result of violation of agency requirements are appropriately addressed by the agency regulations governing benefit payments.

Proposed § 210.4(c)(1) corresponds to § 210.4(c)(2) of current part 210. This section provides that, in the case of benefit payments, a change in the ownership of the account results in the termination of the authorization. This provision is an extension to the authorization requirements relating to account ownership for recipients of benefit payments. The purpose of this provision is to ensure that payments are not deposited to an account to which a recipient no longer has access or in which the recipient's ownership interest has changed.

Under proposed § 210.4(c)(2), as under current part 210, the death or legal incapacity of a recipient of benefit payments or the death of a beneficiary results in the termination of the authorization.

Proposed § 210.4(c)(3), which corresponds to §§ 210.4(c)(4) and 210.7(c) of current part 210, provides that the closing of the recipient's account at the RDFI results in termination of the authorization. In addition, this section requires the RDFI to provide 30 days written notice to the recipient prior to closing the account except in cases of fraud. Some financial institutions commented that the thirty day notice requirement was an improper interference with their customer relationships. However, the Service believes that the notice requirement protects recipients from being deprived of timely access to their funds as a result of an account being closed without sufficient notice to allow the recipient to make other arrangements to receive the funds.

In order to eliminate any unnecessary interruptions in ACH services to recipients when any of the events described in proposed § 210.4(c)(4) occurs, the Service proposes to add a provision that states that an authorization will not terminate upon the insolvency or closure of the RDFI, provided that a successor is named for the institution. If no successor is named, the Federal Government may transfer temporarily the authorization to a consenting financial institution for a period of no longer than 120 days. Proposed § 210.4(c)(4) is largely identical to § 210.3(c)(9) of the 1994 NPRM except that the Service proposes to add the term ''consenting'' to clarify that it will transfer authorizations only to an RDFI that consents to the transfer.

Section 210.5—Account requirements for Benefit Payments

Proposed § 210.5 imposes restrictions on the type of account to which benefit payments may be deposited. Proposed § 210.5(a) sets forth a general rule that benefit payments must be deposited to an account at a financial institution in the name of the recipient. As explained above in connection with the definition of ''benefit payment,'' Federal retirement payments would not constitute benefit payments for purposes of the requirements of proposed § 210.5. The reason for excluding Federal retirement payments from the requirement of proposed § 210.5(a) is that in some circumstances these types of payments are made to accounts owned by someone other than the person authorized to receive the Federal retirement payment, such as a spouse.

For purposes of proposed § 210.5, the phrase ''account at a financial institution'' is intended to mean a deposit account. Proposed § 210.5 would not prohibit the use of a joint account between the recipient and a spouse or other member of the recipient's family.

Proposed § 210.5(b) provides two exceptions from the general rule set forth at proposed § 210.5(a) for situations that involve an authorized payment agent or an investment account established through a registered securities broker or dealer. Proposed § 210.5(b)(1) addresses cases in which an authorized payment agent has been selected or designated. The term ''authorized payment agent'' is narrowly defined for purposes of this NPRM to mean a person or entity selected under certain agency regulations to act on behalf of a beneficiary. In such cases, the account may be titled in any manner that satisfies the regulations of the appropriate agency.

Proposed § 210.5(b)(2) permits an ACH credit entry representing a benefit payment to be deposited into an investment account in the name of a broker or dealer registered under the Securities Act of 1934, provided that the account and related records are structured so that the beneficiary's interest is protected under Federal or state deposit insurance regulations. The deposit of a benefit payment into an account owned by a third party raises concerns about the protection of the beneficiary's interests. The requirement that the account and related records be structured so that the beneficiary's interest is protected under Federal or state deposit insurance regulation is intended to address this concern.

The phrase ''notwithstanding the applicable ACH Rules'' indicates that proposed § 210.5 imposes a requirement not imposed under the applicable ACH Rules, i.e., that the account be ''in the name of'' the recipient, with the two exceptions noted above. This requirement is based on § 210.4(a) of current part 210 and § 210.3(a) of the 1994 NPRM. Like those provisions, this proposed section is designed to ensure that benefit payments reach the intended recipient by requiring that

such payments be deposited into an account in which the recipient has an ownership interest. Proposed § 210.5(a) is limited to benefit payments, however, because the Service is aware that under current commercial practices many vendors designate an account in a general corporate name to receive payments in the name of a subsidiary or designate a bank account in the name of an accountant or other service provider for the receipt of payments. In light of these business practices, the Service does not believe that it is appropriate to require that non-benefit payments be deposited into an account in which the recipient has an ownership interest.

The ACH system in the past has not supported the transmission of ACH credit entries to a non-deposit account. The Service is aware that NACHA has approved an amendment to the ACH Rules (effective March 19, 1999), which permits the crediting of entries to general ledger accounts and loan accounts. The Service does not intend to accept the amendment with respect to certain benefit payments.

Current part 210 provides that the title of the account designated by the recipient must include the recipient's name. However, in response to inquiries, the Service has interpreted current Part 210 as permitting a master/subaccount arrangement in which the benefit payments are deposited into a master account established, for example, by a nursing home that is providing care for a number of Social Security recipients. Proposed § 210.5 is consistent with this approach, but also allows benefit payments to be deposited into an investment account established by a registered securities broker or dealer, provided the recipient's name and ownership interest are indicated on the deposit account records.

Section 210.6—Agencies

The title of this section has been changed from ''Federal Government'' to ''Agencies.'' Proposed § 210.6 sets forth a number of obligations and liabilities to which agencies that initiate or receive Government entries are subject. These obligations and liabilities are in addition to, or different from, the obligations and liabilities that otherwise would be imposed under the applicable ACH Rules. For example, the authorization, prenotification, and reversal requirements of proposed § 210.6(a), (b), and (g) constitute additional obligations. The liability provisions of § 210.6(c), (d), (e), and (g) both expand and limit the liability that an agency would otherwise be subject to under the applicable ACH Rules. Specifically, an agency's liability is broader than it would be under the applicable ACH Rules because an agency is liable for a failure to act ''in accordance with this part [210].'' However, the extent of an agency's potential liability is capped by the amount of the entry(ies), which is a limitation on the liability generally provided for under the applicable ACH Rules.

Proposed § 210.6(a) is based on § 210.6(e)(2) and § 210.4(b) of the 1994 NPRM and requires an agency to obtain prior written authorization from the Service in order to receive ACH credit or debit entries. The Service requires this process in order to make software and operational changes to permit the receipt of entries by the agency. The Service proposes to delete the language from the 1994 NPRM directing the Federal Reserve Bank to take ''appropriate action'' because this language refers to operational matters between the Service and the Federal Reserve Bank, and is not needed in the regulation. Proposed § 210.6(a) is not intended to reduce or change the liability of originators or ODFIs for the initiation of an unauthorized entry to an agency; rather, it is an operational requirement imposed by the Service on agencies.

Proposed § 210.6(b) addresses prenotifications. A prenotification is a non-value informational entry sent through the ACH system that contains the same information that will be carried on subsequent entries (with the exception of the dollar amount and transaction code). The purpose of a prenotification is to verify the accuracy of the account information to ensure that when a live entry is received, it can be posted to the correct account.

Proposed § 210.6(b) is based on current § 210.8(b) and deals with an agency's responsibilities for prenotifications in the context of both debits and credits. The duties of a financial institution with respect to prenotifications are addressed in § 210.8(a).

Under the ACH Rules, prenotifications are optional for all entries. Both the 1994 NPRM and proposed part 210 make prenotification optional for credit entries, but modify the ACH Rules by requiring prenotification for debit entries initiated by an agency. The Service believes that, in the case of debits initiated by the Federal Government, added precautions need to be taken to ensure that the debit is applied against the correct account at the intended financial institution.

In response to questions raised by commenters, it should be noted that an agency must follow all operational requirements relating to prenotifications required under the ACH Rules when the agency initiates or receives a prenotification.

