UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

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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, D.C. 20227

Re: Notice of Proposed Rulemaking, 31 CFR Part 208

Dear Ms. Johnson:

The Federal Trade Commission ("Commission") appreciates this opportunity to comment to the Department of the Treasury ("Treasury") on its proposed rule to implement the Debt Collection Improvement Act of 1996 ("Act"). The Act, which was passed as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Pub. L. 104-134), requires the use of electronic funds transfer ("EFT") for all Federal payments, with the exception of tax refunds, starting January 2, 1999.[1] This program -- commonly known as EFT '99 -- seeks to make the process of transmitting Federal payments more efficient and, at the same time, bring into the mainstream of the financial system those millions of Americans who receive Federal payments and who currently do not use the financial system to receive funds, make payments, save, borrow or invest.[2] The Commission submits the following comments on Treasury's proposed rule.

I. Introduction

The Commission has wide-ranging jurisdiction over credit-related consumer protection matters pursuant to numerous statutes and trade regulation rules. In addition, Section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices. One specific statute that the Commission enforces that is relevant to Treasury's proposal is the Electronic

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[1] 31 U.S.C. § 3332.

[2] According to Treasury's proposal, it is estimated that approximately 10 million individuals who receive Federal payments do not have an account at a financial institution. 62 Fed. Reg. 48714, 48721 (1997).

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Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* The EFTA and its implementing Regulation E cover a variety of electronic fund transfers involving consumers' asset accounts, such as transactions at automated teller machines and debit-card purchases.[3] In addition, the Commission is involved in electronic payments issues as a member of the Consumer Electronic Payments Task Force, an interagency task force created by Treasury Secretary Rubin.[4]

The Commission supports Treasury's goals in implementing the Act. These goals include making certain that recipients have access to their funds at a reasonable cost; providing appropriate consumer protection; ensuring that the system delivers payments and information accurately, conveniently, and in a timely manner; and significantly increasing recipients' participation in the country's financial system.[5] Treasury's proposal goes far to ensure that these goals will be met. The Commission supports the proposal, and offers the following additional comments.

II. Definition of Authorized Payment Agent

The Act requires each recipient of Federal payments required to be made by EFT to designate one or more financial institutions or other *authorized agents* to which such payments shall be made.[6] The proposed rule defines "financial institution" to mean a depository institution, such as a bank, credit union, or savings association.[7] A significant issue is what the Act means by "authorized payment agent" and similar terms. Treasury proposes to limit the definition of "authorized payment agent" to selected representatives of recipients who are physically or mentally incapable of managing their payments. Thus, under the proposed definition, an "authorized payment agent" is

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[3] Under the EFTA, consumer liability for unauthorized use of a lost or stolen card is generally limited to between $50 and $500, depending on when the consumer reports the loss or theft. The EFTA also provides procedures for resolving errors and disputes involving EFT services. For example, providers are required to investigate and respond to consumer complaints within ten days (or longer, if the provider provisionally recredits the consumer's account in the amount of the alleged error pending further investigation). See 15 U.S.C. §§ 1693f and 1693g.

[4] The mission of the Task Force is "to identify and explore issues affecting consumers raised by emerging electronic money technologies (such as stored value and smart card and Internet based payment systems) and to identify innovative responses to those issues, consistent with the needs of a developing market." 62 Fed. Reg. 19173, 19174 (1997).

[5] 62 Fed. Reg. at 48714.

[6] 31 U.S.C. § 3332(g). According to Treasury's proposal, the Act uses three terms -- "authorized payment agent," "authorized agents," and "agent" -- to refer to the same entity or entities, although it does not define the terms. 62 Fed. Reg. at 48716.

[7] 62 Fed. Reg. at 48717.

> any individual or entity that is appointed or otherwise selected as a representative payee or fiduciary, under regulations of the Social Security Administration, the Department of Veterans Affairs, the Railroad Retirement Board, or other agency making Federal payments, to act on behalf of an individual entitled to a Federal payment.[8]

The effect of this proposed definition, together with the requirement in proposed § 208.6, is that all Federal payments will be made to an account at a financial institution, in the name of the recipient or a representative payee or fiduciary.[9] Thus, non-financial institutions, such as check cashers and other money transmitters, will not be permitted to receive Federal payments *directly* on behalf of consumers. However, Treasury anticipates that non-financial institutions will continue to have the opportunity to partner with financial institutions and to market products and services to recipients.[10]

The Commission recognizes that the involvement of a financial institution provides recipients and agencies with important protections, namely, deposit insurance and the safety and soundness associated with a regulated financial institution. The Commission also supports a competitive marketplace in which non-financial institutions have the opportunity to partner with financial institutions and to market innovative products and services to recipients.

