Comments on Notice of Proposed Electronic Transfer Account Features

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These comments written by the National Consumer Law Center[(1)] are provided on behalf of our low income clients, and the Consumer Federation of America, as well as the following national, state and local organizations[(3)] representing low and moderate income recipients of federal benefits:

- Community Legal Services of Philadelphia
- The Consumer Law Center of the South
- Consumer Action
- The Disability Law Center
- National Clearinghouse for Legal Services
- National Consumers League
- The North Carolina Justice Center
- The Northeast Missouri Client Council for Human Needs
- National Senior Citizens Law Center
- The Welfare Law Center
- Virginia Citizens Consumer Council

There are many aspects of the proposed features for Treasury's Electronic Transfer Account (ETA) about which we are very pleased. Federal recipients will be well served by features of the ETA structure which will facilitate ease of use by recipients and afford needed safeguards:

- The requirement that the account be individually owned at a federally-insured financial institution.
- The requirement that the ETA require no minimum balance.
- The provision of a monthly statement.
- The prohibition against allowing financial institutions to contract with non-financial institutions to provide access to ETAs.
- The prohibition against allowing financial institutions to set off other debts owed by the recipient from funds deposited in the ETA.
- The requirement that the ETA be made available to *all federal recipients,* regardless of credit status.
- The basic structure of the ETA providing for a number of free withdrawals as well as POS purchases to be provided for one uniform monthly fee.
- The prohibition of the use of off-line electronic transactions to reduce the possibility of overdrafts and the associated fees.

There are, however, some serious concerns with Treasury's proposed structure for the ETA. This structure must be expanded to include the following additional features and protections:

I. Terms and Conditions for Creation and Termination of Accounts. The terms for the creation and the termination of the ETA must be a matter of public record, and enforceable by recipients, not simply a matter of contract between the financial institutions and Treasury in the financial agency agreement, as proposed by Treasury.

II. Regulation of *All* Fees and Charges Related to the ETA. All fees imposed on ETA recipients by financial institutions for the access to and use of deposited funds must be fully regulated by Treasury, not left to the discretion of the financial institutions, including for example, fees for withdrawals over the number included in the monthly fee, for balance inquiries, as well as those charged for additional features which might be offered.

III. Attachment and Execution on Exempt Funds in ETAs Must Be Prohibited. Treasury must specifically prohibit the attachment or execution of other legal process upon exempt funds deposited into ETAs.[(4)] The brief and confusing discussion of the attachment issue in the Supplementary Information to the ETA features a grossly insufficient way of dealing with this important issue. First, all exempt funds must be protected from attachment -- without requiring the recipient to go to court. Second, more explicit prohibitions against set off are necessary. Third, there is no good reason to exclude non-exempt funds from the account, because appropriate accounting methods can be employed by the financial institution to ensure that exempt funds are protected, and non-exempt funds are subject to attachment.

IV. The Necessity For all ETA Providers to Offer Uniform Additional Attributes. Regulated access to electronic transfers and reasonably priced money orders, as well as the ability to deposit non-federal funds and to authorize automatic ACH bill payment for recurring monthly expenses from the ETA or other bill payment mechanisms available at the financial institution at little or no cost to the consumer are all attributes which should be offered by participating financial institutions.

In addition, these comments will address some issues remaining from the final version of 31 C.F.R. � 208.

V. Other Issues. After the publication of the final version of the EFT 99 regulations[(5)] there are still several serious issues which must be addressed, including the necessity for consistent treatment of state delivery of federal payments through EBT systems, as well as the need for regulation of the accounts voluntarily established by federal recipients to receive direct deposit for federal payments.[(6)]

I. Terms and Conditions for Creation and Termination of Accounts.

One of the most serious problems with the proposed structure of the ETA is the complete lack of an enforcement structure that the public notice assumes. There are no mechanisms for recipients to know what their rights are under either the pubic notice or the financial agency agreement between the institution and Treasury. There are several mandates that Treasury could require that would rectify this situation:

a. Require that all providers of ETAs sign and deliver a written contract to ETA account holders. This writing would disclose all of the terms and conditions, including all fees, additional options that might be available, the recipient's consumer protection rights, the grounds and procedure for termination of the ETA, as well as the obligations of the recipient in a contractual agreement. Treasury should mandate that the contract be signed and dated by both the recipient and the financial institution when the ETA is opened. In this way, recipients not only are provided with the basic information about their rights and obligations, but they also have a method to enforce these rights. If the financial institution charges more than allowed, or terminates the account improperly, the recipient has a contract with which to enforce Treasury's required terms.

In fact, it would be best for Treasury to establish the basic language of the contract in the financial agency agreements signed between Treasury and the providing financial institutions. In this way there could be no dispute over different interpretations of the terms and conditions required by Treasury and the financial institution's individual legalistic articulation of them.

b. Publish all of the terms of the financial agency agreement in the Federal Register. Despite Treasury's massive public education campaign launched over the past few months, there is tremendous confusion around the nation regarding the requirements of the EFT 99 mandate.[(7)] Clear, objective, accurate information must be uniformly and widely available to all recipients and their advocates regarding the rights and obligations of ETA account holders. The best way to accomplish this is to publish all of this information in the *Federal Register.* In this way, all of the important characteristics would be subject to public scrutiny and open to public comment.

c. Allow a financial institution to terminate an ETA only for reasons specified by Treasury such as fraud, theft, or gross mismanagement of the ETA which results in uncompensated losses to the financial institution. In the Supplementary Information to the ETA features, Treasury states that "financial institutions that choose to offer ETAs would be permitted to close an ETA in certain circumstances to be delineated by Treasury."[(8)] These circumstances must be defined publicly, not left to the details of the financial agency agreement negotiated between individual financial institutions and Treasury. The grounds for termination should be uniform across the nation, the same for each recipient, regardless of which financial institution they are using for their ETA or the type of federal benefit they are receiving. These grounds should also be a specific term of the contract entered into between the financial institution and the recipient when the ETA is established.