Proposed § 210.6(c)–(e) set forth an agency's liability to various parties in connection with Government entries. The 1994 NPRM proposed to limit generally the extent of an agency's liability to the amount of the entry(ies) at issue, but to permit an agency to agree to be bound by the compensation and arbitration procedures found in the ACH Rules, subject to the requirement that the agency fund any additional amount of liability and any arbitration costs. The Service has determined that it is not in the interest of the Federal Government to permit agencies to vary the liability of the Federal Government on a case-by-case basis. In order to preserve a uniform set of rules and liabilities for all Government entries, the Service has deleted from proposed part 210 the provision permitting agencies to opt into the ACH compensation and arbitration rules.

Proposed § 210.6(c) is based on current § 210.10(a) and provides that an agency will be liable to the recipient for any loss sustained as a result of the agency's failure to originate a credit or debit entry in accordance with part 210. This section further provides that the agency's liability will be limited to the amount of the entry.

The ACH Rules do not address the basis for, or the extent of, the liability of an originator or ODFI to a receiver. A receiver's rights against an originator or ODFI for failing to properly originate an entry ordinarily would be governed by contract and state law. Proposed § 210.6(c) establishes a recipient's rights against an agency in these circumstances as a matter of Federal law: an agency will be liable for any loss sustained by a recipient, up to the amount of the entry, as a result of the agency's failure to originate a credit or debit entry in accordance with part 210.

Proposed § 210.6(d) is new. It establishes that an agency may be liable to an originator or an ODFI for any loss sustained by the originator or ODFI resulting from the agency's failure to credit an ACH entry to the agency's account in accordance with part 210. The agency's liability would be limited to the amount of the entry(ies). The ACH Rules do not address the liability of an RDFI to an originator. Under the ACH Rules, if an RDFI fails to properly credit an ACH entry to the designated account within the applicable time limitations, the RDFI will have breached a warranty to the ACH Operator, Association, and ODFI, and may be liable to one of those parties for any

losses resulting from the RDFI's breach. Whether the originator has any recourse in such a situation depends on its contract with its ODFI and state law.

Proposed § 210.6(d) would preempt the ACH Rules with respect to the extent of an agency's liability to an ODFI by limiting that liability to the amount of the entry(ies). In addition, proposed § 210.6(d) establishes, as a matter of Federal law, that an agency may be liable directly to an originator in an amount not exceeding the amount of the entry(ies).

Proposed § 210.6(e) provides that an agency's liability to an RDFI for losses sustained by the RDFI in processing a duplicate or erroneous entry will be limited to the amount of the entry(ies). The phrase ''[e]xcept as otherwise provided in this part 210'' is intended to preserve the allocation to the RDFI of liability in connection with the RDFI's failure to comply with, for example, the authorization and prenotification verification requirements. Under current part 210 and the 1994 NPRM, an agency bears responsibility for processing errors; however, the Service believes that neither current part 210 nor the 1994 NPRM are clear in describing the type of errors or the nature of the losses for which an agency would be liable. For this reason, this proposal refers specifically to duplicate and erroneous entries, which are defined in the ACH Rules.

Under the ACH Rules, an ODFI is liable for losses caused by its origination of duplicate or erroneous entries. This proposed rule would subject agencies to the liability for originating erroneous and duplicate entries imposed on ODFIs under the ACH Rules, but would preempt the ACH Rules in three respects. First, under the proposal, an agency would not be liable for all costs incurred by the RDFI, such as attorneys fees, but would be liable only up to the amount of the entry. Second, the proposal uses comparative negligence and reduces an agency's liability to the extent the loss results from the financial institution's failure to follow standard commercial practices and exercise due diligence. Third, proposed § 210.6(e) excludes credit entries received by an RDFI after the death of a recipient of benefit payments or the death or legal incapacity of a beneficiary. It should be noted that liability in connection with any benefit payment to a deceased recipient would not be covered under proposed § 210.6(e), but would be governed solely by subpart B.

Proposed § 210.6(f) is substantially unchanged from § 210.10(c) of current part 210 and § 210.4(i) the 1994 NPRM.

The Service proposes to add a new § 210.6(g) to address the Federal Government's initiation of reversals. As discussed in the analysis of proposed § 210.4(b) above, a recipient who executes an authorization agrees, among other things, that the Federal Government may reverse duplicate or erroneous entries or files, as provided in proposed § 210.6(g).

The ACH Rules permit an originator to reverse duplicate or erroneous entries and permit an ODFI, originator, or originating ACH Operator to reverse duplicate or erroneous files within five banking days of the settlement date of the duplicate or erroneous file or entry. For purposes of the ACH Rules, and as used herein, a duplicate entry is an entry that is a duplicate of an entry previously initiated by the originator or ODFI and an erroneous entry is an entry that orders payment to or from a receiver not intended to be credited or debited by the originator or that orders payment in a dollar amount different that what was intended by the originator.

Under the ACH Rules, the ODFI and/or originating ACH Operator must indemnify the RDFI against any losses the RDFI incurs as a result of effecting a reversal. Consequently, in the event that the RDFI reverses an entry or file initiated by the ODFI, but the RDFI cannot recover the amount of the entry from the receiver (because, for example, the receiver has withdrawn the funds and closed the account), it is the ODFI or originator who bears the loss.

The Social Security Administration (SSA) suffers annual losses of between one and two million dollars due to misdirected payments. SSA has expressed concern that, as the number of Direct Deposit payments dramatically increases, additional millions could be misdirected as a result of data entry errors. The ability to effect reversals is an important way in which the Federal Government can reduce losses resulting from overpayments and misdirected entries. If a reversal is effected expeditiously, in many cases the receiver may not be aware that the erroneous or duplicate entry occurred, and thus the funds may be available in the account for recovery by the RDFI and, ultimately, the Federal Government.

With respect to certain types of payments, however, the Federal Government's ability to reverse a duplicate payment or overpayment to a recipient may be constrained due to the existence of various Federal statutory provisions governing the manner in which the Federal Government may recover overpayments. For example, in the context of Federal benefit payments, the Federal Government may be required to provide a notice and hearing prior to taking action to recover payments, or may be limited in the amount, timing or manner in which an overpayment is recovered. The Service is not proposing to address the operation of these requirements in Part 210 because the applicable requirements may vary depending on the type of the payment. It is the agency's responsibility to determine before certifying a reversal that the reversal will not violate any applicable laws or regulations.

The 1994 NPRM addressed reversals in the context of recipient authorizations: By executing an authorization, a recipient agreed that the Federal Government reserved the right to use reversal entries in the event that it originated duplicate files or entries in error. Several commenters on the 1994 NPRM requested clarification as to whether the Federal Government, when initiating reversals, would be bound by any ACH Rule requirements that generally apply with respect to reversals, such as the five (5) day reversal deadline. It is the intention of the Service that all ACH Rule requirements would apply to Federal Government-initiated reversals except that the extent of the Federal Government's indemnification would be limited to the amount of the entry(ies). The proposed rule has been amended to clarify this point.

Section 210.7—Federal Reserve Banks

The Service proposes to reorganize and expand § 210.6 of current part 210 as § 210.7 of proposed part 210 to more clearly present the role and responsibilities of the Federal Reserve Banks. As discussed below, most of proposed § 210.7 either was previously proposed at § 210.5 of the 1994 NPRM or is unchanged from current § 210.6. However, one change from both the 1994 NPRM and current part 210 relates to the timing of settlement and funds availability. In the 1994 NPRM, the Service had proposed to combine subsections 210.6(c) and 210.6(e) of current part 210 and to substitute the ACH term ''settlement date'' for ''payment date,'' to reflect that for credit entries initiated by an agency, entry information and funds were to be made available by the Federal Reserve Bank no later than the opening of business on the settlement date.

The settlement of ACH entries is determined by the ACH Operator which, in the case of Government entries, is a Federal Reserve Bank. The Service now proposes to delete as unnecessary the

provisions from both part 210 and the 1994 NPRM relating to funds availability since those requirements are addressed under the Federal Reserve Bank Uniform Operating Circular on ACH items.

