Comments to the Treasury on

Proposed Rule 31 C.F.R. 208 Implementing 31 U.S.C. 3332 Requiring Federal Agencies to Convert all Federal Payments from Checks to Electronic Funds

These comments, written by the National Consumer Law Center[(1)] and the Consumer Federation of America,[(3)] are also provided on behalf of the following national, state and local groups representing consumers:

Arizona Consumers Council[(4)]
Consumer Action[(5)]
Mercer County Community Action Agency[(6)]
National Association of Consumer Agency Administrators[(7)]
National Consumers League[(8)]
Organization for New Equality[(9)] and
Niagara Frontier Consumer Association[(10)]
Public Voice for Food and Health Policy[(11)]
Virginia Citizens Consumer Council[(12)]

We are all vitally interested in the way Treasury resolves the issues raised by these proposed rules. Significant harm will come to federal benefit recipients throughout the U.S. as a result of EFT 99 if the new law is implemented as proposed in Rule 208. There are five points we address in these comments:

I. Treasury's failure to regulate the voluntary accounts established by recipients to comply with EFT 99 violates the specific statutory mandate and will result in great harm to millions of unbanked recipients of federal benefits.

II. The hardship waivers established by Treasury are too limited.

A. No waivers are provided for those with mental disabilities, literacy problems or English fluency issues.

B. No waivers are available to those with bank accounts who become eligible for federal benefits after July 26, 1996.

C. Financial hardship waivers are not available to recipients who have accounts.

III Issues on the design of the ETA must be addressed.

A. Under these proposed rules, the ETA account would not be available to recipients who have established other accounts.

B. The law as well as policy considerations dictate that full "Reg E" protections apply to the ETAs.

C. Answers are provided to Treasury's questions regarding appropriate features of the ETA.

D. Additional Basic ETA Requirements

IV. Protections against attachment and set-off must apply to all accounts established to comply with EFT 99.

V. Treasury's proposed waiver for itself from these regulations is overly broad.

I. Treasury's Failure to Regulate the Voluntary Accounts Established by Recipients to Comply with EFT 99 Violates the Specific Statutory Mandate and Will Result in Great Harm to Millions of Unbanked Recipients of Federal Benefits.

Treasury envisions a four tiered system for implementing EFT 99 for individuals:

-- some recipients will be eligible for a hardship waiver of the requirement for electronic payment and will continue to receive paper checks;

-- banked recipients will be encouraged to switch to direct deposit;

-- unbanked recipients will be encouraged to go out and establish their own accounts voluntarily;

-- those recipients who fail to inform Treasury of the financial institution for receipt of the federal payment, and who do not qualify for a waiver, will be provided the default account established by Treasury. Treasury will regulate this default account for access, reasonable cost and consumer protections.

Treasury has chosen *not* to regulate the features of the accounts established voluntarily by recipients to comply with the law.

Clear Mandate. Congress' mandate to Treasury is perfectly clear. First, all federal recipients are required to designate a financial institution to receive the electronic deposit of federal payments:

(g) Each recipient of Federal payments required to be made by electronic funds transfer shall --

(1) designate 1 or more financial institutions . . . to which such payments shall be made; . . .[(13)]

Treasury is then required to provide regulations to ensure access at a reasonable cost, with consumer protections. These regulations must apply to all accounts designated by recipients to receive federal payments electronically:

Regulations under this subsection shall ensure that individuals required under subsection (g) to have an account at a financial institution . . .

(A) will have *access* to such an account at *a reasonable cost;* and

(B) are given *the same consumer protections* with respect to the account as other account holders at the same financial institution.[(14)]

There is no mention in the law of default accounts to be provided by Treasury. Treasury has gone beyond the legal mandate in this law by distinguishing between the default accounts it provides and the accounts voluntarily selected by the recipients. Under this law, *all* accounts are to be designated by recipients.[(15)] Further, Treasury's regulations must ensure that *all* of the accounts designated by recipients be accessible at reasonable cost with consumer protections.

Treasury's proposed regulations do not comply with this clear regulatory requirement. Instead, Treasury has chosen to regulate only to a very limited extent the accounts selected by recipients voluntarily. Treasury only requires that the accounts be in the name of the recipient and at a financial institution.[(16)] The regulations include no requirement for direct access to the federal funds at the financial institution. The regulations include no requirement that only reasonable costs be imposed for accessing the federal funds. The regulations include no requirement that any consumer protections apply.[(17)] These omissions in the regulations violate the clear directive of Congress.

As the undersigned representatives of federal benefit recipients have explained in writing and verbally in numerous instances to Treasury officials regarding the implementation of EFT 99,[(18)] serious harm will come to millions of unbanked recipients of federal benefits if they are forced to receive their federal entitlements electronically without adequate consumer protections. Excessive costs, lack of choice, reduced access, as well as the forced use of the other services provided by non-financial institutions, are some of the harms that will affect the unbanked if Treasury persists in refusing to regulate the voluntary accounts established by recipients to comply with EFT 99.[(19)]

The legislative history also indicates that Congress specifically directed Treasury to protect the interests of the unbanked:

Since this section will require participating beneficiaries to obtain a bank

account, Congress expects the Secretary of the Treasury *to work vigorously to accommodate the needs of the unbanked* recipients through such means as: (1) the planned implementation of a *national electronic benefits transfer system for Federal payments* through the designation of depositaries and financial agents *under the Secretary's existing authority.* Under this program, recipients will receive all benefit payments under a single access card; (2) implement through the private sector *consumer owned bank accounts* where recipients access their funds by debit card or other means, rather than through traditional account features, such as checking. (Emphasis added.)[(20)]

There are several clear messages from this expression of Congressional intent:

1) "Congress expects Treasury *to work vigorously* to accommodate the needs of the unbanked." Administrative burden is not a reasonable excuse for refusing to carry out Congress' clear mandate to regulate the accounts established by unbanked recipients.

2) Congress stated that the accounts established to comply with this law would be *bank* accounts. Obviously, Congress intended that recipients should be able to *access* the account through the bank, not that Treasury would create a second class customer relegated to a fringe banker to reach the funds, as Treasury contemplates is permissible.[(21)]

3) The default account structure in which accounts are to be provided by Treasury may be appropriate because Treasury already had the authority to do it. However, this new law -- amendments to 31 U.S.C. § 3332 -- does not provide the statutory basis for it. As a result, the statutory language in § 3332(i), requiring the regulation of accounts, can only refer to the regulation of *all* accounts established to comply with the mandates of EFT 99, including the "voluntary" accounts.

We will address each of these messages separately:

Congress Expected Treasury To Work Vigorously To Meet the Needs of the Unbanked.[(22)] Judges in numerous cases have held that fear of administrative burden cannot be the rationale for an agency's failure to regulate as Congress intended.[(23)] Nevertheless, Treasury has chosen *not* to regulate the features of the accounts established voluntarily by recipients to comply with the law. It argues that this would be burdensome on Treasury:

Such a broad interpretation potentially would place Treasury in the position of determining the reasonableness of prices charged by thousands of financial institutions, for a wide variety of account services, to individuals who have account relationships at institutions they have chosen voluntarily.[(24)]

Representatives of federal recipients have never sought to impose this extensive an administrative burden on Treasury. As Treasury notes in the preamble to the regulations:

Another approach involves the development of a model deposit account with an invitation to financial institutions to offer this account, at a specified price or at a price below some ceiling determined by Treasury, to individuals without accounts.[(25)]

Treasury then rejects this idea because of the extensive regulatory burden that Treasury believes would be entailed here. It is hard to believe that the burden complained of would actually be greater than that involved with establishing the parameters of the ETA account, going through the regulatory process, soliciting bids, choosing the providers, and maintaining the contractual relationship with the single or multiple financial institutions appointed as Treasury's financial agent or agents.

Instead, Treasury only need set the broad parameters -- based on access, reasonable costs and consumer protections -- of accounts acceptable under this scheme, and the supervision and enforcement of the baseline regulations established by Treasury could be enforced by the agencies which regulate the financial institutions. Indeed, this idea seems to be exactly what Congress contemplated when passing this law: "Congress expects the Secretary of the Treasury *to work vigorously* to accommodate the needs of the unbanked recipients . . . "[(26)]

Congress envisioned that the accounts established to comply would be *bank* accounts with only reasonable fees allowed and required consumer protections . Treasury contemplates that it would be permissible for federal benefit recipients to establish accounts through fringe bankers -- check cashers, finance companies and the like -- which are only accessible through those fringe bankers. No boundaries on costs or required consumer protections would be required. Given the clear language in the statute and the Congressional Record regarding the need to protect the unbanked, Congress did not permit Treasury to create a second class of bank customers with access to only fringe bankers for their federal funds, as Treasury contemplates.[(27)]

If Treasury refuses to limit the conduits of federal payments to regulated financial institutions, and refuses to regulate access with reasonable fees and consumer protections, unbanked federal benefit recipients will be harmed. Appendix D provides detailed documentation of the effect on low income people resulting from the failure to regulate the financial services offered by fringe bankers. Those types of results were exactly what Congress sought to avoid when it required Treasury to regulate the accounts established to obtain federal benefits electronically in § 3332(i).