We recognize the competing tensions at play in the development of appropriate rules for termination of ETAs. On the one hand, if the criteria for termination is too strict, financial institutions will face a greater likelihood for uncompensated losses resulting from improper use of the ETA. That could drive up the real -- or perceived -- cost of the ETA to financial institutions such that arguably the $3 monthly fee, in addition to the contributions made by Treasury, would not adequately compensate for these losses. To the extent that financial institutions perceive these potential costs to outweigh the potential income, they will be hesitant to offer ETAs. If this were to be the case, low income recipients could find themselves with a wonderfully designed, Treasury sponsored ETA that would *not* be widely available. Obviously this is a result which should be avoided.

On the other hand, Treasury should keep in mind several, incontrovertible truths while developing the criteria for involuntary termination of the ETA by the financial institution. The purpose of the ETA is to provide an account at a mainstream, federally regulated financial institution to recipients of federal benefits who are not likely to have other bank accounts. The *reasons* that there are over 10 million unbanked recipients of federal funds include both objective criteria -- e.g., high costs to traditional bank accounts, as well as subjective criteria -- e.g., feelings of unfair or unfriendly treatment.[(9)] There is substantial distrust on both sides of these fledgling relationships. The financial institutions are often loathe to provide services to a less wealthy, unfamiliar population. The unbanked federal recipients are often fearful of second class treatment and costly consequences to unintentional arithmetical mistakes.[(10)] Moreover, the more features included in the ETA, the more potential costs and areas of potential loss to the financial institution there are.

Given these competing concerns, federal recipients should be entitled to the basic ETA, with very limited potential for uncompensated losses to the financial institution, which should include a high burden for the financial institution to terminate. To the extent that additional features are provided by the financial institution, the financial institution should be able to terminate the recipient from *the additional risk and cost adding features*, but not from the basic ETA.

It is critically important that federal recipients be and feel secure in the ETA. Recipients should be protected from unexpected and unaffordable expenses, such as fees for withdrawals over the allowed number and those which might result from unintentional overdrafts. Appropriate grounds for termination of the ETA should only include fraud, theft, or gross mismanagement of the ETA which results in uncompensated losses to the providing financial institution.

Because of the importance of the availability of a basic, low cost ETA to federal recipients, which does not include the opportunity for costly mistakes by the recipient or losses to the financial institution, we applaud Treasury's proposed structure of a basic ETA, with additional features to be added at the option of the recipient. To the extent that these additional features add cost, ETA recipients using those features can pay for the features on an as needed basis. Just as importantly, to the extent that these additional features add risk of loss to the financial institution, financial institutions should be permitted to terminate recipients from eligibility for the additional features on a lighter standard than termination from the basic ETA. In this way a recipient who may become ineligible for a risk adding feature of the ETA, would not lose the ability to participate in the basic ETA.

Treasury must make these rules of termination from the ETA and from the additional features crystal clear, publish them in the *Federal Register,* and require that they be included in each ETA contract entered into between a federal recipient and a participating financial institution.

Treasury's compensation scheme should not only facilitate the establishment of ETAs, but should also provide incentives to financial institutions to keep their ETA customers happy. Treasury's proposal to compensate participating financial institutions $12.60 per account, and possibly an additional amount for each ETA opened above a designated minimum of threshold number of accounts, is good. We appreciate Treasury's willingness to use some of the savings to be experienced by the federal government from direct deposit to offset some of the costs to be borne by federal recipients from direct deposit.

However, we should ensure that the expenditure of Treasury's funds facilitates the goal -- access to federal funds directly deposited in federally insured financial institutions. To accomplish this goal, the $12.60 compensation for each ETA should be paid only if the financial institution still has the ETA account 12 months after it was established, unless the recipient died, became ineligible for federal benefits, or transferred the funds to another account in the same financial institution. In other words, to be eligible for the $12.60 compensation for each ETA, the financial institution must show that it is still in operation 12 months after it was established or that the recipient has moved the funds into another account offered by the financial institution.

This principle is even more important if Treasury establishes the rule that we advocate -- that the establishment of any ETA is eligible for the $12.60 compensation, regardless of whether the recipient previously had an ETA, or even another bank account. It is critically important that the existence of another bank account *not* be the grounds for excluding a recipient from a compensated ETA account. After all, Treasury has to date refused to regulate voluntary accounts, and many recipients have set up expensive accounts through check cashers and other non-regulated financial providers under the mistaken impression that this was necessary to receive federal payments. To exclude these recipients from eligibility for the compensated account would be grossly wrong, and potentially illegal.[(11)] If Treasury were to penalize these recipients now for establishing accounts, based on misinformation provided to them, Congress' explicit intention to protect unbanked federal recipients from expensive consequences of EFT 99 would be violated. Thus, in answer to the question posed by Treasury[(12)] there should *not* be any distinction between ETAs opened by individuals who alr

II. Regulation of *All* Fees and Charges Related to the ETA. All fees imposed on ETA recipients by financial institutions for the access to and use of deposited funds must be fully regulated by Treasury, not left to the discretion of the financial institutions. This would include, for example, fees for withdrawals over the number included in the monthly fee and for balance inquiries, as well as those charged for additional features that might be offered.