It should be noted that some commenters on the 1994 NPRM were concerned about the substitution of the term ''settlement date'' for the term ''payment date'' in current part 210. These commenters argued that the substitution of the term ''settlement date'' for ''payment date'' could result in delaying some payments beyond the statutorily required day on which payment must be made. The commenters further argued that payees who receive payments electronically would be disadvantaged as compared with check recipients. For example, Federal statutes require that certain annuity payments made by the Railroad Retirement Board or the Office of Personnel Management must be made on the first day of the month. These agencies pointed out that when the first day of the month falls on a Saturday, checks are dated for the first date of the month and delivered on Saturday. The commenters did not indicate what happens when the first of the month falls on a Sunday. The commenters pointed out that recipients who receive their payments by EFT will be at a disadvantage as compared with check recipients because check recipients will receive their payment on Saturday whereas other recipients will not receive payment until the ''settlement date'', which would be Monday.

Because the mandatory EFT provisions of the DCIA require all payments made by an agency, except tax refunds, to be made electronically, the equity issues raised by commenters in 1994 should be largely moot. Moreover, the substitution of the term ''settlement date'' for ''payment date'' will not change the date on which payment will be available under current part 210. Current part 210 defines the payment date as the date upon which funds are to be available for withdrawal by the recipient, and on which the funds are to be made available to the financial institution by the Federal Reserve Bank. Current Part 210 provides that ''if the payment date is not a business day for the financial institution receiving a payment, or for the Federal Reserve Bank from which it received such payment, then the next succeeding business day for both shall be deemed to be the payment date.'' Thus, under the example cited above, where the first of the months falls on a Saturday, payment currently would not be made until Monday. Therefore, this issue is not related to the use of the term ''settlement date'' as opposed to ''payment date;'' rather, this issue is related to the nature of electronic payments and the banking industry generally.

The Service recognizes that this issue will need to be addressed by those agencies subject to such constraints, and solicits comment on ways in which this issue could be addressed. For example, the Service solicits comment on the feasibility of initiating certain payments one or two days early in order to ensure that the recipient receives the funds on the day preceding the statutorily prescribed payment date, rather than one or two days later.

The Service proposes to move current § 210.6(a) and § 210.6(f) to proposed § 210.7(a). In addition, the Service proposes to specify in proposed § 210.7(a) that each Federal Reserve Bank, as the Fiscal Agent of the Service, serves as the Federal Government's ACH Operator for Government entries. This language was previously proposed at § 210.5(a) of the 1994 NPRM. Proposed § 210.7(a) also incorporates the exclusion from liability set forth at § 210.5(e) of the 1994 NPRM. The phrase ''notwithstanding the applicable ACH Rules'' has been added to clarify that the Service is preempting the ACH Rule that provides that a Federal Reserve Bank is not an agent of an RDFI or ODFI.

The Service proposes to add § 210.7(b) to ensure that the Service is aware of new ACH applications at an agency so that proper accounting can take place and correct credit can be given in the Treasury investment program as an agency receives ACH transactions. This provision was previously proposed by the Service at § 210.5(b) of the 1994 NPRM.

Section 210.8—Financial Institutions

Proposed § 210.8 addresses the obligations of financial institutions with respect to Government entries, which are set forth at current § 210.7. The Service proposes to remove as unnecessary many of the provisions of § 210.7 of current part 210 because they are addressed in the ACH Rules. For example, current § 210.7(e) has been deleted since the ACH Rules adequately cover the inability of an RDFI to credit an account indicated in an entry. In addition, § 210.7(f), (f)(1), (f)(2), and (f)(4) of current Part 210 have been deleted since the ACH Rules address these provisions.

Proposed § 210.8(a) addresses an RDFI's obligations with respect to prenotifications. A prenotification, as described in the ACH Rules, is a non-dollar entry, sent through the ACH system, which contains the same information (with the exception of the dollar amount and Standard Entry Class Code) that will be carried on subsequent entries. The purpose of a prenotification is to verify the accuracy of the account data. Proposed § 210.8(a) specifies that if an agency initiates a prenotification entry, the RDFI has certain obligations associated with that entry; specifically, the RDFI must verify that the account number and one other item of information in a prenotification entry both relate to the same account. This requirement is not imposed on RDFIs under the ACH Rules, as reflected by the phrase ''[n]otwithstanding the applicable ACH Rules.'' Therefore, the obligation imposed in this section, and the corresponding liability to which a financial institution would be subject under § 210.8(c) if it failed to verify a prenotification, would supersede the ACH Rules with respect to agency-initiated prenotifications.

The Service proposed to add this requirement to part 210 in the 1994 NPRM. The 1994 NPRM proposed to require RDFIs to verify, in the prenotification, the recipient's account number and at least one other identifying data element. The 1994 NPRM gave the authorizing recipient's name as an example of an identifying data element. A number of financial institutions objected to this requirement on the basis that automated systems now in place at many large financial institutions cannot perform this verification and that financial institutions rely on account numbers only. Five commenters expressed specific concern over the recipient's name being used as an example of another identifying data element. Financial institution commenters pointed out that manual processing would be required to verify the recipient's name. Conversely, the Social Security Administration (SSA) suffers annual losses of between one and two million dollars due to misdirected payments. SSA has expressed concern that, as the number of Direct Deposit payments dramatically increases, additional millions could be misdirected as a result of data entry errors.

The Service recognizes that the automated payments processing systems currently utilized by some financial institutions may not have the operational capability to verify recipients' names. However, the Service understands that some financial institutions are working toward implementing systems changes that will permit verification of recipients' names. The Service believes that the reduction

in misdirected entries that could be achieved by requiring verification of prenotifications is significant enough to warrant the requirement. Therefore, this proposal retains the additional ''identifying data element'' requirement.

The Service proposes to redesignate § 210.7(g) of current part 210 as proposed § 210.8(b) without making any substantive change.

The Service proposes to add a new § 210.8(c) to provide that financial institutions shall be subject to liability for failing to handle an entry in accordance with part 210 and that the amount of that liability will be limited to the amount of the entry, except as otherwise specifically provided in subsections 210.8(c)(1) and (2). The phrase ''[n]otwithstanding the applicable ACH Rules'' indicates the liabilities imposed on financial institutions under this section may be in addition to, or different from, the liabilities that otherwise would be imposed under the applicable ACH Rules. To the extent that part 210 imposes duties on a financial institution not imposed under the applicable ACH Rules, proposed § 210.8(c) correspondingly imposes liabilities on a financial institution not imposed under the applicable ACH Rules. However, the extent of the liability to which a financial institution would be subject under the applicable ACH Rules would not exceed the amount of the entry (except in the case of unauthorized debits).

The ACH Rules generally provide that an RDFI or ODFI is liable for all claims, losses, liabilities, or expenses, including attorneys' fees and costs, resulting directly or indirectly from the breach by the RDFI or ODFI of its obligations. Under Article 4A of the Uniform Commercial Code, which would apply to credit entries to non-consumer accounts, the liability of financial institutions which fail to handle entries properly generally does not extend to all resulting losses, but does include imputed interest in certain circumstances. Because the Service, as a general matter, is proposing to limit the Federal Government's liability under part 210 to the amount of an entry, the Service believes that as a matter of equity the liability of financial institutions similarly should be limited. Accordingly, proposed § 210.8(c) would preempt the extent of the liability to which financial institutions are subject under both the ACH Rules and Article 4A by limiting that liability to the amount of the entry. Thus, for example, if an agency originated a credit entry to a corporate vendor and the RDFI failed to credit the entry to the vendor's account in a timely manner, § 210.8(c) would limit the RDFI's liability to the Federal Government to the amount of the entry, thereby preempting the Article 4A rule that imposes liability on the financial institution for imputed interest for the period of the delay. Proposed § 210.8(c) is not intended to affect a financial institution's liability under subpart B.

Proposed § 210.8(c) represents a change from the 1994 NPRM, which provided that a financial institution would be liable for losses sustained by the Federal Government ''if the Government has correctly handled the entry(ies).'' Several commenters pointed out that the language proposed in the 1994 NPRM could have the effect of imposing liability on a financial institution even where the financial institution had complied with its obligations under part 210. It is not the intention of the Service to impose liability on a financial institution under this section unless the financial institution has failed to meet an obligation to which it is subject. Rather, for any obligation imposed on financial institutions under part 210, proposed § 210.8(c) would impose liability on a financial institution for a loss to the Federal Government resulting from the financial institution's failure to meet that obligation. For example, § 210.6(f) of this NPRM provides that an agency generally will be liable to an RDFI for erroneous or duplicate entries originated by the agency. However, § 210.8(a) of this NPRM requires that if the Federal Government initiates a prenotification, the RDFI must verify an entry item in addition to the account number. Thus, if the Federal Government initiated an erroneous entry and the RDFI failed to verify the prenotification, the RDFI would be liable for any loss to the Federal Government, up to the amount of the entry(ies), if the error would have been detected by verifying the prenotification.