EFT 99 does not establish the basis for the default account. Treasury justifies

its failure to regulate the voluntary accounts by relying on its extensive regulation of the default accounts which it will provide.[(28)] However, if there is no statutory authority in 31 U.S.C. § 3332 for the default accounts to be provided by Treasury, then the only accounts which § 3332(i) could refer to are those established voluntarily by recipients to comply with the law. In fact, there is nothing in the 1996 amendments to § 3332 which mentions default accounts, or accounts to be provided by Treasury. The default account structure contemplated by Treasury in the Proposed Regulations may be entirely legal and appropriate, but its legal genesis is based on authority Treasury had prior to passage of EFT 99.[(29)] As a result, the statutory language in subsection (i), requiring the regulation of accounts, can only refer to the regulation of *all* accounts established to comply with the mandates of EFT 99, including the "voluntary" accounts. The regulation of all accounts pursuant to subsection (i), would require regulation for access, reasonable costs, and consumer protections.

*Un*reasonable Fees and Lack of Consumer Protections Will Result from the Failure to Abide by the Law. Fringe bankers, such as check cashers, finance companies, and others, do business in the low income community because of the large profits that they can make. Expensive services, extraordinarily high fees, and abusive transaction terms are standard business practices for these alternative providers. These fringe bankers make no reinvestment of their substantial profits back into the communities. They charge as much for financial services as the regulatory structure - or lack of regulation - allows. And the low income residents of the community are unable to save and gain little benefit other than the specific service provided from their presence. If this non-regulated industry is allowed to be the conduit of federal payments, the financial problems in the low income communities will be exacerbated.

Check cashers[(30)] are NOT the appropriate alternative to banks to provide access to federal payments for the "unbanked." In only fourteen states are there even limits on the amounts that check cashers can charge to cash government checks.[(31)]

Low income advocates fear the use of alternative financial providers as conduits largely because of the other services that will be sold to the recipients. If recipients must go through the doors of the fringe bankers at least one time each month, it is very likely that they will fall prey to the expensive -- and unregulated -- other financial products of these fringe bankers, such as check cashing,[(32)] payday loans,[(33)] high cost home equity loans, and rent-to-own transactions. While recipients may always be able to opt for these services if they care to, they should not be required to go through the doors of these alternative providers every single month in order to obtain their federal entitlement.

For once, let us learn from experience. The experiences in the low-income communities around the nation is that fringe bankers have developed

sophisticated and ingenious techniques for taking money from the poor. Fringe bankers--check cashers, finance companies, and others--should not be provided a government boost to their business by serving as contractors with financial institutions for the delivery of federal payments, *unless there is an absolutely clear regulation that requires access through the financial institution to the federal funds, at a reasonable cost, with consumer protections.*

"Fringe banking" is an entire industry devoted to doing business in the low-income community, which has proliferated largely as a result of the deregulation of interest rates and loan terms in many states since the 1980's. Appendix D documents the high cost of deregulation to the poor. Many of these providers constantly push the envelope in terms of the legality of their practices--they keep charging the exorbitant fees until made to stop. All too often, the abusive practices are not technically illegal, but exceed the bounds of common decency.[(34)] Establishing any one of the purveyors of this high cost credit as the conduit of federal payments sanctions and stimulates these types of transactions. The federal government should be in the business of discouraging high cost lending, not providing means to facilitate it.

We know that check cashers and other fringe bankers are already seeking to expand their business opportunities as a result of EFT 99. (See Appendix C.) If they are successful, federal recipients will be required every month, month after month to go back to the check casher to receive their federal benefits. The costs will be excessive. In one example from Minneapolis -- a state which limits the amounts that check cashers can charge to 2% for government checks -- the *monthly* cost to receive cash for a federal payment of $500 will be $13.95![(35)] For this cost no new services are provided.

If Treasury's proposed regulation is implemented, when the recipient signs up with a fringe banker to receive the federal payment through it, the recipient gains no advantages, only additional costs, and ends up with a lack of choice each month as to where to cash the check. This benefit recipient also becomes a likely prospect for the other loan products of the check casher, such as payday loans. The result is that the federal payment simply ensures that the recipient becomes a captive customer of that fringe banker, without even the present opportunities to go elsewhere if treated unfairly. Treasury's failure to impose any regulations on access to the accounts into which the federal payments will be delivered is tantamount to federal encouragement and support of fringe bankers. Moreover, the lack of regulation will cause substantial harm to the unbanked. The attached Appendix D provides extensive examples of the abusive charges and practices of fringe bankers when there is a lack of effective regulation.

There are several reasons that some low income people choose to use check cashers rather than banks. Very often, low income people cannot afford to use banks: they cannot afford the fees or minimum balances required for

accounts. Presumably the proper design of Direct Deposit Too accounts will remedy the financial aspect of this issue. However, many low income people do not use banks even when affordable accounts are offered because of privacy concerns, fears of having their funds attached by creditors, or just because banks are not as comfortable to them as the local check casher or retailer. Reassurances of privacy and of the anti-attachment prohibitions for Social Security funds should address the first two aspects of this concern. (See Section IV of these comments.) The last aspect -- the level of comfort -- can be addressed by simply allowing check cashers to continue providing their services in the community as they do currently.

We do not propose that fringe bankers be prohibited from providing any access to federal money, just not that they be the sole access for any federal recipient. Nothing prohibits check cashers from establishing ATM or POS devices on their premises and selling recipients all of the products and services that are now currently offered. The key distinctions between this and allowing alternative financial providers to be contractors with financial institutions for the delivery of federal electronic payments are:

1) If recipients can receive their federal payments through "financial institutions" as currently defined by Treasury, they will be pulled into the mainstream banking system, and thus provided savings' opportunities as well as alternative (and less expensive) sources for credit.

2) Recipients who must have a bank account, but who nevertheless choose to access their money through a check casher or a money transmitter, will still have the choice every month of where to obtain their funds-- they would not be forced to go to the check cashers to receive their federal payments.

3) The banks receiving the federal payments will have a greater source of funds as a basis for community reinvestment into the low income community, whereas the check casher has no such obligation.

As advocates of low income people, and of consumers generally, we basically agree that electronic transfers are a more efficient and safer method of receiving payments than the paper check based system. However, the additional advantages of the electronic system quickly evaporate if recipients have higher costs, unanticipated risks, and greater potential losses, *as will clearly occur under the Proposed Regulations, because Treasury has failed to provide even a minimal level of regulations for the accounts established by recipients.*

II. The Hardship Waivers Established by Treasury Are Too Limited.

The scheme proposed by Treasury of allowing recipients to self-certify their eligibility for a hardship exemption so as to continue to receive payment by check rather than EFT is good, in so far as it goes.[(36)] Treasury anticipates that "a waiver from payment by EFT will be automatic and based solely on

the individual's certification."[37] Serious hardships will be caused, however, to many federal recipients because the criteria for hardship waivers are far too narrow. There will be one of two adverse results: either 1) federal recipients will be forced to surrender a level of independence, and be subjected to unacceptable charges and abusive practices they would not have encountered in the check based environment; or 2) they will have to lie on their self-certification waiver to avoid expensive or inaccessible electronic deposits -- a result which should not be encouraged by a federal regulation.

A. No Waivers Are Provided for Those with Mental Disabilities, Literacy Problems or English Fluency Issues.

Treasury ignores the legislative history on the hardship exemption in the Act by excluding from the enumeration of qualifying criteria:

-- mental handicap,
-- educational hindrances,
-- language problems,
-- financial hardship if the recipient has a bank account, and
-- *any* criteria whatsoever, if the recipient has a bank account and becomes eligible for the federal payment after July 26, 1996.

Treasury seems to have ignored the explicit intent of Congress, as evidenced in the Legislative History, to use hardship waivers to ease the transition to an electronic payment system:

The Secretary of the Treasury is given broad discretion to waive the requirements of this section to avoid imposing a hardship on a beneficiary. Congress expects the Department of the Treasury to promulgate regulations addressing such hardship waivers and to consider various factors in defining hardship. Congress recognizes that adherence to these provisions may be difficult for a variety of beneficiaries. We are concerned that individuals who have geographical, physical, *mental, educational, or language barriers* or as a result of natural or environmental disasters will not be able to receive benefits. Recipients in this category includes small businesses as well as individuals. *Waivers should be provided in order to minimize disruptions to any beneficiary.*[38]

Under the proposed regulations, none of these conditions would be just cause for the granting of a waiver from the EFT requirement. Only physical handicap, geographic barrier, or financial hardship for the unbanked, would qualify as a hardship criteria. The rationale offered by Treasury for this decision in the preamble to the proposed regulations evidences a lack of true understanding or compassion for the populations that would be affected.