Treasury has appropriately proposed to regulate the monthly fees charged to ETA recipients and to require a minimum number of withdrawals (as well as a monthly statement). However, Treasury has failed to regulate the *other* costs that recipients will undoubtedly incur by using the ETA. The following fees and charges related to the ETA must be regulated:

- Fees for ATM or teller withdrawals over the four included in the monthly fee. These fees should not exceed the *actual cost* to the financial institution for each withdrawal.[(13)]

- Fees charged for use of foreign ATMs must be prohibited or at least limited to a reasonable amount.

- Surcharges for POS usage at merchants. While it is not explicit in the published information provided by Treasury, we assume that the four transactions allowed within the monthly fee do *not* include POS transactions. This needs to be made clear. Additionally, while it is a laudable that Treasury has proposed prohibiting financial institutions from charging for POS transactions[(14)], surcharges assessed by merchants must also be prohibited.[(15)]

- Balance Inquiries. Treasury's proposal is completely silent on balance inquiries. This is despite the fact that Treasury's contractor specifically recommended that two free balance inquiries be included every month.[(16)] Treasury should require the following with respect to balance inquiries:

- Any balance inquiries which, when combined with the ATM and teller withdrawals for that month do not exceed the allotted four, should not result in any charge to the recipient.

- Balance inquiries should be made less necessary by the *required* automatic inclusion of balance information on all receipts accompanying withdrawals provided by the account holder's financial institution. In other words, every withdrawal at an ATM owned by the financial institution providing the ETA must include balance information. The same rule should be applied to withdrawals through tellers at financial institutions where the ETA withdrawals are to be handled in this way.

- At least two monthly ATM or telephone balance inquiries should be allowed for free, and others should be charged no more[(17)] than the actual cost to the bank for providing the information.

- Transaction History Upon Request. Whether or not a toll free telephone service is available, recipients should be able to obtain a transaction history upon request at minimal or no cost. Certainly whenever there is a dispute, a transaction history should be available free upon request.

- Training for ETA Recipients Should Be Provided for Free. Many of the 10 million unbanked recipients of federal payments may have never had a relationship with a financial institution or used a credit or debit card prior to implementation of EFT 99. In recognition of this, there should be an opportunity for anyone who desires some personal training on how to use an ATM for a balance inquiry or withdrawal to receive some minimal level of assistance from the financial institution. This should be in addition to any written training material that may be provided. In addition to providing written materials, financial institutions offering federally established ETAs should be required to notify recipients of the availability of in-person training.

- Debit Card Issuance and PIN (personal identification numbers) Selection Should Accommodate Recipients' Needs. Where PIN assignment is used, individuals must be allowed to easily change their PIN to a self-selected number. Also, the mailing of cards and PINs to recipients raises all the issues of theft, loss, and delay within the mail system that already exist in the paper based benefit delivery system. ETAs must be able to accommodate alternative card issuance mechanisms for any recipients who express a concern about routine mail issuance.

- Fees and Procedures for PIN Replacement and Card Replacement Must Be Regulated. A system for delivering federal payments should have established procedures for promptly responding to recipient requests for a replacement of either the ATM card or the PIN. The need to get a replacement card or PIN could arise for any number of reasons, including the loss of the card, damage to the card or the magnetic strip on the card, failure to remember the assigned PIN, or recipient concern that the card and/or PIN has been compromised. Use of the card and PIN may well be the only way that federal payees can access the benefits they need to pay their bills and provide for the bare necessities.

Financial agents must demonstrate that they will provide simple procedures for requesting and promptly obtaining a replacement card and/or PIN and assure that a clear explanation of the steps an individual must take to initiate this process will be included in the informational materials that will be provided about the account.

Further, there should be federal standards regarding the maximum amount that financial institutions can charge for issuing a replacement card and the circumstances under which such replacement fees can be assessed. For example, financial institutions should be prohibited from charging fees for replacing a defective card, or for the first card replacement in any twelve month period.

III. Attachment and Execution on Exempt Funds in ETA Must Be Explicitly Prohibited. Treasury must specifically and deliberately prohibit the attachment or execution of other legal process upon exempt funds deposited into ETAs.[(18)] The brief and confusing discussion of the attachment issue in the Supplementary Information to the ETA features a grossly insufficient way of dealing with this important issue. There is no reason not to allow non-exempt funds to be deposited into the ETA, unless exempt funds are to be accorded the protection federal law requires but which they have not heretofore received.

As Treasury notes in the Supplementary Information, the law is clear that most federal funds are exempt from most attachment orders or other legal process.[(19)] However, as Treasury also acknowledges, financial institutions holding exempt funds routinely ignore the federal law and allow attachment or execution against exempt Social Security, SSI, veterans benefits deposits, and civil service retirement benefits.[(20)] The burden is then on the recipient to hire an attorney, bring an action, and prove that the funds are exempt. This is even the case when the funds have not been commingled with non-exempt funds, and the bank has only deposited clearly exempt funds in the account.[(21)] The result of these illegal attachment and setoff procedures are always upsetting, inconvenient, costly and often devastating to the elderly or disabled recipient of federal benefits.[(22)]

Treasury has the authority to create regulations regarding the treatment of all deposits of federal moneys in accounts held at financial institutions. Treasury has avoided its obligations under this authority with the weak and confusing verbiage in the Supplementary Information about attachment. Even the prohibition against setoff against the ETA for other debts owed the financial institution does not explicitly deal with the problems that we have brought to Treasury's attention.

Treasury must explicitly and unequivocally prohibit attachment or other process in all ETAs. Treasury should issue regulations which accomplish the following:

- Attachment, execution and garnishment must be prohibited against all exempt funds in ETAs.