The Service proposes to add a new § 210.8(c)(1) to make it absolutely clear that a financial institution may not originate or transmit a debit entry to an agency without the prior written authorization of the Service. As previously discussed, debit entries to the Treasury General Account (TGA) represent a significant security concern for the Service. By expanding the use of the ACH system to allow for Federal Government payments by a debit to the TGA, the possibility of unauthorized debits to the TGA arises. In carrying out its responsibility of protecting the public trust, the Service believes it is necessary to take precautions to ensure that such debits do not occur. Therefore the Service proposes to require special security measures not imposed under the ACH Rules.

The ACH Rules provide that a receiver must have authorized the initiation of an entry to the receiver's account before the entry is originated and that the ODFI must warrant that the authorization is valid. Proposed § 210.8(c)(1) goes beyond the ACH Rules by requiring that an agency authorize the debit entry, and that the authorization be in writing or similarly authenticated.

Under the general rule that the Service is proposing, a financial institution would be liable for any unauthorized debit entries initiated to an agency in violation of this requirement. However, the Federal Government also must be able to recover the interest that it would have derived from the use of the debited funds had they remained in the TGA. Therefore, a financial institution's liability for unauthorized debit entries to the TGA would include imputed interest under proposed § 210.8(c)(1). This provision is an exception to the general limitation of a financial institution's liability to the amount of an entry.

Commenters on the 1994 NPRM objected to the proposal to permit the Service, in the case of unauthorized debits, to instruct the Federal Reserve Bank to debit the account used by the financial institution. Such action, if necessary, represents a last step in recovering funds that have not otherwise been recovered. Nevertheless, the right to debit through the Federal Reserve Bank is a right that needs to be retained by Treasury. This NPRM retains this provision because it is in the best interest of the Federal Government and it is protective of public funds.

Section 210.8(c)(2) of this NPRM restates the third and fourth sentences of current § 210.11(b). The Service proposes to expand this section to address fraud for authorizations of both debits and credits. Under the ACH Rules, a receiver must authorize an entry before the entry may be originated and the ODFI must warrant that the authorization is valid. The ODFI or the originator thus bears the ultimate liability for any loss resulting from a forged or invalid authorization. Similarly, under Article 4A, the ODFI or originator generally bears the risk of loss if an entry is originated to a receiver not entitled to the payment. Proposed § 210.8(c)(2) operates to preempt these ACH and Article 4A rules in situations where a financial institution accepts the recipient's authorization and fails to verify the identity of the recipient. If the

financial institution accepts a forged authorization, the financial institution rather than the Federal Government will be liable for the entries effected in reliance on the forged authorization.

Proposed § 210.8(d) sets forth the conditions under which a financial institution's obligation for the amount of an entry is acquitted, and is unchanged from § 210.4(i) of the 1994 NPRM.

Subpart B—Reclamation of Benefit Payments

The Service proposes to restructure Subpart B of current Part 210 by adding a new § 210.9—Parties to the reclamation. The other five sections comprising proposed Subpart B (§§ 210.10 through 210.14) are a reorganization of the four existing sections on reclamations in current Part 210. As discussed above, the reclamation provisions of Subpart B completely preempt the reclamation provisions of the ACH Rules with respect to benefit payments received by an RDFI after the death or legal incapacity of a recipient or the death of a beneficiary. Any provisions of the ACH Rules dealing with reclamation of benefit payments are not applicable ACH Rules as defined in proposed § 210.2.

In the 1994 NPRM, the Service proposed to revise Subpart B in order to provide a framework for paperless processing of reclamations. This NPRM is intended to make Subpart B more flexible by deleting references that would tend to limit the reclamation process to paper reclamations, as the Service intends to move toward a more automated environment for reclamations. In addition, however, in this NPRM the Service has reorganized and rewritten current Subpart B in an attempt to clarify the obligations and liabilities imposed on financial institutions under current Subpart B. The Service is not proposing to change significantly these obligations and liabilities at this time.

In order to simplify the regulation and enhance its flexibility with respect to automating reclamations, the Service proposes to move procedure-oriented provisions from Subpart B to the Service's Green Book. Commenters on the 1994 NPRM requested that any reclamation procedures differing from ACH Rules be implemented through amendments to Part 210 itself rather than by amending the Green Book. As discussed above with respect to Subpart A, the Green Book does not introduce new rights and obligations that are not contained in the Code of Federal Regulations. Instead, the Green Book provides specific operational directions and procedures which put the regulatory requirements into practice. Therefore, the Service proposes in this NPRM to remove certain procedures and guidelines currently set forth in Part 210 to the Green Book or Treasury Financial Manual, as proposed in the 1994 NPRM. All regulatory amendments would be promulgated for public comment in the **Federal Register**. It should be noted that the Service has the authority to enforce the requirements set forth in the Green Book and the Treasury Financial Manual in the same manner that it enforces regulations.

Section 210.9—Parties to the Reclamation

The Service proposes to add this new section to delineate the differing roles of the financial institution, the Service, and the agency that certified the benefit payments in question.

Proposed § 210.9(a) restates provisions of § 210.7(a) and § 210.14(d) of current Part 210, which provide that by accepting and handling benefit payments, a financial institution agrees to the provisions of Subpart B, including the reclamation actions and the debiting of the financial institution's Federal Reserve Bank account for any reclamation amount for which it is liable.

The Service proposes to add a new § 210.9(b) to clarify that the Service performs only disbursing and collection functions on behalf of agencies and does not make decisions as to the underlying obligations themselves. For example, if a financial institution or recipient has a question about the amount of a reclamation, the Service will respond that the amount was determined by the appropriate agency. In addition, if a financial institution or recipient disputes the facts underlying a death or date of death, that party should discuss the dispute with the appropriate agency. After resolution, the Service will carry out the reclamation in accordance with the direction of the agency that certified the payment or directed the Service to reclaim the funds in question.

Section 210.10—RDFI Liability

In this section the Service proposes to define more clearly the liability of RDFIs for benefit payments received after the death or legal incapacity of the recipient or death of the beneficiary, and to limit the extent of that liability.

Proposed § 210.10(a) restates the rule set forth at § 210.12(a) of current part 210, but moves the limited liability provisions to the next section to make it clear that an RDFI is presumed liable for all benefit payments received after the death or legal incapacity of the recipient or death of the beneficiary unless the RDFI meets the qualifications for limited liability set forth in § 210.11. An RDFI has no right to limit its liability with respect to benefit payments received after it knows of the death or incapacity of the recipient or death of the beneficiary. Accordingly, the RDFI is instructed to return all benefit payments received after it learns of the death or legal incapacity of the recipient or death of the beneficiary. This obligation applies whether the RDFI has received a notice of reclamation or learned of the death or legal incapacity on its own.

The Service proposes to restate the provisions of § 210.13(c) of current part 210 at proposed §§ 210.10(b) and 210.10(c). Current § 210.13(c) contains provisions governing both an RDFI's responsibilities upon its discovery, or imputed knowledge of, the death or legal incapacity of a recipient or death of a beneficiary and an RDFI's responsibilities upon receipt of a notice of reclamation. Dividing these provisions into two separate subsections provides a clearer delineation of an RDFI's responsibilities.

In the 1994 NPRM, the Service proposed a six-year limitation on an RDFI's liability for post-death and post-incapacity payments in order to provide RDFIs with relief from otherwise potentially unlimited liability in situations where an agency is unaware of the death or legal incapacity of the recipient or the death of a beneficiary and continues to make payments to the account for a number of years. Cases in which such payments continue for more than six years are infrequent and therefore the proposed six-year limitation, while providing protection to RDFIs in these relatively rare circumstances, likely will have a minimal impact on the overall recovery of funds by the Federal Government. Financial institutions that commented on the 1994 NPRM generally supported the six-year limitation also supported requiring financial institutions to cooperate with the Federal Government's reclamation efforts after the expiration of any applicable time limitation.