Mental Disability. Treasury simply states that waivers would not be required for persons with a mental disability. The rationale offered is that those who have a mental disability that makes them incapable of managing their own

funds would have a representative payee appointed for them by the applicable program agency and such payee would presumably be able to handle an EFT payment arrangement unless he/she individually met one of the other exemption criteria.[(39)] There are several very important considerations that Treasury leaves out of its overly simplistic justification. First, there are a very large number of recipients with mental impairments who are quite capable of managing their own funds in a check based system and who, absent a transition to an electronic delivery system, could function independently without the need of turning their finances over to a representative payee. Some of these recipients may simply be unable to remember a PIN; others may have a limited ability to think conceptually and, while they can count out money to make purchases or even write checks to pay bills, cannot deal with abstract benefits they cannot see and feel. It is simply unconscionable to say that, because the government wants to save some money, such individuals should now have to put someone else in charge of their funds and give up that level of control over their own lives.

The second consideration that Treasury ignores is that there is already a great difficulty in finding persons or entities willing to serve as representative payees for those government benefit recipients who are truly incapable of managing their own funds. SSA officials over the years have acknowledged this problem and there has been a concerted effort to identify entities willing to serve in this capacity. In some parts of the country there is a thriving business of individuals and agencies that sell their services to be a representative payee to persons who can not otherwise find someone. By forcing even more people into a situation where they will have to have a representative payee in order to receive their government benefits, Treasury will in effect be supporting the growth of this industry that takes money out of the pockets of some of our neediest citizens without any tangible benefit to the program recipients.

A final consideration ignored by Treasury's justification for its position is the possible risk of loss of benefits to recipients if they are forced into a representative payee situation, especially in those cases where the representative is someone with whom the recipient does not otherwise have a relationship, such as the pay for service arrangements discussed above. While Congress has made clear that recipients of direct federal payments in an EFT environment are fully covered under the Reg E protections,[(40)] the Reg E[(41)] limitations on consumer liability for losses that are associated with the use of a valid card and PIN do not apply if those benefits are accessed by a representative payee who misappropriates the funds for his/her own use. Thus, there would be no protection for recipients who felt compelled to pay some stranger to serve as their representative payee so that they could get their government benefits only to find that such person wiped out their accounts and moved on.

Limited Literacy Skills and English Fluency. Treasury's proposed rule also does not envision permitting a hardship waiver on the basis of educational

level, limited literacy skills, or lack of fluency in English. Here Treasury argues first that these factors do not pose any barriers unique to an EFT delivery mechanism as opposed to a check system.[(42)] Such an assertion is again simply untrue. Many persons who fall within one of these categories can in fact operate in a paper based environment, sometimes alone and sometimes with the help of friends and family, even if they cannot read or write or are not fluent in English. It does not take an ability to read or write to sign a check with an "X" or an ability to read English to sign your name on the back of a check. It does on the other hand require an ability to read English or one of the other limited languages that may be available on a POS or ATM screen to negotiate an electronic debit of funds. It is those who are not literate and/or fluent in English that are most likely to end up with an electronic debit only account. It is these populations who will not otherwise have a relationship with a bank and therefore will not even be able to avail themselves of teller assistance when they cannot negotiate the ATM.

Treasury's next argument is that whatever problems EFT may pose for these segments of the population are merely a "short-lived" "transitional hurdle" that it asserts will be overcome by targeted educational programs.[(43)] Since, to the best of our knowledge, Treasury has no plans to offer any in-person training on how to use debit card technology or on how to shop around for low cost bank accounts that will permit direct deposit , it is unclear how they plan to "educate" this population to get them through the transition. The printed materials they appear to be relying on most heavily for their educational campaign will be of little use to those who cannot read the materials, nor is there any indication that they will be made available in anything other than a very limited number of languages. Public service announcements, the other major vehicle Treasury plans to employ, are unlikely to provide much in the way of substantive information. It is certainly unrealistic for Treasury to count on already over-extended and under-funded community based organizations to take on the role of educating and training those among the 10 million unbanked recipients of direct federal benefits who are out there who will need such assistance because of their educational or language problems.

It is not enough to note, as Treasury does in the preamble to the proposed regulations, that in some areas ATMs and POS terminals offer language options other than English[(44)] as this does nothing to answer the question of whether on-screen messages in the appropriate language are in fact available to those who need them where and when they need them. The obvious answer to this question is no if your primary language is something other than Spanish or English.

Moreover, Congress specifically instructed Treasury to address the problems that recipients with these handicaps have in transitioning to an electronic system. Simply saying that the problems are not problems, is not addressing them, it is ignoring them. There will be, as Congress recognized, significant difficulties faced by recipients with mental problems, and literacy and English

fluency barriers in this changed environment. There is simply no justification for excluding these populations from the ability to seek a hardship waiver.

B. No Waivers Are Available to Those with Bank Accounts Who Become Eligible for Federal Benefits after July 26, 1996.

No waivers are available whatsoever for recipients who become eligible for federal payments after July 26, 1996 who have bank accounts. Treasury's justification for this is slim:

Treasury's proposal to tie the availability of a waiver for an individual who has a bank account to the date an individual became eligible for the federal payment is based on a review of its experience, and the experience of the agencies responsible for the vast majority of Federal payments, during phase one .... The SSA . . . reports that approximately 76% of the recipients who became eligible to receive Social Security and Supplemental Security Income payments since July 26, 1996, are receiving payment by EFT.[(45)]

There are several problems with this justification. One: We have heard reports from recipients, that they are being told when they go into SSA offices and apply for benefits that they must have a bank account.[(46)] So recipients are going out and obtaining new bank accounts -- whether or not they can afford them -- solely because they are led to believe that obtaining one is a prerequisite to qualifying for federal benefits. Recipients should not be misled in this way. Congress never intended that unbanked new recipients be pressured into obtaining bank accounts for the sole purpose of qualifying for federal payments, especially when there is no federal oversight of the costs for the accounts established just for receipt of federal benefits. The fact that as a result of this misinformation, many new recipients are signing up for EFT, and are obtaining bank accounts in the process, cannot be a reasonable basis for disallowing hardship waivers to this population.

The second problem is if only 76% of the recipients who become eligible are receiving payment by EFT, what about the rest? This means that 24% of new recipients are NOT signing up for EFT. How does Treasury propose to handle them? In its discussion of the hardship waiver, Congress made no distinction between individuals based *on when they become eligible for federal benefits:*

(2)(A) The Secretary of the Treasury may waive application of this subsection to payments--

(i) for individuals or classes of individuals for whom compliance imposes a hardship;[(47)]

New recipients need waivers based on physical, geographic, mental, English fluency, and literacy reasons as much as other recipients. There should not be any distinctions based on when eligibility for federal benefits occurred. Moreover, this proposed system of waivers makes no allowance for future

changes in the circumstances of a recipient. For example, if a recipient moves from one area in which banks are accessible to another in which they are not, the recipient should be able to claim a geographic hardship. Or if a recipient becomes non-ambulatory and can no longer walk to the bank, the physical hardship waiver should always be available. Further, if banks merge, close branches, or fees and charges increase to an unaffordable amount, recipients need to be able to claim hardship waivers.

Finally, having different waiver criteria based on the date of eligibility for federal payments confuses and unnecessarily complicates the already difficult educational process. Also, as the years go by, this distinction becomes more arbitrary and unreasonable.

C. Financial Hardship Waivers Are Not Available to Recipients Who Have Accounts.

Treasury proposes to disallow any waiver based on financial hardship to those with bank accounts. This might not be so disastrous if Treasury were ensuring that the bank accounts which recipients are securing are: a) accessible through the financial institution, b) at a reasonable cost, and c) have consumer protections, as the law requires. Yet, Treasury is engaging in a massive public education effort designed to promote direct deposit for federal recipients, and many recipients are under the impression that obtaining a bank account is a prerequisite to qualifying for federal benefits. [(48)] Additionally, the fringe bankers themselves are launching an ambitious campaign to maintain and increase their business, by telling federal recipients that they must have electronic deposit.[(49)] Also, some recipients who seek accounts at banks are being denied them because of their credit history.[(50)] The result of all this is tremendous confusion by unbanked recipients about whether they need to go out and obtain their own accounts, and what will happen to their federal benefits if they do not.