Where possible, however, the Commission prefers policies designed to inform consumers about the risks and benefits of their options, rather than policies that limit or prohibit these options. Treasury's proposal limits consumers' options in that it does not allow them to receive Federal payments directly through non-financial institutions. As Treasury notes, this is because non-financial institutions are presently unable to receive payments electronically on behalf of consumers because electronic financial transactions are made primarily through the ACH (Automated Clearinghouse) network, which is limited to financial institutions. Therefore, according to Treasury, it is not possible from an operational standpoint to deliver Federal payments by EFT directly to any entity that is not a financial institution.[11] The effect of this policy, based on Treasury's view of the current structure of payments made through ACH, may

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[8] Id. at 48716-17, 48725.

[9] Proposed § 208.6 addresses account requirements for Federal payments made by EFT, and requires that all such payments be deposited into an account at a financial institution. In addition to allowing deposits to selected representatives, proposed § 208.6(b)(2) permits deposits to "sweep accounts" at registered securities brokerage firms, where some two million Social Security beneficiaries now receive their payments for cash management purposes. 62 Fed. Reg. at 48722.

[10] Id. at 48723.

[11] Id. at 48716.

impose costs on consumers who now use non-financial institutions to cash their checks and may be burdened by having to switch to a possibly less convenient financial institution. Yet, financial institutions provide consumers with the protections of deposit insurance and "safety and soundness" regulation which are not available from non-financial institutions. In addition, financial institutions have the necessary infrastructure for receiving large volumes of payments electronically and safeguarding those payments. Finally, non-financial institutions could pose a greater risk of fraud, especially in their dealings with less sophisticated consumers. Thus, on balance, the Commission supports Treasury's proposal to require that Federal payments be made directly to financial institutions. However, the Commission encourages Treasury in the future to consider increasing consumer choice and competition by permitting certain non-financial institutions to participate in this market. This may require exploring modifications to the current ACH system or considering alternative delivery systems. If non-financial firms were technically able to receive payments, Treasury should then establish criteria that would require non-financial institutions to demonstrate that they are trustworthy and financially stable, and that they can offer the necessary consumer protections and infrastructure to justify direct participation.

Based on discussions with Treasury staff, one permissible arrangement under Treasury's proposal and the current payment structure would be for non-financial institutions, such as check cashers, grocery stores, money transmitters, and other non-banks to act as consumers' "secondary payment agents" through the use of "sub-accounts."[12] For example, consumers could decide, for geographic convenience or other reasons, to have their Federal payments deposited into bank accounts, then immediately swept into a check casher's pooled account. The check casher could in turn issue a check to the consumer, and cash it for the consumer, charging various fees. Some consumers may well find these arrangements beneficial, because they would more closely resemble their current arrangements. Treasury should endeavor to ensure, however, that consumers fully understand the costs of such an approach and that they are familiar with other, perhaps less costly, options which might foster competition. For example, financial institutions might offer consumers inexpensive electronic banking accounts accessible through automated teller machines and point-of-sale devices.[13] In addition, for consumers who do not designate a financial institution for receiving payments or obtain a waiver from such requirement, Treasury will provide access to an account at a reasonable cost.[14] Unless consumers are aware of such options and their associated costs, they will be ill-equipped to choose the best means of obtaining their Federal payments. For this reason, the Commission supports Treasury in its efforts to educate consumers fully and early about their options.[15]

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[12] Another alternative would be for non-financial institutions to acquire financial institutions as their liaison with the payment system.

[13] See Footnote 23, infra.

[14] See Part IV, infra.

[15] The Commission's Office of Consumer and Business Education is working with Treasury on its educational efforts to implement EFT '99.

III. Hardship Waivers

The Act authorizes Treasury to waive the requirement to make Federal payments by EFT for individuals for whom compliance imposes a hardship.[16] Treasury proposes to determine hardship waivers based upon three categories.

First, Treasury's proposed rule would not allow hardship waivers for individuals who have an account with a financial institution and who became eligible for a Federal payment on or after July 26, 1996 ("newly-eligible recipients"). According to Treasury, newly-eligible recipients have been receiving their payment by EFT, in accordance with the Act and Treasury's interim rule,[17] and thus would not experience a change in the manner in which they receive payment.

Second, an individual who has an account with a financial institution and who became eligible to receive payment *before* July 26, 1996, would not be required to receive payment by EFT where the use of EFT would impose a hardship due to either a *physical disability* or a *geographic barrier*. For example, a waiver would be available to a recipient with a physical disability who currently has an arrangement with a nearby grocery store to cash his or her monthly check, but would have great difficulty traveling even a short distance to get the payment by EFT. Similarly, a waiver for "geographic barrier" would be available to someone who lives in a rural area or an Indian reservation with limited access to transportation or banking facilities and who would have great difficulty getting to a bank or automated teller machine to receive payment by EFT.[18]

Finally, an individual who does *not* have an account with a financial institution is not required to receive payment by EFT where the use of EFT would impose a hardship on the individual due to a *physical disability* or a *geographic barrier*, or where the use of EFT would impose a *financial hardship* on the individual. According to Treasury's proposal, the financial hardship waiver would be available to individuals without bank accounts who cash their checks

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[16] 31 U.S.C. § 3332(f)(2)(A).