The six-year limitation has been reworded in proposed § 210.10(d) of this NPRM to clarify that it is the most recent six years of payments (rather than the six years of payments immediately following the death or incapacity) that is relevant to determining the amount that an agency can reclaim. In addition, the Service is proposing to provide an exception to the six-year limitation where the amount in the account at the time the RDFI receives the notice of

reclamation exceeds the six-year amount for which the RDFI otherwise would be liable. In such a case, the RDFI would be liable for the total amount of all post-death or post-incapacity payments, up to the amount in the account. For example, if payments had been made for twenty years following the death of a recipient, and the amount in the account was equal to or exceeded the total amount of the payments made during the twenty years, the RDFI would be liable for the full amount of all payments made over the twenty-year period. In the foregoing example, if the amount in the account when the RDFI received the notice of reclamation was equal to the most recent ten years of payments (less than the full twenty years of payments but more than the six-year amount), the RDFI would be liable for an amount equal to the amount in the account, i.e., the most recent ten years of payments.

Proposed § 210.10(d) also incorporates a requirement proposed in the 1994 NPRM that an agency must initiate a reclamation within a certain period of time after learning of the death or incapacity of the recipient or death of the beneficiary. Section 210.10(g) of the 1994 NPRM proposed a 12-month period following knowledge of the death or incapcity for initiation of the reclamation. The Service proposes in this NPRM to shorten that period to 120 days after the date that the agency receives notice of the death or incapacity of the recipient or death of the beneficiary. This provision is intended to encourage Federal agencies to act in a timely manner in initiating reclamations, and to protect RDFIs from liability in the event an agency does not act expeditiously.

Proposed § 210.10(e) restates a rule of reclamations set forth at § 210.13 (c) and (d) of current part 210: the Federal Government has the right to debit the RDFI's reserve account at its Federal Reserve Bank for the full amount of all post-death or post-incapacity benefit payments owed to an agency or for a lesser amount as a result of the RDFI's ability to limit its liability. Such action, if necessary, represents a last step in reclaiming funds that have not otherwise been recovered.

The 60-day time period for an RDFI to return funds, which is set forth at current § 210.13(c), is a procedural item that may change with the automation of reclamations. Therefore, the Service proposes to relocate this requirement to the Green Book.

Section 210.11—Limited Liability

The Service does not propose to change the criteria which an RDFI must meet in order to limit its liability under Subpart b. The Service does propose to reword the provisions setting forth the criteria to achieve greater clarity.

Proposed § 210.11(a) provides the basis for calculating an RDFI's liability if it is eligible to limit its liability because it did not have actual or constructive knowledge of the death or incapacity of a recipient or the death of a beneficiary. The formula is taken from § 210.12(b) of current part 210 and, although reworded, does not change significantly the substantive operation of the current formula.

Section 210.12(d) of current part 210 sets forth rules addressing the circumstances in which an RDFI is ''deemed to have knowledge'' of the death or incapacity using a standard of ''due diligence.'' The Service believes that the description of due diligence is confusing and difficult to apply. Therefore, the Service proposes to utilize the definition of ''actual or constructive knowledge'' set forth at proposed § 210.2.

Under current part 210, one of the factors relevant to determining the extent of an RDFI's limited liability is the amount in the account. Current § 210.13(b)(2)(i) defines the ''amount in the account'' to mean the balance in the account when the RDFI has received a notice of reclamation and has had a reasonable time to take action based on its receipts, plus any additions to the account balance made before the RDFI returns the notice of reclamation to the Federal Government. Current part 210 provides that a reasonable time to take action is not later than the close of business on the day following the receipt of the notice of reclamation. In § 210.10(i)(2)(ii) of the 1994 NPRM, the Service proposed to add that the amount in the account would not be reduced for debit card withdrawals, automated withdrawals, pre-authorized debits, non-Federal Government reclamations, and forged checks or other comparable instruments made after the RDFI had knowledge of the death or incapacity of the recipient or death of the beneficiary. Some commenters on the 1994 NPRM objected to the proposed change on the basis that it would shift the risk of liability to the RDFI for all debits, both legitimate and fraudulent, made during this period.

The Service has experienced many instances in which the ''amount in the account'' for reclamation purposes has been reduced by ATM withdrawals and the RDFI cannot provide information regarding the identity of the withdrawer. Without this information, the Service cannot pursue recovery from the withdrawer(s). The Service therefore believes that the funds recovered through the reclamation process can be increased if the Service does not allow ATM withdrawals and other debits to reduce the calculation of the amount in the account. Under proposed Subpart B, the amount in the account is the account balance at the time the RDFI receives the notice of reclamation. The ''reasonable time to take action'' language in current § 210.13(b)(2)(i) has been eliminated; therefore, any withdrawals subsequent to the RDFI's receipt of the notice of reclamation will not reduce the ''amount in the account.'' RDFIs can take whatever steps may be permitted under their account agreements and applicable law to reduce their exposure, such as blocking debits to an account upon receipt of a notice of reclamation.

Proposed § 210.11(b) sets forth the steps an RDFI must take in order to qualify for limited liability. By requiring an RDFI to certify the information required in proposed § 210.11(b)(1) and (2), the burden of demonstrating qualification for limited liability is placed on the RDFI. Failure to meet this burden results in the full liability of the RDFI under proposed § 210.10.

Proposed § 210.11(b)(1) is taken from § 210.13(b)(2) of current part 210. Proposed § 210.11(b)(2) incorporates the last sentence of current § 210.13(b)(1), and adds the requirement that the RDFI certify the date the RDFI first had information of the death or legal incapacity of the recipient or death of the beneficiary even if such information was obtained first through notice received from the agency. Requiring these certifications, in combination with the authority of the Federal Government to debit the RDFI's reserve account as provided in proposed § 210.10(e), underscores that the burden is on the RDFI to demonstrate its qualification for limited liability.

Section 210.13(b)(2)(ii) of current Part 210 has been relocated to proposed § 210.11(b)(3).

Section 210.11(c) provides the payment and collection procedures which apply if an RDFI qualifies for limited liability. After an RDFI returns the amount specified in proposed § 210.11(a)(1), if the agency is unable to collect the remaining amount of the outstanding total, the Federal Government will debit the RDFI's reserve account at its Federal Reserve Bank (or the correspondent account utilized by the RDFI) for the amount specified in proposed § 210.11(a)(2).

Proposed § 210.11(d) incorporates the current § 210.12(e) and broadens the scope of an RDFI's forfeiture of its rights to limit its liability if the RDFI fails to

comply with any provision of Subpart B. 210.12—RDFI's rights of recovery

Proposed § 210.12(a) restates the principle set forth in current § 210.14(c) and in § 210.10(d) of the 1994 NPRM that in reclaiming funds from an RDFI, the Federal Government is not directing or authorizing the RDFI to debit the recipient's account. Any rights that an RDFI may have to recover the amount of reclaimed funds from a recipient are a matter of applicable state law and the contract between the RDFI and the recipient. Subpart B neither limits nor expands those rights.

Proposed § 210.12(b) restates without substantive change § 210.14(d) of current Part 210, which was set forth at § 210.10(h) of the 1994 NPRM.

Section 210.13—Notice to Account Owners

Proposed § 210.13 is based on § 210.14(a) of current Part 210, but has been changed slightly to provide for the possibility of an automated reclamation process by the addition of the phrase ''or otherwise provide to the account owner(s)'' to the existing requirement that notice be mailed. In addition, the phrase ''any notice required by the Service to be provided to account owners as specified in the Green Book'' has been substituted for the specific reference to the ''Notice to Account Owners'' to allow for more flexibility in changing the format of the required notice. The Service proposed in the 1994 NPRM to add language to the regulation indicating that the Federal Government might require proof that the RDFI had mailed written notice and that such proof might include (but would not be limited to) a file copy of the notice, a certified mail receipt, or documentation pertaining to the standard operating procedure of the RDFI that such a notice is sent routinely. The reference to a mailed written notice and the types of proof that might be appropriate in connection with such a notice have been deleted in this NPRM in keeping with the Service's effort to eliminate paper-oriented requirements from Subpart B.