The combination of these three factors -- the failure to tell recipients that may qualify for a waiver of the EFT requirement only if they *do not* have a bank account, and the complete failure to regulate the bank accounts that recipients obtain in order to receive benefits, combined with the heavy advertising campaign by the fringe bankers to establish electronic accounts through them -- is clearly in derogation of Congress' intent to protect low income recipients from expensive consequences of the EFT mandate. Congress explicitly said:

The Secretary of the Treasury is given broad discretion to waive the requirements of this section *to avoid imposing a hardship on a beneficiary.* (Emphasis added.).[(51)]

Also, what about all the recipients who may have an affordable bank account now, for which the institution raises prices, or if the financial circumstances of the recipient changes, such that an account is no longer affordable? Surely

recipients who find themselves unable to afford bank accounts should be able to qualify for this waiver based on financial hardship as well.

The absolute prohibition against waiver based on financial hardship for anyone who has a bank account is far too broad, and clearly outside the parameters of Congress' intention for Treasury to design a waiver system "to avoid imposing a hardship on a beneficiary." Waivers should be available to everyone based on financial hardship, regardless of whether they have an account at the time they became eligible for the federal payment, or when EFT went into effect.

IV. Issues on the Design of the ETA Must Be Addressed.

A. Under These Proposed Rules, the ETA Would Not Be Available to Recipients Who Have Established Other Accounts.

Treasury proposes that the ETA will *only* be provided to

"an individual [who] either certifies that he or she does not have an account with a financial institution, or [who] fails to provide information pursuant to Sec. 208.8 . . . .[(52)]

Inexplicably, Treasury proposes to *not* provide the only accounts regulated for reasonable costs and consumer protections to individuals who already have accounts. Thus, all of the following recipients are prohibited from participating in these regulated, limited fee, and protected accounts:

1) Those who were misled into believing that they had to have an account to qualify for or maintain their federal benefits; [(53)]

2) those who were good citizens and responded to the insistent advertisements from the Social Security Administration that they had to obtain an account and signed up for a bad one through a check casher or even an account with a bank that does not work for them for some reason or another; or

3) those who may already have an account with a financial institution but find that it is too expensive or inconvenient.

We are led to believe that the reason that Treasury will not provide the ETAs to those already with accounts is because Treasury does not want to compete with the private sector. Treasury cannot have it both ways. Treasury should not be in the business of providing accounts if it does not want to compete for those accounts. Congress expressly required Treasury to ensure that recipients do not suffer as a result of the EFT 99. Treasury seems most concerned that the private sector not suffer as the result of EFT 99. If Treasury is concerned about competing with financial institutions for business

then the simple solution is for Treasury *not* to offer an ETA. Rather, Treasury should establish a baseline of minimum consumer protections that would apply to all accounts established to access federal money, *as Congress mandated*.

Further, it is entirely unreasonable to assume, as Treasury does, that recipients of federal benefits, who rely on their monthly checks for subsistence will close existing bank accounts to become eligible for the ETA. To qualify for an ETA, a recipient would be required to close an existing account, obtain and send in the Treasury waiver form, then be assigned an ETA, all within one month. This would be necessary to ensure the federal benefit payments arrive in a timely manner. The process is complicated and unwieldy. How many *sophisticated consumers* would trust the combined bureaucracies of the federal government and two financial institutions to make a transfer of an essential payment from one institution to another on timely basis? Imagine the consternation of a fairly unsophisticated recipient who is facing this prospect as the only way to obtain the ETA.

B. The Law as Well as Policy Considerations Dictate That Full "Reg E" Protections Apply to the ETAs.

Presumably Treasury will establish that ETAs will be considered government benefit accounts under 12 C.F.R. § 205.15. As such, they will be exempt from certain requirements of Reg E. If they are exempt, the cost to financial institutions for establishing the ETAs will be lower. However, this is not what Congress envisioned.

Treasury is setting up the ETA structure pursuant to the Congressional mandate to provide regulations which ensure access at reasonable cost with "the same consumer protections with respect to the account as other account holders at the same financial institution" as is required by 31 U.S.C. § 3332(i)(2). All Reg E protections apply to all other account holders, and by virtue of § 3332(i)(2), should apply to the ETA accounts as well. This means that the various exemptions for accounts "established by a government agency for distributing benefits to a consumer electronically" -- as permitted by 12 C.F.R. 205.15 (Reg E) -- should *not* be applicable to the ETAs. If these exemptions were to be applicable, such that ETA recipients were not entitled to the same initial disclosures, and the same periodic statements as all other accounts holders, what would be the meaning of the language in 31 U.S.C. § 3332(i)(2)?

On the other hand, if ETAs are provided by Treasury pursuant to authority that it had prior to the passage of 31 U.S.C. § 3332(i)(2), then the exemptions allowed government benefit accounts in Reg E would be permissible. It is clear that Congress was under the impression that Treasury already had the authority to establish a federal Electronic Benefit Transfer

system:

Congress expects the Secretary of the Treasury to work vigorously to accommodate the needs of the unbanked recipients through such means as (1) the planned implementation of a national electronic benefits transfer system for federal payments . . .under Treasury's *existing authority*. (emphasis added.)[(54)]

Congress contemplated that the *new* accounts, to be established by recipients to comply with EFT 99 requirements, are to be owned by the recipients. As the statement in the Congressional Record goes on:

(2) implement through the private sector *consumer owned bank accounts* where recipients access their funds by debit card or other means, rather than through traditional account features, such as checking.[(55)]

Any accounts which are owned by the recipients do not qualify for the exemption in Reg E, as the exemption only applies to accounts which are"established by a government agency."[(56)]

The solution to this confusion is simple: ETAs can be provided by Treasury as a default account, if it chooses to go that route, but it does so pursuant to the authority it has exclusive of the mandates of EFT 99. As such, the ETAs would qualify for the exemption in Reg E. In that case, the mandates of 31 U.S.C. § 3332(i) -- requiring that Treasury regulate accounts established by recipients to comply with the requirements of EFT 99, for access at reasonable cost, with all consumer protections applicable to other account holders -- would apply to all the voluntary accounts established by recipients.

C. Answers to Treasury's questions regarding appropriate features of the ETA.

Question: Should Treasury make available a debit card-based account to individuals who are required to receive Federal payments by EFT and who do not have an account of their own with a financial institution?

Response: Yes, but this should not be the only type of account option offered to recipients. Treasury's own commissioned study, *Mandatory EFT Demographic Study*, showed that this type of account is particularly unappealing to those who are unbanked [(57)] Moreover, in many rural areas the local community banks completely lack ATMs. Debit card only accounts would be useless to recipients in such areas, as they would be unable to readily access their funds. Accordingly, the ETA should encompass a menu of account options from which recipients can select the account type that best meets their needs, including the option to opt out of any of the alternatives based on one of the hardship waivers (which should be expanded to include criteria as discussed above).

Question: Should the cost of the account to the recipient be the most important factor for selecting the account structure and/or the account providers, or should the account structure be designed to meet other objectives even if the cost to recipients is increased as a result? If the latter, which objectives? What is an appropriate standard by which to weigh tradeoffs between increased cost and additional account features?

Response: Yes, the cost of the account to the recipient should be the most important factor. Cost would be less critical if Treasury were willing to permit the majority of the currently unbanked to claim a waiver from ETA on the basis of financial hardship, as most of these individuals are now able to have checks cashed at little or no cost.[(58)]

One of the major reason some recipients have avoided establishing bank accounts is because they cannot afford the fees and have found alternative means for cashing their benefit checks.[(59)] For low income recipients living on fixed incomes any new expense is in fact a financial hardship. Accordingly, we would urge that Treasury waive all fees for a basic ETA for all unbanked recipients of needs based federal benefits and that some sort of sliding fee scale be established for all other recipients based on their actual monthly income.

By offering a menu of services, decisions about cost can be made by the individual recipients. Encouraging saving should be included among the goals to be met by the ETA.

Question: Should the account be structured to provide only a basic withdrawal service at the lowest possible cost, with additional service charges for additional features, or should the account offer a range of services at a fixed monthly cost, even if greater than the cost of a basic account?

Response: For the very reasons noted above, we believe the former approach is preferable. Many recipients will want nothing more than basic withdrawal services and should not be required to pay routine monthly fees for services they never or rarely use. Those who want additional services can shop around for them and then decide whether to obtain them on their own or elect to have them provided as part of their ETA at an additional cost.

Question: How many withdrawals should be included in the base price of the account? Should the account terms address the charges imposed by automated teller machine owners other than the account provider?

Response: No fewer than four ATM withdrawals should be included in the base price of the account plus a reasonable number of ATM balance inquiries, as well as an unlimited number of POS transactions including withdrawals. In the absence of ATM availability, the same general rules should apply to teller withdrawals. Recipients who use the ATMs of the financial agent with whom

the account has been established or any of its subcontractors, on a more frequent basis than for four withdrawals a month, should be charged no more than the actual cost of the transaction to the financial agent.

Evaluators of the Maryland EBT Project found that cash assistance recipients averaged 1.7 transactions per $100 in cash benefits. Given that the basic SSI grant for a single individual will be in excess of $500 per month by January 1999, it would appear that providing only four free ATM transactions is, if anything, already on the low side.