- If other funds are deposited in the ETA, then the bank should engage in an accounting process to determine which funds are exempt and which are non-exempt.[(23)] Only the non-exempt funds should be subject to the attachment order. The ETA should be charged -- only at the time of the accounting -- a fee, determined by Treasury to be reasonable, to cover the cost of the accounting.

- The setoff prohibition in the ETA must also explicitly prohibit financial institutions from taking federal benefits to repay the financial institution for:

- mistaken overpayments. Financial institutions have argued that prohibitions against setoff for obligations owed to *another* account do not prevent the bank from taking moneys due them based on overpayments made on the current account.[(24)]

- provisional credits made under the Electronic Fund Transfer Act.[(25)] After the bank has paid a provisional credit, it may determine that the unauthorized transfer was *not* unauthorized under the law,[(26)] such that the bank is entitled to recoup the provisional credit back.[(27)] The correct policy should be that set-offs are never permitted for ETAs. When provisional credits have been incorrectly made by the financial institution, the institution should be able to recoup its money from the federal government immediately. The government then should treat the provisional credit as an accidental overpayment and apply the overpayment rules, including the right to notice and hearing, accordingly.

- Set Off and Attachment Should Be Prohibited on Exempt Funds in All Bank Accounts. In fact, Treasury should take this opportunity to inform financial institutions that they are prohibited under existing federal law from allowing an attachment or performing a setoff against exempt federal funds in *all* bank accounts, even those accounts which are not ETAs.[(28)] The rule should be that a financial institution which has a reasonable belief that the funds sought by the attachment, execution or garnishment order, are exempt by reason of federal law, must refuse the state court order for attachment on those grounds. When there has been an electronic transfer of funds from the U.S. Government, the financial institution should be charged with the knowledge that the funds are exempt.

IV. The Necessity For All ETA Providers to Offer Uniform Additional Attributes. Regulated access to electronic transfers for bill payments and reasonably priced money orders, as well as the ability to deposit non-federal funds into the ETA are all attributes which should be offered by participating financial institutions.

There are several implicit purposes to Treasury's design and provisions for the ETA. One is to provide unbanked federal recipients with a low cost method of accessing their federal funds after they have been electronically deposited. Another is to encourage the use of mainstream financial institutions by federal recipients who are unbanked. Treasury's generous system of hardship waivers does allow any federal recipient to continue receiving a paper check if the available alternatives prove too costly. However, the hardship waiver does not advance either Treasury's interest in increasing the use of electronic deposit of federal funds, or the interest of those currently unbanked recipients desirous of participating in the mainstream banking system.[(29)] Advocates of low income recipients of federal funds continue to be concerned that the baseline ETA account be as low cost as is possible, to at least ensure essential access to the federal deposits.

Treasury's proposal to provide a two tiered system for the ETA is a good way to balance all of these competing interests. The basic ETA should be a streamlined, no cost or very low cost account with access guaranteed for all federal recipients, and involuntary termination only for fraud, theft, or gross mismanagement of the ETA which results in uncompensated losses to the financial institution. To accomplish the other goal of encouraging the use of mainstream financial institutions, providers of ETAs must also offer additional features to enable federal recipients to accomplish their financial transactions *through* the financial institution. If the additional features are not provided, then ETA users will be in the anomalous position of withdrawing their federal funds from the bank and then walking down the block to the check casher to buy money orders with which to pay their bills.

Every ETA provider should be required to offer the following additional attributes, with appropriate, *regulated*, fees charged to recipients for each attribute:

- The deposit of non-federal funds should be permitted as an additional attribute. Allowing the deposit of non-federal funds is beneficial to both the financial institution and the recipient. The recipient is able to use the ETA to handle more income, which should reduce expenses and facilitate savings. The financial institution has more funds deposited in the ETA on which to earn float. Assuming Treasury does make the rule crystal clear that financial institutions are prohibited from allowing an attachment or execution against an ETA, and requires that the financial institution engage in an accounting exercise before allowing an attachment, then it makes sense for the acceptance of non-federal deposits to be a separate attribute, for which there may be imposed a separate charge. However, this separate charge should only be imposed when, and if, the additional accounting necessary to protect against an attachment or execution is necessary.[(30)] In this way, no fee should be charged for the deposit of additional funds in the account unless and until an attachment or execution order is served on the financial institution. If Treasury does not impose the flat prohibition against attachment for exempt funds, there is no reason whatsoever, to make the deposit of other funds a separate, additional attribute. It does not add cost or risk to the account.

- Bill payment capacity should be provided as an additional attribute to all ETA account holders. The unbanked ETA customers must be offered some mechanism to pay their bills through the services provided by the financial institution to its other customers. This can be accomplished in one or more of the following ways:

- Checking accounts should be offered at no cost to credit worthy ETA account holders.

- Low cost money orders should be provided to ETA holders who are not eligible for the checking accounts.

- Financial institutions offering ETAs should be required to agree to act as bill payment centers for all local utilities that otherwise authorize the establishment of third party bill payment locations where customers can pay their bills via cash or electronic debit with the utility company absorbing the costs for this service.

- ACH bill payment capacity should be provided as an additional, optional, feature available to ETA account holders for housing and utility payments. Just as is true for other customers, no fees should be charged for this service, because the financial institution is likely to incur lower costs from this service. (See discussion below.)

- Any fees that are charged for the additional attributes must be reasonable. Treasury has proposed the additional attributes, without proposing a fee structure to be charged for those attributes. The fees must be determined to be fair and reasonable by Treasury and specifically allowed in the financial agency agreement, and set out in the contract between the financial institution and ETA account holder.