Section 210.14(b) of current Part 210 requires that RDFIs notify account owners of any actions to be taken by the RDFI with respect to the account in connection with a reclamation action. The Service believes that this requirement intrudes unnecessarily into the relationship between the RDFI and its customer and conflicts with the principle that reclamations are actions between the Federal Government and the RDFI, and not between the Federal Government and the recipient. Actions taken by an RDFI with respect to a customer account, and any notice to the customer in connection with those actions, are a matter of State law or contract, not Federal law.

Section 210.14—Erroneous Death Information

This proposed section is based upon § 210.15 of current part 210, with certain additions and deletions. Much of current § 210.15 is procedural information which the Service proposes to move to the Green Book, where it is more appropriately located. In particular, the Service proposes to relocate to the Green Book the procedures that RDFIs are to follow in correcting erroneous death information (codified in current § 210.15(a)(1) and (2) and § 210.15(c)). The Service proposes to eliminate from the regulation and move to the Green Book the 60-day time limit for the RDFI to return the completed notice of reclamation to the Federal Government in order for the RDFI to limit its liability for the payments made after the death or legal incapacity of the recipient or death of the beneficiary. This 60-day limit is a requirement for the paper-based reclamation procedure. The Service is not eliminating this requirement as part of the paper reclamation process, but rather is placing it with other procedures and operational guidelines in the Green Book. Any automated reclamation procedures developed or used by the Federal Government would not be bound by the same time limit as the paper process since an automated procedure theoretically could be completed in less time.

The provisions at proposed § 210.14(b) that the Service proposes to add to this section seek to direct questions and disputes to the agency issuing directions on reclamations. These provisions clarify that the Service only performs disbursing and collection functions on behalf of the Federal agencies and does not make decisions as to the underlying obligations.

Subpart C—Discretionary Salary Allotments

The Service proposes in this NPRM to remove subpart C from part 210. Subpart C of current part 210 provides that discretionary allotments from Federal employees' wage and salary payments permitted by the issuing agency may be made through the ACH system and shall be subject to Part 210. The Service determined that subpart C is redundant since the substance of Subpart C is covered in other regulations. For example, regulations issued by the Office of Personnel Management, at 5 CFR part 550, address the circumstances under which discretionary allotments may be made. Under Part 208, Federal agencies are required to make all Federal payments, including allotments, by EFT. Subpart A of Part 210 sets forth the rules governing all ACH credit entries made by an agency, including any savings and salary allotment payments. For these reasons, specific provisions for the use of the ACH system to allow for discretionary allotments in Part 210 are unnecessary.

Rulemaking Analysis

Treasury has determined that this proposed regulation is not a significant regulatory action as defined in Executive Order 12866. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small business entities. The proposed rule does not require any actions on the part of small entities. Accordingly, a Regulatory Flexibility Act analysis is not required.

List of Subjects in 31 CFR Part 210

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

Authority and Issuance

For the reasons set out in the preamble, 31 CFR part 210 is proposed to be revised to read as follows:

PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

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

§ 210.1 Scope; relation to other regulations.

This part governs all entries and entry data originated or received by an agency

through the Automated Clearing House (ACH) network, except as provided in paragraphs (a) and (b) of this section. This part also governs reclamations of benefit payments.

(a) Federal tax payments received by the Federal Government through the ACH system that are governed by part 203 of this title shall not be subject to any provision of this part that is inconsistent with part 203.

(b) ACH credit or debit entries for the purchase of, or payment of principal and interest on, United States securities that are governed by part 370 of this title shall not be subject to any provision of this part that is inconsistent with part 370.

§ 210.2 Definitions.

For purposes of this part, the following definitions apply. Any term that is not defined in this part shall have the meaning set forth in the ACH Rules.

(a) *ACH Rules* means the Operating Rules and the Operating Guidelines published by the National Automated Clearing House Association (NACHA), a national association of regional member clearing house associations, ACH Operators and participating financial institutions located in the United States.

(b) *Actual or constructive knowledge,* when used in reference to an RDFI's knowledge of the death or legal incapacity of a recipient or death of a beneficiary, means that the RDFI received information, by whatever means, of the death or incapacity or that the RDFI would have discovered the death or incapacity if it had followed commercially reasonable business practices.

(c) *Agency* means any department, agency, or instrumentality of the Federal Government, or a corporation owned or controlled by the Federal Government. The term agency does not include a Federal Reserve Bank.

(d) *Applicable ACH Rules* means the ACH Rules published in the ''1997 ACH Rules,'' including all rule changes published therein with an effective date on or before September 19, 1997, 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 1.2.3 (governing the arbitration of disputes);

(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).

(e) *Authorized payment agent* means any natural person or entity that is appointed or otherwise selected as a representative payee or fiduciary, under regulations of the Railroad Retirement Board, the Social Security Administration, the Department of Veterans Affairs, or other agency making benefit payments, to act on behalf of a beneficiary.

(f) *Automated Clearing House or ACH* means a funds transfer system governed by the ACH Rules which provides for the interbank clearing of electronic entries for participating financial institutions.

(g) *Beneficiary* means a natural person other than a recipient who is entitled to receive the benefit of all or part of a benefit payment.

(h) *Benefit payment* is a payment for a Federal entitlement program or for an annuity, including, but not limited to, payments for Social Security, Supplemental Security Income, Black Lung, Civil Service Retirement, Railroad Retirement Board Retirement and Annuity, Department of Veterans Affairs Compensation and Pension, and Worker's Compensation. For purposes of § 210.5 of this part, the term ''benefit payment'' shall not include a Federal retirement payment.

(i) *Federal payment* means any payment made by an agency. The term includes, but is not limited to:

(1) Federal wage, salary and retirement payments;

(2) Vendor and expense reimbursement payments;

(3) Benefit payments; and

(4) Miscellaneous payments, including but not limited to, interagency payments; grants; loans; fees; principal, interest, and other payments related to United States marketable and nonmarketable securities; overpayment reimbursements; and payments under Federal insurance or guarantee programs for loans.

(j)(1) *Financial institution* means:

(i) An entity described in section 19(b)(1)(A), excluding subparagraphs (v) and (vii), of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)). Under section 19(b)(1)(A) of the Federal Reserve Act and for purposes of this part only, the term ''depository institution'' means:

(A) Any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to apply to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(B) Any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to apply to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(C) Any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to apply to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(D) Any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) or any credit union which is eligible to apply to become an insured credit union pursuant to section 201 of such Act (12 U.S.C. 1781); or

(E) Any savings association as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) which is an insured depository institution as defined in such Act (12 U.S.C. 1811 *et seq.*) or is eligible to apply to become an insured depository institution under the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*); and

(ii) Any agency or branch of a foreign bank as defined in section 1(b) of the International Banking Act, as amended (12 U.S.C. 3101).

(2) In this part, a financial institution may be referred to as an Originating Depository Financial Institution (ODFI) if it transmits entries to its ACH Operator for transmittal to a Receiving Depository Financial Institution (RDFI), or it may be referred to as an RDFI if it receives entries from its ACH Operator for debit or credit to the accounts of its customers.

(k) *Government entry* means an ACH credit or debit entry or entry data originated or received by an agency.

(l) *Green Book* means the manual issued by the Service which provides financial institutions with procedures and guidelines for processing Government entries. The Green Book is available for downloading at the Service's web site at http://www.fms.treas.gov/ or by calling (202) 874–6540, or writing the Product Promotion Division, Financial Management Service, Department of the Treasury, 401 14th Street, S.W., Room 309, Washington, D.C. 20227.

(m) *Notice of reclamation* means notice sent by electronic, paper or other means by the Federal Government to an RDFI which identifies the benefit payments that should have been returned by the RDFI because of the death or legal incapacity of the recipient or death of the beneficiary.

(n) *Outstanding total* means the sum of all benefit payments received by an RDFI from an agency after the death or legal incapacity of a recipient or the death of a beneficiary, minus any

amount returned to, or recovered by, the Federal Government.

(o) *Recipient* means a natural person, corporation, or other public or private entity that is authorized to receive a Federal payment from an agency.