Surcharging should be prohibited for all ETA transactions at either ATMs or POS devices, whether they are owned by the account provider or not. There is already precedent for such a position as several states expressly prohibit surcharging for EBT transactions or have otherwise worked out arrangements with the business sector to waive surcharges for such transactions.

Question: Should the account structure provide for additional electronic or nonelectronic deposits within the basic monthly service charge? If so, what number of deposits?

Response: Yes, an unlimited number of other deposits to the account should be permitted at no additional cost to the recipient as such deposits are to the financial institution's own benefit as the financial institution will benefit from the float on these non-interest bearing ETAs. If, however, it is clear that additional costs are actually incurred as a result of the additional deposits, then rather than adding costs to the baseline ETA, appropriate fees for the additional deposits may be allowed.

Question: Should the account provide for some number of third-party payments, such as payments for rent or utility bills? If so, how many third party payments should be provided for and should they be priced in the basic monthly service charge?

Response: Yes, third party payments should be permitted at recipient option, with fees permitted only to cover the actual, incremental costs incurred for providing this service. This is especially important if the basic account structure limits the number of "free" withdrawals. Otherwise it would take many recipients multiple withdrawals just to get enough cash at the beginning of the month to pay their basic bills for housing and utilities. Moreover, the third parties involved will generally pay the costs of any processing fees involved in such electronic transactions, just as they do now for the general banking public, since it is in their own best interest to receive recurring payments in this manner. Typically, utility companies and other service providers pay for electronic bill payment services in lieu of maintaining walk-in business offices to receive cash payments.

Question: Should the account include a savings feature? How would such a feature operate? Would additional free withdrawals or the capability to accept

deposits other than the Federal payment act to foster savings by the recipient?

Response: Yes, the ETA should include a savings feature. It certainly would not cost the financial agent to allow the recipient to carryover funds month to month.[(60)] The ETA menu could provide for a similar option to encourage savings and provide no-cost bill payment methods. Other features that should be considered to encourage savings would be to provide for additional free ATM transactions or lower monthly service fees to those recipients who maintain a certain monthly balance in the account. Allowing additional free withdrawals and the capability to accept deposits other than the Federal payment would certainly foster Treasury's goal of encouraging savings.

Question: How important is a broad geographic reach to meeting the access objectives that most recipients will want? How should Treasury best meet access needs in underserved areas?

Response: Treasury should not designate any financial institution as the financial agent for providing ETA services in any geographic area where such institution has not provided evidence that it can guarantee reasonable free access to all those recipients living within that designated area, including those recipients who may have special needs. Moreover, Treasury should consider investing some of the Federal savings resulting from EFT 99 in assuring the placement of convenient ATMs in underserved areas. Treasury will also need to assure that recipients are fully informed of their waiver options, especially those related to geographical hardship, so that if access needs cannot be reasonably met in some underserved areas, recipients will know of their ability to continue to receive their benefits via check.

Question: Should access to the account be provided at outlets in addition to those normally offered by the financial institution providing the account? For example, should arrangements be permitted under which third parties may offer other means by which a recipient may, in effect, withdraw funds from the account. If yes, should there be any restrictions on where additional access may be provided or under what terms it can be offered?

Response: Yes, additional access points for cash withdrawals should be made available, so long as the recipient truly has reasonable access to multiple sources for accessing the funds, including free access through the financial institution's ATM and POS structure. We do not see a need for imposing any restrictions on where additional access may be provided at this time as our goal is to maximize the ease with which recipients can access their benefits by providing as extensive a range of access points as possible. However, we do feel strongly that any third parties who offer such services for a fee must clearly post information about those fees and must also allow for the recipient to cancel the transaction midstream without the imposition of any fee should the recipient decide he/she does not want to incur the listed fee that must appear on the ATM or POS screen. The informational materials

provided to the recipient by the financial agent should also specify that there may be some access points that will impose fees and identify the types of locations where benefits can be accessed without incurring any additional fees.

Question: If additional access is offered through arrangements with third parties, should the cost of this additional access be included in the pricing proposal in the competitive bid process?

Response: If the additional access points provided by the third parties are part of the method by which the financial agent will provide the necessary access to the recipients within their geographic area, then all costs incurred necessary to obtain the federal money must be included in the competitive bid process. If the additional access is indeed *extra,* and not part of the required outreach of the financial agent, then the fees should be required to be reasonable.

Question: Which account design would provide the appropriate opportunity for non-financial institutions to participate in the delivery of services to Federal payment recipients?

Response: We do not support delivery of services exclusively through non-financial institutions, although we do support maximizing recipient access to their benefits by permitting a broad range of businesses to offer ATM and POS access for debit purchases, bill payment, and cash withdrawal. Recipients must truly be afforded meaningful and reasonable access to their funds at a financial institution but they should also have the option of accessing their benefits at grocery stores and other retail outlets and electronic bill payment options at utility companies, housing authorities, or retail outlets. This is especially true, if this is a free service to recipients. Even when there is a fee involved, so long as the fee is reasonable, non-financial institutions may have a place in the delivery structure of federal payments, because they may provide safer and more secure options and provide less expensive money orders. *However, for non-financial institutions to have a role, that role must be regulated to ensure that the fees charged are reasonable, and to prohibit set-offs against federal payments received through them.*

In addition, we strongly encourage aggressive efforts on the part of Treasury to encourage the U.S. Postal Service to offer electronic access to federal benefits through its network of local post offices. Such access would go a long way toward addressing issues of both safety and convenience without raising the specter of high pressure marketing of other costly services, especially since the Postal Service already offers low cost money orders and some branches also afford other options for some bill payments. The *Mandatory EFT Demographic Study* found that of all locations other than banks for accessing funds electronically recipients overwhelming preferred being able to use their local post office over any other option.[(61)]

D. Additional Basic ETA Requirements

Basic consumer protections for federal ETAs are absolutely essential. In addition to the criteria specified above in response to the questions posed by Treasury in the NPRM, we feel that there are several additional minimum attributes that must be met by any ETA product:

-- Need for enhanced consumer protections. Given the fact that the majority of the recipients of federal benefits who will be subject to the ETA default option will be low income, we contend that an enhanced set of consumer protections that go beyond those generally required under Regulation E must be guaranteed. This would include the prohibition against attachment and set-off discussed elsewhere in this comment, as well as both an extension of the more favorable credit card liability limits to ETA debit card recipients, and a prohibition on the assessment of either over-the-limit fees with debit card use or bounced deposit fees if other checks deposited into the account are returned for insufficient funds.

To provide ETA services, the financial agent must provide assurances that an enhanced package of consumer protections beyond those specified by Regulation E will be guaranteed.

-- Reasonable access to information about the balance left in the account. Providing monthly statements--as otherwise required to consumers under the EFTA--is a relatively expensive service which might reasonably be waived for ETA recipients (Although if the ETAs are established pursuant to the new authority granted Treasury by virtue of P.L. 104-134, Congress' explicit requirement for "the same consumer protections with respect to the account as other account holders at the same financial institution" mandates that the monthly statements be provided.[(62)]) However, without monthly statements there is a necessity that recipients be entitled to find out, on a reasonable basis, *without cost* the remaining balance in their accounts, as well as the reason, the timing, and the amount of any fees imposed. While 12 C.F.R. § 205.15 requires account balance information and written history upon request when the requirement for the monthly statement is waived, a charge is not prohibited.

Also, every ATM transaction should include a receipt which indicates the imposition of fees, to the extent applicable, and the remaining balance in the account. POS transactions should also provide for receipts with comparable information, except that in the case of POS we support a recipient option to suppress the balance information from appearing on the receipt whenever there are safety or privacy concerns. To the extent that further information is necessary, or recipients wish to find out any of this information at other times, they should be able to call a toll free number, provide appropriate identifying information and obtain their account information at no cost. This would include an unlimited number of free balance verification inquiries to the financial institution's automated phone line. Whether or not this

telephone service is available, recipients should be able to obtain a transaction history upon request at minimal or no cost.

At a minimum, all receipts from ATM transactions should include information about the remaining balance and fees; at least two monthly ATM balance inquiries should be allowed for free, and others should be charged no more than the actual cost to the bank for providing the information; and a transaction history should be available free upon request or whenever there is a dispute

-- The ATM card or device must be accepted by a reasonable number of merchants in the neighborhood and surrounding area. There are currently a number of ATM networks--Cirrus, Honor, etc.--most of which are reasonably accessible at merchants in the geographical area in which the banks offering them are located. However, some networks are more popular in some areas than others, and are thus less accessible in the "foreign" areas. It is important that there be both access to cash benefits through ATMs without fees, and reasonable POS access. This means that there must be a sufficient number of stores which both accept the type of ATM network device provided in the geographic vicinity in which the federal payee lives and permit the use of the card for cash back and withdrawals as well as purchases.