[17] On July 26, 1996, Treasury issued an interim rule -- in accordance with the Act's requirement to convert Federal payments to EFT in two phases -- which requires that all recipients who become eligible to receive Federal payments on or after July 26, 1996 are required to receive such payments by EFT unless the recipient certifies in writing that the recipient does not have an account with a financial institution or an authorized payment agent. 61 Fed. Reg. 39254 (1996).

[18] 62 Fed. Reg. at 48719. This may not be as much of a problem in the future, if as suggested in Part II, supra, non-financial institutions become eligible to be direct participants.

at grocery stores and other locations at little or no cost.[19] The financial hardship waiver is not available to recipients who already have accounts with financial institutions because these individuals presumably would not incur any additional expense to receive payment by EFT.[20]

The Commission supports "bona fide" hardship waivers and encourages Treasury to make such waivers well-known to consumers through its educational efforts. Waiver certificates should also be clear, easy to complete, and accepted based solely on the individual's certification. Since Treasury's proposal does not at present define physical disability, geographic barrier, or financial hardship -- beyond examples -- it is unclear how these hardship waivers will be explained to recipients. The Commission encourages Treasury to fully explain these terms to recipients so that "bona fide" waivers may be obtained. As noted in Treasury's proposal, EFT '99 should minimize the hardship associated with conversion from check to EFT, and recognize the wide variety of circumstances in which recipients live and work.[21]

IV. Access to Account Provided by Treasury

The Act requires Treasury to ensure that all individuals required to receive payments electronically will have access to an account at a financial institution at a reasonable cost and with consumer protections comparable to those afforded other account holders at such institutions.[22] Treasury's proposal provides that where an individual does not designate an account at a financial institution, and does not obtain a waiver, Treasury will provide the individual with access to an account at a Federally-insured financial institution selected by Treasury.[23] Treasury plans to obtain such account services through a competitive process that will select one or more entities to act as Treasury's agent to provide these services. The proposed regulation seeks comment on the design of these Federally-provided accounts, and notes Treasury's preliminary view that each recipient should have an individual account at a

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[19] As discussed above, some consumers could be inconvenienced by having to switch to a financial institution. Presumably, however, many such individuals will obtain a financial hardship waiver and therefore not experience inconvenience.

[20] Id.

[21] Id. at 48718.

[22] 31 U.S.C. § 3332(i)(2). In the event that systems are developed that would permit non-financial institutions to receive Federal payments directly, see Part II, supra, the Commission encourages Treasury to enhance competition in the market for involuntary accounts by permitting qualified non-financial institutions to bid to provide such accounts.

[23] In the interim, Treasury and the financial industry are marketing "Direct Deposit Too," which is a model for a simple, low-cost, electronically accessible deposit account that consumers may choose *voluntarily*. Treasury hopes that many recipients without accounts will open accounts as a result of such educational and marketing efforts. 62 Fed. Reg. at 48721.

Federally-insured financial institution that can be directly accessed via plastic debit card at any location of that institution, including any automated teller machines or point-of-sale terminals that accept transactions by the institution's cardholders.[24] After the close of the comment period on this notice, Treasury plans to develop proposed terms, conditions, and attributes of the account to be offered and to publish the proposal for a limited period of public comment.

Since Federally-provided accounts will be given to recipients on an *involuntary* basis, the Commission urges Treasury to design the accounts to protect consumers' interests. The Commission agrees that the involvement of financial institutions provides recipients with important protections, such as deposit insurance. In addition, since these ETAs will involve electronic fund transfers to and from consumers' asset accounts, they appear to be covered by the EFTA and Regulation E to the same extent as voluntary accounts. These provisions, especially those addressing unauthorized use and error resolution, offer strong protections for consumers with ETAs. Any proposal to limit their applicability should be critically examined given the vulnerable nature of the population that relies on Federal payments.[25]

In addition to deposit insurance and EFTA protections, the Commission encourages Treasury to provide guidelines and to develop a bidding process designed to lead to accounts being provided at a reasonable cost and to accounts that are accessible to consumers at convenient locations. The account provider should provide a sufficient geographic reach to meet the access needs of recipients, including branch or electronic locations. One way to minimize the costs to both recipients and account providers is to structure these ETAs so that they are very basic accounts for the receipt and withdrawal of Federal payments. Once recipients have entered the financial mainstream, they can always convert to a more traditional, *voluntary*, bank account that offers more features, such as third-party payments and savings. In sum, the Commission supports the concept of ETAs that are designed to be accessible to consumers and reasonably priced. The Commission looks forward to the detailed account proposal planned by Treasury, and may comment further at that time.

The Commission appreciates your consideration of these views. If any other information would be useful regarding these matters, please contact Lucy Morris, Assistant Director, Division of Credit Practices at (202) 326-3224.

By direction of the Commission, Commissioner Swindle not participating.

Donald S. Clark
Secretary

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[24] These accounts are being generally referred to in various Treasury materials as Electronic Transfer Accounts ("ETAs").

[25] See Footnote 3, supra.