(p) *Service* means the Financial Management Service, Department of the Treasury.

(q) *Treasury Financial Manual* (TFM) means the manual issued by the Service containing procedures to be observed by all agencies and Federal Reserve Banks with respect to central accounting, financial reporting, and other Federal Government-wide fiscal responsibilities of the Department of the Treasury. The TFM is available for downloading at the Service's web site at http://www.fms.treas.gov/ or by calling (202) 874–9940, or writing the Directives Management Branch, Financial Management Service, Department of the Treasury, 3700 East West Highway, Room 500C, Hyattsville, MD 20782.

§ 210.3 Governing Law.

(a) *Federal Law.* The rights and obligations of the United States and the Federal Reserve Banks with respect to all Government entries, and the rights of any person or recipient against the United States and the Federal Reserve Banks in connection with any Government entry, are governed by this part, which has the force and effect of Federal law.

(b) *Incorporation by reference—applicable ACH Rules.* (1) This part incorporates by reference the applicable ACH Rules published in the ''1997 ACH Rules,'' including all rule changes published therein with an effective date on or before September 19, 1997. Copies of the ''1997 ACH Rules'' are available from the National Automated Clearing House Association, 607 Herndon parkway, Suite 200, Herndon, Virginia 20170. 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. 20001.

(2) Any amendment to the applicable ACH Rules that takes effect after September 19, 1997, 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** document expressly accepting such amendment.

(c) *Application of this part.* Any person or entity that originates or receives a Government entry agrees to be bound by this part and to comply with all instructions and procedures issued by the Service under this part, including the Treasury Financial Manual and the Green Book.

Subpart A—General

§ 210.4 Authorizations and revocations of authorizations.

(a) *Requirements for authorization.* Each debit and credit entry subject to this part shall be authorized in accordance with the applicable ACH Rules and the following additional requirements:

(1) The agency or the RDFI that accepts the recipient's authorization shall verify the identity of the recipient and, in the case of a written authorization requiring the recipient's signature, the validity of the recipient's signature.

(2) Unless authorized in writing by an agency or similarly authenticated, no person or entity shall initiate or transmit a debit entry to that agency.

(b) *Terms of authorizations.* By executing an authorization for an agency to initiate entries, a recipient agrees:

(1) To the provisions of this part;

(2) To provide accurate information;

(3) To verify the recipient's identity to the satisfaction of the RDFI or agency, whichever has accepted the authorization;

(4) That any new authorization inconsistent with a previous authorization shall supersede the previous authorization; and

(5) That the Federal Government may reverse any duplicate or erroneous entry or file as provided in § 210.6(g) of this part.

(c) *Termination and revocation of authorizations.* An authorization shall remain valid until it is terminated or revoked by:

(1) With respect to a recipient of benefit payments, a change in the ownership of a deposit account as reflected in the deposit account records, including the removal or addition of the name of a recipient, the addition of a power of attorney, or any action which alters the interest of the recipient;

(2) The death or legal incapacity of a recipient of benefit payments or the death of a beneficiary;

(3) The closing of the recipient's account at the RDFI by the recipient or by the RDFI. If an RDFI closes an account, it shall provide 30 calendar days' written notice to the recipient prior to closing the account, except in cases of fraud; or

(4) The RDFI's insolvency, closure by any state or Federal regulatory authority or by corporate action, or the appointment of a receiver, conservator, or liquidator for the RDFI. In any such event, the authorization shall remain valid if a successor is named. The Federal Government may temporarily transfer authorizations to a consenting RDFI. The transfer is valid until either a new authorization is executed by the recipient, or 120 calendar days have elapsed since the insolvency, closure or appointment, whichever occurs first.

§ 210.5 Account requirements for benefit payments.

(a) Notwithstanding ACH Rule 2.1.2, an ACH credit entry representing a benefit payment shall be deposited into an account at a financial institution and, except as provided in paragraph (b) of this section, such account shall be in the name of the recipient.

(b)(1) Where an authorized payment agent has been selected, the benefit payment shall be deposited into an account titled in accordance with the regulations governing the authorized payment agent.

(2) Where a benefit payment is to be deposited into an investment account established through a securities broker or dealer registered under the Securities Act of 1934, such payment may be deposited into an account in the name of the broker or dealer, provided the account and all associated records are structured so that the beneficiary's interest is protected under applicable Federal or state deposit insurance regulations.

§ 210.6 Agencies.

Notwithstanding ACH Rules 2.2.3, 2.4.5, 2.5.2, 4.2, and 7.7.2, agencies shall be subject to the obligations and liabilities set forth in this section in connection with Government entries.

(a) *Receiving entries.* An agency may receive ACH debit or credit entries only with the prior written authorization of the Service.

(b) *Prenotifications.* An agency, at its discretion, may send a prenotification prior to origination of the first credit entry to a recipient. An agency shall send a prenotification prior to origination of the first debit entry to an account.

(c) *Liability to a recipient.* An agency will be liable to the recipient for any loss sustained by the recipient as a result of the agency's failure to originate a credit or debit entry in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(d) *Liability to an originator.* An agency will be liable to an originator or an ODFI for any loss sustained by the

originator or ODFI as a result of the agency's failure to credit an ACH entry to the agency's account in accordance with this part. The agency's liability shall be limited to the amount of the entry(ies).

(e) *Liability to an RDFI or ACH Association.* Except as otherwise provided in this part, an agency will be liable to an RDFI for losses sustained in processing duplicate or erroneous credit and debit entries originated by the agency. An agency's liability shall be limited to the amount of the entry(ies), and shall be reduced by the amount of the loss resulting from the failure of the RDFI to exercise due diligence and follow standard commercial practices in processing the entry(ies). This section does not apply to credits received by an RDFI after the death or legal incapacity of a recipient of benefit payments or the death of a beneficiary as governed by subpart B. An agency shall not be liable to any ACH association.

(f) *Acquittance of the agency.* The crediting of the amount of an entry to a recipient's account shall constitute full acquittance of the Federal Government.

(g) *Reversals.* An agency may reverse any duplicate or erroneous entry, and the Federal Government may reverse any duplicate or erroneous file. In initiating a reversal, an agency shall certify to the Service that the reversal complies with applicable law related to the recovery of the underlying payment. An agency that reverses an entry shall indemnify the RDFI as provided in the applicable ACH Rules, but the agency's liability shall be limited to the amount of the entry. If the Federal Government reverses a file, the Federal Government shall indemnify the RDFI as provided in the applicable ACH Rules, but the extent of such liability shall be limited to the amount of the entries comprising the duplicate or erroneous file. Reversals under this section shall comply with the time limitations set forth in the applicable ACH Rules.

§ 210.7 Federal Reserve Banks.

(a) *Fiscal Agents.* Each Federal Reserve Bank serves as Fiscal Agent of the Treasury in carrying out its duties as the Federal Government's ACH Operator under this part. As Fiscal Agent, each Federal Reserve Bank shall be responsible only to the Treasury and not to any other party for any loss resulting from the Federal Reserve Bank's action, notwithstanding ACH Rule 11.5 and Article 8 of the ACH Rules. Each Federal Reserve Bank may issue operating circulars not inconsistent with this part which shall be binding on financial institutions.

(b) *Routing Numbers.* All routing numbers issued by a Federal Reserve Bank to an agency require the prior approval of the Service.

§ 210.8 Financial institutions.

(a) *Prenotifications.* Notwithstanding ACH Rules 2.3 and 4.1.4, upon receipt of a prenotification originated by an agency, an RDFI shall verify the recipient's account number and at least one other identifying data element contained in the entry.

(b) *Status as a Treasury depositary.* The origination or receipt of an entry subject to this part does not render an RDFI a Treasury depositary. An RDFI shall not advertise itself as a Treasury depositary on such basis.

(c) *Liability.* Notwithstanding ACH Rules 2.2.3, 2.4.5, 2.5.2, 4.2, and 7.7.2, if the Federal Government sustains a loss as a result of a financial institution's failure to handle an entry in accordance with this part, the financial institution shall be liable to the Federal Government for the loss, up to the amount of the entry, except as otherwise provided in this section.