The ATM card or device must be accepted by a reasonable number of merchants in the neighborhood and surrounding area who permit both free cash back with purchase transactions and free or reasonably priced cash withdrawal options.

-- ATMs and POS devices must be accessible to handicapped people. Many recipients of direct federal benefit payments are eligible for such payments on the basis of a physical or mental handicap. Their handicap may cause them to be unable to participate in an electronic banking environment unless the equipment is specially modified to accommodate any handicapping condition they have, such as braille PIN pads, wheelchair accessible ATMs, etc. For those handicapped recipients who neither want a waiver or a representative payee, provisions should be made to insure that they can participate.

Unless Treasury is prepared to monitor compliance, merely requiring system compliance with the Americans with Disabilities Act is not sufficient. Leaving it up to the aggrieved individual to somehow find a way to manage while independently pursuing an ADA claim is an unreasonable expectation for government benefit recipients who are both poor and disabled.

To provide ETA services, the financial agent must demonstrate an ability to meet the special needs of handicapped recipients of government payments.

-- Recipients with limited reading skills or no English literacy at all also have special needs. ATM and POS on-screen messages must meet the needs of

those with limited English proficiency or who are non-English speaking as must the written materials provided to recipients.

To provide ETA services, the financial agent must demonstrate an ability to meet the special needs of those who are non-English speaking or have limited English proficiency.

-- Training for new electronic transfer recipients. 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 provide in-person training upon recipient request.

-- Opportunity for recipients of federal ETA to choose their own PINs (personal identification numbers) and to obtain their debit card by means other than regular mail delivery as necessary. Mandatory electronic delivery systems should use PIN self-selection as the norm to reduce the likelihood of the individual's needing to write the number down in order to remember it. Where PIN assignment is used individuals must be allowed to 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.

Federally established ETAs must provide for a simple and quick means for recipients with an assigned PIN to change to a number of their own choosing and for alternatives to the mail issuance of the debit device when requested by the recipient.

-- Reasonable procedures for PIN replacement and card replacement. It is critical that any electronic system for delivering federal payments 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.

IV. Protections Against Attachment and Set-off Must Apply to All Accounts Established to Comply with EFT 99.

Protections from Attachment by Third Parties Must Be Clarified. Most federal benefit programs afford recipients certain basic due process protections before their federal benefits can be attached by a third party. The statutes creating benefit programs, e.g. Veteran's benefits,[(63)] and Social Security benefits,[(64)] exempt those benefits from attachment by creditors when those benefits are deposited into a bank account as long as the funds are available on demand or for the support of the beneficiary and not converted into a permanent investment.[(65)] The provision on Social Security is typical of these protections:

(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.[(66)]

There are similar provisions in the governing statutes for SSI benefits[(67)] and Veteran's benefits.[(68)] Also, there are provisions in each of these statutes regarding the government's collection of overpayments, in cases in which too much money has mistakenly been paid to the federal recipient.[(69)]

The law is clear regarding attachment and protection from the execution from claims of judgment creditors -- the underlying statutes prohibit it[(70)]. However, while the law is clear, the *practice* is less so. As evidenced by the volume of cases in the appellate courts, third party creditors attempt to attach *exempt* funds in a bank account quite often.[(71)] While the federal recipient always wins, because the law is crystal clear on this point, the recipient had the burden of finding an attorney, prevailing in the case, and doing without the federal payment during the duration of the litigation. However, low income recipients of federal benefits -- such as those on needs based assistance programs -- generally lack the resources to pursue court challenges and in any event cannot afford to do without the benefits needed simply to survive while awaiting a court decision.

At the same time, creditors are becoming more brazen about seeking the funds they believe they are entitled to, especially against consumers who

they know have fewer resources to defend themselves.[72] *Fear of having their meager resources attached by creditors is an important reason why some federal recipients do not use banks.* Fear of attachment is also a significant reason why many recipients are still resisting direct deposit.[73]

The solution is simple: Treasury should clarify that the financial institutions which provide accounts established for the express purpose of complying with the mandates of EFT 99, to receive Social Security, SSI, VA or similar federal funds are prohibited from allowing any execution, attachment, garnishment, levy or other legal process against any funds in those accounts. This rule should apply to the voluntary accounts as well as to the ETA accounts. Two dividends will immediately be achieved by such a rule: the federal payments which Congress intended to be safe from creditors will in fact be much more protected, and because recipients will be reassured of the safety of their federal payments, more recipients will sign up for accounts voluntarily with banks.

Protection from Set-off. Garnishment, attachment and execution are all remedies enforced to address the claims of third parties against the debtor, and while the practice may be cloudy, the law is clear. The states are split on the issue of whether a bank that is a creditor of the consumer may use the self-help remedy of *setoff* to seize funds in the consumer's bank account which are exempt from legal process.

The bankers' right of a setoff can be a devastating remedy when employed against funds needed for a household's essential living expenses. The amount of an entire social security or other check may be taken from the debtor's bank account without any warning, leaving the debtor without resources to meet the necessities of life. While the majority rule is that otherwise exempt income (e.g., social security, welfare, disability, retirement funds)[74] is also exempt from setoff,[75] a significant minority of courts, through a variety of rationales, allow a setoff against these same types of funds.[76] Some recent minority rule cases fail even to acknowledge older cases in the same jurisdiction[77] which follow the majority rule.

The extent to which it is legal for a bank -- or another creditor -- to set-off Social Security payments, or other exempt funds is critical to the evolution of the regulations implementing EFT 99. As we have been maintaining for months, one of our greatest fears resulting from Treasury's failure to regulate the voluntary accounts, will be the coerced purchase of other financial services from the non-financial institutions. If a federal recipient must return month after month to a check casher or a finance company to obtain the federal payment, it is highly likely that eventually the recipient will fall prey to obtaining a high cost loan from that provider. If the right of set-off is permitted in that jurisdiction, what is to prevent the non-financial institution from claiming a portion or all of otherwise exempt funds if the recipient falls behind in making the payments on the high cost loan?

The most practical course for consumers to take to protect against the bankers' right of setoff, at least in the minority states and those without recent precedent, is not to maintain an account at a bank or other depository institution to which they owe a debt or where they have cosigned for another debtor. However, because EFT 99 will force these relationships into existence before the debts are created, and because of the difficulty entailed in *switching* EFT providers, this option will effectively not be available *after* the recipient enters into the credit arrangement with the EFT provider.[(78)]

Again, the solution is easy. Treasury should absolutely prohibit any financial institution or non-financial institution which is a conduit for the electronic payment of federal money from setting off any debt against the federal money.

Provisional credits under the Electronic Funds Transfer Act. Another issue is how provisional credits made to recipients under the requirements of the Electronic Funds Transfer Act[(79)] after there has been an unauthorized transfer, will be recouped from the recipient when the bank has determined that the transfer was not unauthorized. These problems are most likely to arise when there is a dispute regarding the appropriate application of the Electronic Funds Transfer Act.

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 EFTA, this would not be considered an unauthorized transfer.[(80)]

In the recent Direct Payment system pilot project in Texas, it appears that in this scenario the financial institution is simply going back and withdrawing the money directly out of the account. No notice or hearing is offered, even though the provisional credits are exactly analogous to an overpayment. Yet under the Social Security statute, notice, hearing and an extended time period for repayment are required. This is wrong and probably illegal.

The correct policy should be that set-offs are never permitted for special accounts established to receive federal benefit payments. 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.

V. Treasury's Proposed Waiver for Itself from These Regulations Is Overly

Broad.

Without offering any explanation as to the need for or intent of this provision, the Proposed Regulations includes 208.10, which would enable the Secretary, at his or her sole discretion, to waive any provision of these rules whenever the Secretary deems it necessary or appropriate. No formal rulemaking process or any other formal review process would be required. The inclusion of such a provision renders the protections otherwise afforded under these regulations meaningless, since they could be withdrawn at any time and for any reason simply at the Secretary's discretion. Such broad authority presents an unwarranted threat to the normal checks and balances inherent in a democracy. Recipient advocates have vehemently opposed even less far reaching waiver provisions whenever they have been considered in the public benefits context and for very good reason: when dealing with the most vulnerable of our citizens, many of whom are totally dependent on the receipt of these benefits to meet their basic needs, every assurance must be provided that there is full opportunity for their input in the rulemaking process before any final decisions are made.