- Involuntary Termination from the Additional Attributes should be a separate determination from termination from the basic ETA. To the extent that providing any of these extra services adds real *risk* of uncompensated financial loss to the financial institution, then it is for financial institutions to be able to terminate ETA account holders from the additional attribute, without meeting the same heavy standard for termination from the basic ETA.

- Maintaining minimum balance should reduce fees. Financial institutions offering ETAs should also offer federal recipients the opportunity to maintain a certain amount in the account as a minimum balance in return for the waiver of the monthly fee, or some other fees.

- Regular, interest bearing savings accounts should be offered to credit worthy federal recipients with appropriate minimum balance requirements. These separate savings accounts are a much better way of encouraging the unbanked to participate in the financial mainstream than paying interest on carryover funds in the ETAs.

Discussion on ACH Bill Payment Capacity. The basic ETA structure should provide for ACH debit payment for housing and utility costs at recipient option so long as the housing or utility billers provide for such payment methods. We do *not* recommend that ACH capacity be authorized for other payments such as to creditors.[(31)] Treasury's concerns regarding *any* ACH capacity are either unfounded or controllable by limiting the types of third party bill payments available. The potential savings to both the recipients and the financial institutions far outweigh any possible costs from rejected ACH transactions due to insufficient funds.

Although ACH debit payment services are more frequently associated with checking accounts, we have been advised that banks already provide for direct debit payments from savings accounts when a depositor initiated request from the biller is received by the bank. Moreover, as any bank with a connection to the Automated Clearing House can accommodate these transactions, there is no reason that smaller financial institutions would be unable to offer this service on a competitive basis.[(32)] In ACH transactions, it is the billers' bank that incurs most of the processing costs. Further, there is no evidence that the risks in a savings situation are any greater than with a checking account.

While we agree with Treasury's concern that recipients might authorize ACH debit entries for goods and services that are not delivered as promised, this is not a valid reason to deny this important feature entirely. Instead, we recommend that, in the ETA context, any ACH capacity only be authorized for housing and necessary utility costs (like water, telephone, electricity, and gas). It also would be appropriate for participating ETA financial institutions to provide training on how to deal with the risks of ACH transfers for bill payments.[(33)]

No Overdraft Fees. When recommending the ACH bill payment capacity for ETA accounts, we are relying on information provided by the National Automated Clearing House Association (NACHA) According to NACHA staff, no responsible financial institution would process an ACH request from a biller's bank when there are insufficient funds in the account to cover the debit. As no overdraft would result from the ACH debit, no overdraft fee would be assessed.[(34)] *If this representation is incorrect, and overdraft fees could result, then the ACH bill payment issue must be revisited.*

The likelihood of the ACH bill payment feature creating overdraft situations is minimal. The only situation in which it should occur would be when the customer is making an ATM or POS withdrawal based on a balance reading that does not reflect a third party bill payment transfer that is already scheduled. The ETA financial institution can remedy this by charging all scheduled ACH transactions to the account on the first minute of the billing day. In the situation where the depository bank allows a withdrawal before the ACH transfer, which results in insufficient funds being available fore the ACH transfer, the bank should simply deny the ACH transaction, and send the transaction back to the biller's bank as unpaid due to insufficient funds, resulting in a cost to the recipient's bank of no more than the fee for a returned transaction. It would then be up to the biller to collect the unpaid amount from the consumer, as is the case in the ACH bill payment world currently.

ETA customers should be advised about how to stop payment in a particular month, for one month or for all future months. Further, to deal with problems which might result from a variable amount ACH debit, as would be typical for utility bills, ETA customers should authorize a *range* of debit amounts. Also, NACHA rules require billers of variable amount ACH debits to send a notice or monthly to the customer at least 10 days prior to the scheduled ACH debit specifying the amount to be debited, unless the charge is within the provisions of an existing authorization.(35)

The biller's bank incurs almost all of the cost of an ACH transaction, not the bank from which the money is electronically debited. As a result the financial institution which provides the ACH debiting service will realize a *savings* from this feature, because the small processing cost incurred for the ACH transfer is far less than the cost incurred for other types of withdrawals from the account. Therefore, the ACH debit feature should be offered to all ETA accounts at no fee.

V. Other Issues

The publication of the final EFT 99 regulations on September 25, 1998 and the release of this proposal on ETAs still leave several serious issues of concern to low income recipients. This seems an appropriate forum to address these issues.

Lack of Clear, Uniform Rules and Policies for federal/state EBT programs. There is a total lack of rules, policies, or even proposals available for public comment with respect to federal/state EBT programs. Final �208.2(d) defines EBT as including both disbursement of the federal funds through an ETA as well as through a "Federal/State EBT program", on which nothing has been published for public comment. Despite the lack of information for public comment, there are several troubling statements by Treasury included in the September 25, 1998 promulgation of Rule 208.

These statements uniformly suggest that features and requirements of an EBT account may vary depending on the type of EBT program employed in the recipient's state, and that the issues subject to these variations will only be determined in the Financial Agency Agreements negotiated between Treasury and the individual states.[(36)]

There is no justification for allowing variations in account characteristics based on which state the recipient resides in or what type of federal benefits are involved. Further, Treasury proposes no method of soliciting public input on these characteristics. Worse, there is no method for recipients to have ready access to the terms of these contracts. The states have evidenced strong opposition to providing Reg E protections to EBT recipients of state administered benefits, and have argued against even applying such protections to the federal portion of the funds distributed through a combined federal/state account. It is therefore, of considerable concern that Treasury may consider supporting a waiver of Reg E coverage for federal benefits as a way of inducing more states to offer such accounts to any recipient whose income is low enough to qualify them for a needs based state assistance program.