(1) An ODFI that transmits a debit entry to an agency without the prior written or similarly authenticated authorization of the agency, shall be liable to the Federal Government for the amount of the transaction, plus interest. The Service may collect such funds using procedures established in the applicable ACH Rules or by instructing a Federal Reserve Bank to debit the ODFI's reserve account at the Federal Reserve Bank or the account of its designated correspondent. The interest charge shall be at a rate equal to the Federal funds rate plus two percent, and shall be assessed for each calendar day, from the day the Treasury General Account (TGA) was debited to the day the TGA is recredited with the full amount due.

(2) An RDFI that accepts an authorization in violation of § 210.4(a) shall be liable to the Federal Government for all credits or debits made in reliance on the authorization.

(d) *Acquittance of the financial institution.* The crediting of the correct amount of an entry received and processed by the Federal Reserve Bank and posted to the TGA shall constitute full acquittance of the ODFI for the amount of the entry. Full acquittance of the ODFI shall not occur if the entries do not balance, are incomplete, are clearly incorrect, or are incapable of being processed.

Subpart B—Reclamation of Benefit Payments

§ 210.9 Parties to the reclamation.

(a) *Agreement of RDFI.* An RDFI's acceptance of a benefit payment pursuant to this part shall constitute its agreement to this subpart. By accepting a benefit payment subject to this part, the RDFI authorizes the debiting of the Federal Reserve Bank account utilized by the RDFI in accordance with the provisions of § 210.10(e).

(b) *The Federal Government.* In processing reclamations pursuant to this subpart, the Service shall act pursuant to the direction of the agency that certified the benefit payment(s) being reclaimed.

§ 210.10 RDFI liability.

(a) *Full liability.* An RDFI shall be liable to the Federal Government for the total amount of all benefit payments received after the death or legal incapacity of a recipient or the death of a beneficiary unless the RDFI has the right to limit its liability under § 210.11 of this part. An RDFI shall return any benefit payments received after the RDFI learns of the death or legal incapacity of a recipient or the death of the beneficiary, regardless of the manner in which the RDFI discovers such information. If the RDFI learns of the death or legal incapacity of a recipient or death of a beneficiary other than from the agency, the RDFI shall immediately notify the agency of the death or incapacity.

(b) *Notice of Reclamation.* Upon receipt of a notice of reclamation, an RDFI shall provide the information required by the notice of reclamation and return the amount specified in the notice of reclamation in a timely manner.

(c) *Exception to liability rule.* An RDFI shall not be liable for post-death benefit payments sent to a recipient acting as a representative payee or fiduciary on behalf of a beneficiary, if the beneficiary was deceased at the time the authorization was executed and the RDFI did not have actual or constructive knowledge of the death of the beneficiary.

(d) *Time limits.* An agency may initiate a reclamation within 120 calendar days after the date that the agency receives notice of the death or legal incapacity of a recipient or death of a beneficiary. An agency shall not reclaim any post-death or post-incapacity payment(s) made more than six years prior to the most recent payment made by the agency to the recipient's account; provided, however, that if the amount in the account at the

time the RDFI receives the notice of reclamation exceeds the total amount of all payments made by the agency during such six-year period, this limitation shall not apply and the RDFI shall be liable for the total amount of all payments made, up to the amount in the account at the time the RDFI receives the notice of reclamation.

(e) *Debit of RDFI's account.* If an RDFI does not return the full amount of the outstanding total or any other amount for which the RDFI is liable under this subpart in a timely manner, the Federal Government will collect the amount outstanding by instructing the appropriate Federal Reserve Bank to debit the reserve account utilized by the RDFI. The Federal Reserve Bank will provide advice of the debit to the RDFI.

§ 210.11 Limited liability.

(a) *Right to limit its liability.* If an RDFI does not have actual or constructive knowledge of the death or legal incapacity of a recipient or the death of a beneficiary at the time it receives one or more benefit payments on behalf of the recipient, the RDFI's liability to the agency for those payments shall be limited to:

(1) An amount equal to:

(i) The amount in the account at the time the RDFI receives the notice of reclamation, plus any additional benefit payments made to the account by the agency before the RDFI responds in full to the notice of reclamation, or

(ii) the outstanding total, whichever is less; plus

(2) If the agency is unable to collect the entire outstanding total, an additional amount equal to:

(i) The benefit payments received by the RDFI from the agency within 45 days after the death or legal incapacity of the recipient or death of the beneficiary, or

(ii) The balance of the outstanding total, whichever is less.

(b) *Qualification for limited liability.* In order to limit its liability as provided in this section, an RDFI shall:

(1) Certify that at the time the benefit payments were credited to or withdrawn from the account, the RDFI had no actual or constructive knowledge of the death or legal incapacity of the recipient or death of the beneficiary;

(2) Certify the date the RDFI first had information of the death or legal incapacity of the recipient or death of the beneficiary, even if such information was obtained first through notice received from the agency;

(3)(i) Provide the name, address and any other relevant information of the following person(s):

(A) Co-owner(s) of the recipient's account;

(B) Other person(s) authorized to withdraw funds from the recipient's account; and

(C) Person(s) who withdrew funds from the recipient's account after the death or legal incapacity of the recipient or death of the beneficiary.

(ii) If persons are not identified for any of these subcategories, the RDFI must certify that no such information is available and why no such information is available; and

(4) fully complete all certifications on the notice of reclamation and comply with the requirements of this part.

(c) *Payment of limited liability amount.* If the RDFI qualifies for limited liability under this subpart, it shall immediately return to the Federal Government the amount specified in § 210.11(a)(1). The agency will then attempt to collect the amount of the outstanding total not returned by the RDFI. If the agency is unable to collect that amount, the Federal Government will instruct the appropriate Federal Reserve Bank to debit the reserve account utilized by the RDFI at that Federal Reserve Bank for the amount specified in § 210.11(a)(2).

(d) *Forfeiture of rights.* An RDFI that fails to comply with any provision of this subpart in a timely and accurate manner, including but not limited to the certification requirements at § 210.11(b) and the notice requirements at § 210.13, shall be deemed to have forfeited its right to limit its liability under this subpart and shall be liable to the agency for the amount of the benefit payments at issue.

§ 210.12 RDFI's rights of recovery.

(a) *Matters between the RDFI and its customer.* This subpart does not authorize or direct an RDFI to debit or otherwise affect the account of a recipient. Nothing in this subpart shall be construed to affect the right an RDFI has under state law or the RDFI's contract with a recipient to recover any amount from the recipient's account.

(b) *Liability unaffected.* The liability of the RDFI under this subpart is not affected by actions taken by the RDFI to recover any portion of the outstanding total from any party.

§ 210.13 Notice to account owners.

Provision of notice by RDFI. Upon receipt by an RDFI of a notice of reclamation, the RDFI immediately shall mail to the last known address of the account owner(s) or otherwise provide to the account owner(s) a copy of any notice required by the Service to be provided to account owners as specified in the Green Book. Proof that this notice was sent may be required by the Service.

§ 210.14 Erroneous death information.

(a) *Notification of error to the agency.* If, after the RDFI responds fully to the notice of reclamation, the RDFI learns that the recipient or beneficiary is not dead or legally incapacitated or that the date of death is incorrect, the RDFI shall inform the agency that certified the underlying payment(s) and directed the Service to reclaim of the funds in dispute.

(b) *Resolution of dispute.* The agency that certified the underlying payment(s) and directed the Service to reclaim the funds will attempt to resolve the dispute with the RDFI in a timely manner. If the agency determines that the reclamation was improper, in whole or in part, the agency shall notify the RDFI and shall return the amount of the improperly reclaimed funds to the RDFI. Upon certification by the agency of an improper reclamation, the Service may instruct the appropriate Federal Reserve Bank to credit the reserve account utilized by the RDFI at the Federal Reserve Bank in the amount of the improperly reclaimed funds.

Dated: January 23, 1998.

Richard L. Gregg,

Acting Commissioner.

Editorial Note: Proposed rule document 98–2042 was originally published at 63 FR 5426–5445 in the issue of Monday, February 2, 1998. That publications contained a typographical error. For the convenience of the user, this reprint includes the correction to be published on Thursday, February 5, 1998.

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