One Treasury official suggested at the Baltimore hearing on October 30, 1997, the intent of this provision was to permit the Department to make limited, technical changes to these regulations to address unanticipated glitches or "exceptional circumstances" that might come to light after these regulations are finalized. He said speedy action might be needed to prevent harm to certain classes of individuals without imposing any new burdens on other populations. If that description of the need is the sole reason for this broad waiver provision, then the provision should be more narrowly drafted to address this more limited need. Further, the provision should specify how such technical amendments or clarifications would be promulgated and what opportunities would be afforded to solicit and respond to public comments either before or after the fact on such modifications, which may themselves have unintended consequences that need to be considered by Treasury.[(81)]

While the current administration's intent in providing this waiver authority to the Secretary may in fact be benign in nature, the broadness of the provision as drafted opens the door to abuse at some future point when the best interests of the affected recipient populations may not be of paramount importance. This is especially true since neither the proposed provision itself nor the Preamble to the Proposed Regulations establishes any standards governing the exercise of this authority or otherwise speaks to its limited intent. At a minimum, the regulation should include a stated prohibition on any waiver of any portion of the regulations that would prejudice any recipient's rights otherwise guaranteed under the statute or implementing regulations.

Whether or not the current Administrative Procedures Act or that which may govern at some future time provides sufficient protections to insure that the Secretary does not abuse this authority is really besides the point. The

concerns we have raised about the proposed language of Section 208.10 need to be addressed here and now in these regulations to prevent any possible harms to recipients of government benefits before they occur. Recipients should not be forced to take a chance that harms may occur because the rules gave the Secretary unintended authority that might subsequently be undone if they are lucky enough to find an attorney who can eventually prevail with an APA claim in court.

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1. The National Consumer Law Center is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and privates attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have.[(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. CFA's address is 1424 16th Street, NW, Suite 604, Washington, DC 20036.

4. Arizona Consumers Council is a statewide grassroots consumer advocacy organization located in Phoenix, Arizona.

5. Consumer Action is a California based information and advocacy organization.

6. Mercer County Community Action Agency is a local level community and consumer agency in Sharon, Pennsylvania.

7. The National Association of Consumer Agency Administrators (NACAA) is a national association of consumer agency administrators.

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

9. The Organization for a New Equality (O.N.E.) is a multi-racial organization whose top priority is expanding economic opportunity to people who have historically been excluded from the economic mainstream.

10. Niagara Frontier Consumer Association is a consumer organization located in Williamsville, New York.

11. Public Voice for Food and Health Policy is national consumer organization that promotes improved access to food and health for all consumers.20005.

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

13. 31 U.S.C ◆ 3332(g).

14. 31 U.S.C. ◆ 3332(i).

15. 31 U.S.C ◆ 3332(g).

16. Proposed 31 C.F.R. 208.6.

17. *Id.*

18. *See* Comments in Response to Treasury Request for Comments on Interim Rule, 61 Fed. Reg. 39253 (July 26, 1996), November 25, 1996; Supplemental Comments, April 30, 1997; Testimony before the Senate Committee on Banking, Housing and Urban Affairs regarding the Impact of P.L. 104-134 ("EFT 99"), May 22, 1997; Testimony before the Committee on Government Reform and Oversight Subcommittee on Government Management, Information and Technology regarding the Impact of P.L. 104-134 ("EFT 99") June 18, 1997; Testimony before the House Committee on Banking and Financial Services regarding the impact of Treasury's Proposed Regulation under the "EFT 99," September 25, 1997. In addition, there were numerous formal and informal meetings and discussions with Treasury officials, including October, 1996; March 19, 1997; April 8, 1997; May 19, 1997; July 11, 1997; July 24, 1997; and July 25, 1997.

19. *See* the extensive documentation provided in Appendix D of the abuses -- particularly the high costs and the lack of consumer protections -- that characterizes financial services provided to low income consumers where there is no regulation.

20. 142 *Cong. Rec.* H4090.

21. *See* 62 *Fed. Reg.* 48722-3: "The proposed rule is silent on the role that non-financial institutions may play in the delivery of Federal payments to recipients with bank accounts and the relationship between non-financial institutions and such recipients. 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."

22. See Memorandum of Law from Crowell & Moring to the National Consumer Law Center regarding Treasury's Statutory Mandate to Regulate the Voluntary Accounts, December 15, 1997 -- Appendix B.

23. *See* Reed v. Reed, 404 U.S. 71, 76-77 (1971) (holding that administrative convenience alone did not justify a preferential system of administering statutory benefits); Frontiero v. Richardson, 411 U.S. 676, 688-91 (1973) (same); Califano v. Goldfarb, 430 U.S. 199, 205-07 (1977) (same).

24. 62 *Fed. Reg. 48723.*

25. *Id.*

26. 142 *Cong. Rec.* H4090.

27. *See* 62 *Fed. Reg.* 48722-3: "The proposed rule is silent on the role that non-financial institutions may play in the delivery of Federal payments to recipients with bank accounts and the relationship between non-financial institutions and such recipients. 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."

28. "Section 3332(i) also could be read more narrowly as referring to those individuals who, as of January 2, 1999, have not voluntarily selected or opened an account a financial institution . . . . Treasury believes the latter interpretation is the better one . . . ."*Id.*

29. Hence the reference in the Congressional Record to "the planned implementation of a national electronic benefits transfer system for federal payments . . .under Treasury's *existing authority."* (Emphasis added). 142 *Cong. Rec.* H4090.

30. For additional information about the current practices of check cashers and pay day lenders, *see* Jean Ann Fox, *The High Cost of "Banking" at the Corner Check Casher: Check Cashing Outlet Fees and Pay Day Loans,* Consumer Federation of America August (1997).

31. Examples of caps on check cashing fees in the few states that have limits are:

California: 3 to 3.5% for government and payroll checks, depending upon identification.

Connecticut: 1% for state welfare checks, 2% for others.

Delaware: 2% or $4, whichever is larger, for all checks.

Florida: 5% with ID or 6% without, or $5 whichever is greater for personal checks and money orders; 3% with ID, 4% without or $5 for state benefits or Social Security checks, whichever is greater.

Georgia: The larger of $5 or 3% for welfare checks, 5% for payroll checks, and 10% for personal checks.

Illinois: 1.4% to 1.85% plus an additional 90-cent-per-check charge.

Indiana: $5.00 or 10% of the face amount of the check, whichever is greater.

Minnesota: 2.5% of welfare checks over $500 (5% for the first check), 3% on other government and payroll checks (6% for the first check); no limit on personal checks (but rates must be filed and "reasonable").

New Jersey: 1% on New Jersey checks, 1.5% on others, or $.50, whichever is larger.

New York: 1.1% of the face amount or $.60, whichever is larger.

North Carolina: 3% or $5 whichever is greater for government checks; 10% or $5 whichever is greater for personal checks; 10% or $5 whichever is greater for all other checks.

Ohio: 3% on government checks.

Rhode Island: The larger of $5 or 3% for welfare checks, 5% for payroll checks.

Tennessee: 3% or $2 whichever is greater for state public assistance or federal social security checks, 10% or $5 whichever is greater of personal checks or money orders.

While some of these fee ceilings may themselves seem high, in the rest of the 36 states, there are no limits whatsoever on these fringe bankers.

32. According to a recent study of fringe banking in Milwaukee: "Customers pay far more for services provided by a check cashing business than they pay for the same services at a conventional bank. Fees for cashing payroll checks nationwide generally range between one percent and three percent of the face value of the check For personal checks the range was generally between 1.7 percent and 20 percent, averaging around 8 percent. In some instances, however, fees and interest rates have been reported as high as 2000 percent. A study by the New York Office of the Public Advocate found that a check cashing customer with an annual income of $17,000 will pay almost $250 a year at a check cashing business for services that would cost $60 at a bank. The Federal Reserve Bank of Kansas City reported that a family with a $24,000 annual income using a check cashing business will spend almost $400 in fees for services that would cost under $110 at a bank." (Citations omitted). Squires and O'Connor, *Fringe Banking in Milwaukee: The Rise of Check Cashing Businesses and the Emergence of Two-Tiered Banking System.* (1997) at 5,6.

33. Payday loans are generally provided by check cashers who agree to cash a post-dated personal check with the understanding that it will not be deposited until the customer's next payday. "Customers can receive $50 for a check written in the amount of $60 and dated 14 days after the cash is provided. ... The effective annual interest rate for this loan is 1,092 percent." *Ibid,* at 11, 12.

34. The legal standard applicable to judge these transactions thus becomes one of "unconscionability." Unconscionability generally refers to a transaction "which is so one sided that only one under delusion would make it and only one unfair and dishonest would accept it." *See* Cobb v. Monarch Finance Company, 913 F.Supp 1164, 1179 (N.D.Ill. 1995).

35. There is a $12 annual fee, a $2.95 monthly fee, and 2% of $500 is $10.00.

36. Proposed 31 C.F.R. 208.4.

37. 62 *Fed. Reg.* 179 at 48718, September 16, 1997.

38. 142 *Cong. Rec.* H 4091.

39. 62 *Fed. Reg.* 179 at 48718, September 16, 1997.

40. This is required by the language in 31 U.S.C. § 3332(i):

Regulations under this subsection shall ensure that individuals required under subsection (g) to have an account at a financial institution . . .