Finally, Treasury must work with federal recipients and their advocates on the development of these EBT programs. It is entirely inappropriate for Treasury to consult *only* with the states on the development of these EBT programs, as the promulgation suggests.

SAS Contract is a Bad Model for Other States. As approximately 11,000 recipients have signed up for the combined delivery of federal and state benefits in the Southern Alliance of States, we are concerned about how these accounts will be handled in the future. The SAS combined EBT accounts are grossly inferior to anything that will be available through the ETA offerings and they should not serve as a model for what might be developed in other states.

No Requirements to Notify Electronic Recipients of Waiver and ETA Options. The final �208 rules only requires agencies to notify new recipients and those who are receiving federal benefits via check of the various options available. This means that the 11,000 recipients mentioned above will not be informed of the options of either hardship waiver or the availability of the less expensive ETA options.[(41)] Not only will the 11,000 EBT recipients in the SAS not be informed of their new options, but neither will the multitudes of recipients who entered into costly electronic alternatives thinking they had to do so in order to continue receiving their federal payments have the necessary information to make an informed decision about the best possible method for receiving their benefits in the future. This must be changed. All recipients of federal benefits have a right to be notified of all the available options to receive payment of federal moneys, regardless of the cost involved to Treasury. It was confusing and incorrect information that emanated from the U.S. government in the first place that caused many federal recipients to sign up for accounts which may be too costly or inconvenient for them.

Failure to Regulate the Voluntary Accounts. To date, Treasury has still refused to confront another serious issue: the voluntary accounts established by recipients must be regulated to ensure access through financial institutions at reasonable cost.

Congress specifically instructed Treasury to "ensure that individuals required . . . to have an account at a financial institution . . . have access to such an account at a reasonable cost; and ... are given the same consumer protections . . . as other account holders." Treasury's design of the ETA does not meet this mandate, because too many recipients have signed up for accounts through check cashers and other fringe bankers which are expensive and potentially extortionate. Treasury's failure to specify even minimum standards for the voluntary accounts opened by recipients ignores the law, as well as the harsh costs to recipients of these accounts.

Only financial institutions should be permitted to be conduits for federal moneys. Partnering between a check casher and a bank should not be permitted. Treasury must issue regulations to prohibit the deposit of federal payments into accounts which are effectively accessible only through fringe bankers. The recipient should be able to access the federal payment in his or her neighborhood through ATMs and POS devices made available by the financial institution. The partnership between federally-insured banks and fringe bankers (i.e. check cashers, rent-to-own stores, money transfer corporations, etc.) benefits all parties except the payment recipient. Banks operating as conduits between the federal government and fringe bankers simply add another layer of fees to the price of the fringe bankers' already costly services. We have seen a rise in the number of questionable partnerships established between fringe bankers and mainstream banks to take advantage of the opportunity and loophole that exists in the regulation of EFT payments. EFT 99 represents a great opportunity to bring significant numbers of the unbanked into the financial mainstream. Treasury's failure to regulate the voluntary accounts will substantially undermine this goal, and cost federal recipients.

It is essential that Treasury require that the fees charged for these new accounts be reasonable in relation to the federal payment and the features of the account, and that consumer protections apply to the transaction from the point the federal payment is deposited in the account until the recipient withdraws the funds. Treasury should require that the banking regulators ensure the reasonableness of the fees charged for accounts used for electronic deposit of federal funds.

The implementation of EFT 99 must ensure the consumer protection mandates of Congress. Millions of federal recipients will be substantially harmed if the direction of the EFT regulations are not changed. The voluntary accounts must be regulated for access, cost and consumer protections.

Conclusion

We appreciate this opportunity to comment on the ETA proposal. We urge Treasury to adopt our recommendations in order to adequately meet the needs of recipients of direct federal benefits in an electronic environment.

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1. **The National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. [(2)]

2. The National Consumer Law Center, Inc. (NCLC) is a nonprofit Massachusetts corporation founded in 1969 at Boston College School of Law and dedicated to the interests of low-income consumers. NCLC provides legal and technical consulting and assistance on consumer law issues to legal services, government and private attorneys across the country. *Cost of Credit* (NCLC 1995), *Truth in Lending* (NCLC 1996) and *Unfair and Deceptive Acts and Practices* (NCLC 1991), three of twelve practice treatises published and annually supplemented by NCLC, and our newsletter, *NCLC Reports Consumer Credit & Usury Ed.*, describe the law currently applicable to all types of consumer loan transactions. - -- --

3. **The Consumer Federation of America,** is a nonprofit association of some 250 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

Community Legal Services, Inc. is a legal services program representing low income individuals and groups in Philadelphia, Pennsylvania.

The Consumer Law Center of the South is a nonprofit public interest organization incorporated in Georgia. Established in 1995, its mission is to advocate for consumer protection through consumer education, legislative reform, involvement in the regulatory process, and litigation support.

Consumer Action is a California based information and advocacy organization.

The Disability Law Center, Inc. is a private non-profit organization that provides free legal services for persons with disabilities throughout Massachusetts.

National Clearinghouse for Legal Services is a not-for-profit communications, advocacy, and policy organization that fosters and develops creative approaches to policy research, development, analysis, and advocacy on issues affecting low-income communities.

The National Consumers League is America's pioneer consumer organization. NCL is a private, non-profit membership organization dedicated to representing consumers.

The North Carolina Justice Center is a non-profit, advocacy organization dedicated to improving the lives of low income people in North Carolina. It is based in Raleigh, North Carolina.