(A) will have access to such an account at a reasonable cost; and

(B) are given the same consumer protections with respect to the account as other account holders at the same financial institution. (emphasis added.)

41. Reg E is found at 12 C.F.R. 205, implementing the Electronic Fund Transfers Act, 15 U.S.C. 1693 *et seq.*

42. 62 *Fed. Reg.* 179 at 48719, September 16, 1997.

43. *Id.*

44. *Id.*

45. 62 *Fed. Reg.* 179 at 48718, September 16, 1997.

46. We have heard this about recipients in Massachusetts, Maryland, and California, to name just a few.

47. 31 U.S.C. § 3332(f)(2)(A).

48. We have heard this from advocates in several states.

49. *See* Appendix C, ad from a Minneapolis check casher advertising electronic deposit with the delivery of a paper check. Total cost each month for a $500 Social Security check - $13.95.

50. We have heard this problem from an advocate in Illinois. The client was told that in order the client's disabled child to receive SSI payments, the mother must establish a bank account. Because of the mother's credit problems, no bank would provide her an account.

51. 142 *Cong. Rec.* H 4091.

52. Proposed 31 C.F.R. 208.5.

53. Advocates from several states report that recipients are being misled in this way.

54. *Id.*

55. *Id.*

56. 12 C.F.R. § 205.15(a)(2).

57. 52% of the unbanked recipients in the mail survey said that they would be not at all or not too likely to elect a debit card based account. In the telephone survey the opposition was even stronger with two-thirds of the

unbanked indicating that they were not at all or not too likely to want such an account.

58. The *Mandatory EFT Demographic Study* found that for respondents to the mail survey two-thirds of the unbanked recipients use banks, credit unions or grocery stores to cash their federal checks, 12% get friends or relatives to cash the checks for them, and only 12% pay check cashing outlets to cash their checks; corresponding figures from the telephone survey found 81% of respondents using primarily banks and grocery stores and 8% using check cashing outlets (the telephone survey did not include a comparable question about the use of friends and relatives for check cashing purposes). Thus, the survey results fully support the fact that most unbanked recipients of federal benefits are able to find a way to have their federal checks cashed for free.

59. Findings from the *Mandatory EFT Demographic Study* were that 67% of respondents to the mail survey and 47% of respondents to the telephone survey felt that they did not have enough money to make having a bank account worthwhile while 24% and 40% respectively cited high fees and costs as their primary reason for not having an account.

60. For example, Union Bank of California offers a "Cash & Save" account that provides six free money orders to customers who maintain a "Nest Egg Club Savings Account" opened with only a $10 deposit.

61. Of mail survey respondents 70% of all respondents and 62% of unbanked respondents stated a preference for accessing their benefits at the Post Office.

62. 31 U.S.C. § 3332(i)(2)(B), 1996. *Also see* discussion in section IIIB regarding the policy arguments requiring full Reg E protections to apply to the ETAs.

63. *See* Porter v. Aetna Casualty & Surety Co., 370 U.S. 159 (1962).

64. *See* Philpott v. Essex Cty. Welfare Board, 409 U.S. 413 (1973). *See also* S&S Diversified Services L.L.C. v. Taylor, 897 F. Supp. 549 (D. Wyo. 1995) (Social Security benefits remained exempt, even after being commingled with other funds, so long as "readily traceable." Court warned of possible sanctions against creditors who attempt to garnish social security benefits).

65. Porter v. Aetna Casualty & Surety Co., 370 U.S. 159 (1962). *See also* Jones v. Goodson, 772 S.W.2d 609 (Ark. 1989) (certificates of deposit purchased with Veterans' benefits remained exempt; funds were "immediately accessible" even though depositor would forfeit some interest in case of early withdrawal); Younger v. Mitchell, 777 P.2d 789 (Kan. 1989) (veterans' benefits deposited into an interest bearing savings account exempt); United Home Foods Dist., Inc. v. Villegas, 724 P.2d 265 (Okla. App.

1986) (veterans benefits direct deposited into a bank account and used to pay household expenses "clearly" exempt).

66. 42 U.S.C. § 407(a).

67. 42 U.S.C. § 1383.

68. 38 U.S.C. § 5301. *See* Porter v. Aetna Casualty & Surety Co., 370 U.S. 159 (1962).

69. 42 U.S.C. § 1383 applies to overpayments of SSI benefits, and is an example of these provisions.

70. *See* Philpott v. Essex Cty. Welfare Board, 409 U.S. 413 (1973). *See also* S&S Diversified Services L.L.C. v. Taylor, 897 F. Supp. 549 (D. Wyo. 1995) (Social Security benefits remained exempt, even after being commingled with other funds, so long as "readily traceable." Court warned of possible sanctions against creditors who attempt to garnish social security benefits).

71. *See eg.* S&S Diversified Services L.L.C. v. Taylor, 897 F. Supp. 549 (D. Wyo. 1995) (Social Security old age benefits remained exempt when commingled with other funds in joint account, so long as they are "reasonably traceable." Court warned creditors it may impose sanctions for attempt to garnish exempt funds); NCNB Financial Services v. Shumate, 829 F. Supp. 178 (W.D. Va. 1993) (first in first out accounting rule applied to exempt old age Social Security benefits); Hatfield v. Christopher, 841 S.W.2d 761 (Mo. App. 1992) (where recipient cashed his Social Security check, spent part of it and deposited balance in account commingled with other funds, benefits remained exempt); Collins, Webster & Rouse v. Coleman, 776 S.W.2d 930 (Mo. App. 1989) (Social Security benefits exempt); Dean v. Fred's Towing, 801 P.2d 579 (Mont. 1990) (Social Security benefits of non-debtor wife remained exempt when commingled in joint account with debtor husband; first in first out accounting rule).

72. *Id.*

73. We have heard from numerous low income clients who do not want to participate in EFT 99 because of these fears.

74. An extensive listing of state and federal exempt property statutes is found in National Consumer Law Center, *Fair Debt Collection Practices Act* (3rd ed. 1996) Ch. 16, and National Consumer Law Center, *Consumer Bankruptcy Law and Practice* Ch. 10 (5th ed. 1996); Exemptions, 7 Collier on Bankruptcy (1988). *See also* W. Vukowich, *Debtor's Exempt Property Rights,* 62 Georgetown L. Rev. 779 (1974).

75. Atlantic Life Insurance Co. v. Ring, 187 S.E. 449 (Va. 1936) ("The exemption of such payments from setoff finds strong support in the textbooks and in decided cases."); Anno., *Availability of Debtor's Exemption to Defeat Counterclaim or Setoff,* 106 A.L.R. 1070 (1937). *See* Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 113 Cal Rptr. 449, 521 P.2d 441 (1974); Finance Acceptance Co. v. Breaux, 160 Colo. 510, 419 P.2d 955 (1966); Bettcher v. Bristol Savings Bank, Clearinghouse No. 30,961 (Conn. Super. Ct. 1981); Carlough v. City Federal Sav. & Loan Ass'n, Clearinghouse No. 44,838 (N.J. Super. Ct. 1984). *See also* exemption prevails over bankruptcy right of setoff: *In re* Klein, 10 B.R. 356 (Bankr. 9th Cir. 1981); *In re* Hoffman, 12 B.R. 371 (Bankr. M.D. Tenn. 1981).

76. Frazier v. Marine Midland Bank, 702 F. Supp. 1000 (W.D.N.Y. 1988); *In re* Gillespie, 41 B.R. 810 (Bankr. D. Colo. 1984); Dougherty v. Central Trust, *Consumer Cred. Guide* (CCH) 96,014 (Ohio Sup. Ct. 1986) (per curiam); Bernardini v. Central Nat'l Bank, 290 S.E.2d 863 (Va. 1982).

77. *Compare* In re Gillespie, 41 B.R. 810 (Bankr. D. Colo. 1984); Bernardini v. Central Nat'l Bank, 290 S.E.2d 863 (Va. 1982) *with* Finance Acceptance Co. v. Breaux, 160 Colo. 510, 419 P.2d 955 (1966); Atlantic Life Insurance Co. v. Ring, 187 S.E. 449 (Va. 1936).

78. The courts in *In re* Gillespie, 41 B.R. 810 (Bankr. D. Colo. 1984) and Bernardini v. Central Nat'l Bank, 290 S.E.2d 863 (Va. 1982) recommended that consumers simply switch banking providers because the law provided no other protection against set-off of exempt funds. However, this option will not be available for EFT recipients.

79. 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).

80. The definition of "unauthorized electronic fund transfer" does not include "any electronic fund transfer (A) initiated by a person other than the consumer who was furnished with the card, code, or other means of access to such consumer's account, unless the consumer has notified the financial institution involved that transfers by such other person are not longer authorized,..." EFTA § 903(11).

81. After all Treasury does not have much history dealing with the special needs of the many of the diverse groups which will be particularly impacted by EFT 99.