The Northeast Missouri Client Council for Human Needs is a non-profit organization of low income clients of legal services, in Hannibal, Missouri.

National Senior Citizens Law Center is a national legal and policy organization that works on behalf of low income senior citizens to help make their lives better through legal analysis, legal representation, and support to advocates.

The Welfare Law Center is a national legal and policy organization that works with and on behalf of poor people to ensure that adequate income support is available when necessary to meet basic needs and foster healthy individual and family development. The Center achieves its goals through legal and policy analysis, legal representation, public education, training, and aid and support to advocates.

Virginia Citizens Consumer Council is a statewide consumer advocacy organization, headquartered in Richmond.

4. Except for those circumstances which are specifically permitted by federal law, such as for some debts owed to the federal government or for child support.

5. 31 CFR Part 208, *Fed. Reg.* (Vol.63, No. 186), September 25, 1998.

6. These voluntary accounts may well have been entered into solely because the recipient feared that the recipient would otherwise no longer receive the federal benefit due to the widespread misinformation about the requirements of EFT 99. Further, these accounts may well lack access through the financial institution as well as most consumer protections. Too often these accounts are provided through a partnership between the financial institution and an alternative, unregulated provider, such as a check casher or a money exchanger.

7. We have relayed some of this confusion directly to Treasury officials, including extensive misinformation provided to recipients by Social Security personnel in public offices as well in a number of regional offices. For example, since implementation of the law was first announced, recipients have been erroneously told by Social Security officials that they were *required* to sign up for a bank account or they would not be eligible for benefits (e.g. South Carolina, Illinois); that they would have to *prove* the grounds for their hardship waivers (e.g. California, Massachusetts); that if they had previously signed up for direct deposit they would have to sign a statement and show the grounds for a waiver in order to go back to a paper check(e.g. New York, Georgia, Pennsylvania).

8. 63 *Federal Register* 64822, November 23, 1998.

9. Data from the 1995 Survey of Consumer Finances, (which involved interviews of 4,299 families from all income brackets) found that 15 percent reported that they did not have a checking account. The reasons provided by these families for not having a checking account ranged:

- 27% said they did not write enough checks to make one worthwhile;
- 20.5% said they did not have enough money to afford a checking account;
- Nearly 29% reported that they did not like to deal with banks; and
- Just under 10% each gave as their reason either high minimum balance requirements, an inability to manage or balance an account, or bank service charges they deemed to be too high.

Family Finances in the U.S.: Recent Evidence from the Survey of Consumer Finances. Federal Reserve Bulletin, Col. 83, No. 1, Jan. 1997 at 7.

On the other hand, Treasury's study involving a much smaller sample of unbanked direct *federal benefit recipients* found:

- 47% said they did not have enough money to have an account;
- 21% said they had no need for an account; and
- 6% said that bank fees were too high.
- Much smaller percentages cited concerns about bounced checks, overuse of ATM's, bad credit histories, distrust of banks, privacy, or having their assets frozen in the event of a legal judgment.

Department of the Treasury Financial Management Service, *Mandatory EFT Demographic Study, Executive Summary,* April 22, 1997 at 3-4.

10. And this population is more likely to be illiterate. *See, Adult Literacy in America,* National Center for Education Statistics, U.S. Dept. of Ed. (Sept. 1993).

11. Congress explicitly instructed Treasury to protect the unbanked from potentially costly consequences of the EFT mandate by requiring that Treasury ensure by regulation that recipients required to establish accounts have access to the accounts at a financial institution at a reasonable cost with consumer protections. *See* 31 U.S.C. � 3332(I).

12. 63 *Federal Register* 64821, November 23, 1998.

13. Treasury's contractor recommended that the maximum fee allowed for additional ATM or teller withdrawals be capped at $1.00 per transaction. *ETA Initiative Final Report*, p. 75, Dove Associates, June 15, 1998.

14. 63 *Federal Register* 64821, November 23, 1998.

15. Information compiled by the National Consumer Law Center reveals that, in the state administered EBT programs, POS surcharging has been prohibited in Connecticut, the District of Columbia, Illinois, Maryland, Massachusetts, Maine, New Hampshire, New Jersey, New York, Rhode Island and Vermont. Additionally, in several of these states ATM surcharges are not charged by financial institutions for EBT transactions.

16. Dove, *supra*, at 63.

17. Seven day, twenty four hour telephone support for access to balance inquiries, as well as for recipients to report lost or stolen cards would be preferable. Treasury's contractor found that the cost for providing this service would only be $.54 per recipient per month, and recommended that this service be included in the basic ETA. *Id*, at 63 and 64.

18. Except for those circumstances which are specifically permitted by federal law, such as for some debts owed to the federal government or for child support.

19. *See* 42 U.S.C. � 407; 42 U.S.C. � 1383; 38 U.S.C. � 530; and 5 U.S.C. � 8346.

20. *See, e.g. Porter v. Aetna Casualty and Surety Co.,* 370 U.S. 159 (1962); *Fillpot v. Essex County Welfare Board,* 409 U.S. 413 (1973); *Tom v. First American Credit Union,* 151 F.3d 1289 (10th Cir. 1998); *Crawford v. Gould,* 56 F.3d 1162 (9th Cir. 1995); *Blindman v. Rah,* 878 F.2d 263 (9th Cir. 1989).

21. The cases cited in the previous footnote are one small indication of this problem. NCLC's experience and that of legal services attorney across the nation is another illustration. In the month prior to filing these comments NCLC has worked with legal aid attorneys in **Arizona, California, Colorado, Massachusetts, Mississippi, Nebraska, and Pennsylvania,** regarding the illegal attachment or setoff of funds that were unequivocally exempt under the Social Security Act. These attorneys tell us that banks routinely allow illegal attachment and execution orders of exempt funds. When the lawyers threaten suit, the banks back off and make the clients whole. But the practice still goes unchallenged by the many recipients who do not have access to free legal services.

22. In one recent case, a mentally impaired SSI client noticed that her bank balance was unexpectedly large. She asked the bank about this, and was told that was the amount that had been deposited by the U.S. Government. The woman accepted the situation - and spent the money. Then the bank discovered that it had credited somebody else's tax refund to the SSI recipient's account. The bank then set off the recipient's next three SSI checks. She got evicted from public housing, ended up back on the street, and lost contact with legal services before they could put together a case against the bank.

23. There are a number of cases which authorize the first-in, first-out method of accounting for determining which funds are exempt. *See, e.g. NCNB Financial Services v. Shumate,* 829 F. Supp. 178 (W.D. Va. 1993), aff'd 45 F.3d 427 (4th Cir. 1994), cert. den. 515 U.S.1161 (1995); *Dean v. Fred's Towing,* 801 P.2d 579 (Mont. 1990); *In re Moore,* 214 B.R. 628 (Bankr. D. Kan. 1997). However, the more logical method of accounting for exempt funds would be a first-in, last-out analysis: this would assume that the first funds deposited and the last funds used were exempt funds. In this way, a depositor would deposit the non-exempt funds last, and spend them first.

24. In one case in California, a mentally disabled SSI recipient was provided with an ATM card which he gave to pay for a rental car. Before he returned the car, he had a psychotic episode, so that the rental car company charged $1500 to his account, which was substantially more than was in the account. There was an optional credit agreement attached to the account. The bank took the next several SSI deposits to pay itself back the credit, that the client never authorized to be extended on his behalf. California has a statute explicitly prohibiting set off of Social Security and SSI benefits (Cal.C.C.P. � 704.080) yet the bank claims that it does not apply to this situation.

25. The financial institution is required to provisionally credit a consumer's account in the amount of the alleged error within 10 business days after receiving the notice of error. 12 C.F.R. � 205.11(c).

26. An example of when a transfer may be considered to have been unauthorized would be when the recipient has reported a card stolen and money missing from the account; the bank makes the provisional credit required by 12 C.F.R. � 205.11(c), then determines that the transfer was made by the recipient's brother who knew the PIN number because he had used the card with permission on previous occasions. Under the definition of "unauthorized transfer" in the Electronic Fund Transfer Act, this would not be considered an unauthorized transfer.

27. In the recent Direct Payment system pilot project in Texas, it appears that in this scenario the financial institution was simply going back and withdrawing the money directly out of the account. No notice or hearing was offered, even though the provisional credits are exactly analogous to an overpayment. Under the Social Security statute, notice, hearing and an extended time period for repayment are required. Thus, the bank's practice in these situations was wrong and quite possibly illegal.

28. Except for those circumstances which are specifically permitted by federal law, such as for some debts owed to the federal government or for child support.

29. We also recognize that because of the new, voluntary structure of the ETA, the potential profit to financial institutions must still be sufficient to persuade financial institutions to offer the account.

30. The time for imposition of the additional charge is only when the accounting is necessary -- when the financial institution receives the order of attachment or execution.

31. ACH capacity will be very valuable for payments for necessaries such as housing and utility payments. There are too many risks of inappropriate ACH transfers if payments to creditors or merchants are permitted.

32. While it is true that the per transaction costs for smaller financial institutions might be higher because of the lower volume of ACH payment transactions, this same disparity exists in the ATM environment, where smaller financial institutions are nonetheless often able to offer their customers lower fees and charges than their larger competitors.

33. This "ACH training" would include advising consumers of the need to contact the biller directly rather than their financial institution whenever they wish to cancel an ACH debit arrangement and the procedures for advising the financial institution to put a "stop payment" order on an ACH debit payment for a particular month, a service for which the bank could charge an additional fee to cover the costs involved.

34. Oral information provided to NCLC by Cary Whaley, Director of Network Products, National Automated Clearinghouse Association, December, 1998.

35. **A Consumers Guide to Electronic Payments**, website maintained by the Mid-America Payment Exchange at http://paytips.org/consumer.htm.

36. For example, we are confronted with statements such as the following:

"The characteristics and requirements of EBT programs, including the duties of the Financial Agent for a particular program, may vary according to the program. Therefore, Treasury believes that these duties are best incorporated in the Financial Agency Agreement for the particular program."(37)

37. 63 *Federal Register* 51491, September 25, 1998.

- "Treasury also believes that the bases upon which it is appropriate to permit a Financial Agent to close an account may vary among EBT programs, depending on the nature and features of the accounts. The Financial Agency Agreement will include program-specific criteria for the closing of accounts ....."(38)

38. 63 *Federal Register* 51493, September 25, 1998.

- "The extent to which Regulation E applies to an account established under a particular EBT program will be addressed on a program-by-program basis, including in the context of a Federal/State EBT program."(39)

39. 63 *Federal Register* 51494, September 25, 1998.

- "It is Treasury's intention to continue working with *States* in designing and implementing Federal/State EBT programs. *States* will play an active role in developing the linkage between State and Federal EBT programs and will have an opportunity to provide input on many of the duties and qualifications of the Financial Agents designated by Treasury in connection with Federal/State EBT programs."(40)

40. 63 *Federal Register* 51499, September 25, 1998.

41. *Id.* at 51501, September 25, 1998.