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BY ELECTRONIC & OVERNIGHT DELIVERY

October 17, 2003

Stephen M. Vajs, Director
Risk Management Division
Financial Management Services
U.S. Department of the Treasury
Room 433
401 14th Street, SW
Washington DC 20227

Re: 31 CFR Part 210/ Federal Government Participation in the Automated Clearing House

Dear Messrs. and Mmes:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the proposed amendments to 31 CFR Part 210 ("the Proposal"). Bank of America is one of the world's leading financial services companies, and is the sole shareholder of Bank of America, N.A., one of the largest banks in the United States. Through the nation's largest financial services network, Bank of America provides financial products and services to 30 million households and two million businesses, and also provides international corporate financial services for clients around the world.



Bank of America issues nearly two million cashier's checks per month. A number of these are for large dollar amounts, and close to half represent payroll checks issued on behalf of our corporate clients. The bank also issues several million credit card checks each month, as well as a substantial volume of traveler's checks and money orders.

Bank of America supports the commitment of the United States Treasury to an all-electronic environment and commends the leadership the Treasury has shown in moving toward this goal. With one major exception, we believe we can comply with the changes set forth in the Proposal without incurring significant administrative costs. We are, however, very concerned about the FMS's proposed conversion of "Additional Instruments" and, as we discuss below, believe that FMS should exclude conversion of these instruments from the amendment to 31 CFR Part 210.

Risk to the Payments System

Bank of America is the check writer, or issuer, of a number of the instruments mentioned by the Treasury under the broad category of "Additional Instruments". These items include Cashier's Checks, Money Orders, credit card checks and Traveler's Checks. The Treasury contemplates converting these checks based on the authorization of the check presenter. The check presenter is not an authorized signer on the Receiver's account. Only select officers of Bank of America are signers on these accounts. These officers could not and would not agree to conversion of these items to the ACH because of the bank's responsibility to inspect signatures, review endorsements, verify payee name and monitor the images of these checks for proper fonts, water marks and other fraud prevention devices embedded in the paper stock of these carefully issued items. We believe that the Treasury's proposal, which contemplates destruction of these checks without embracing the standard of high quality image retrieval and presentation worked out as part of the pending Check 21 legislation, will expose payments system participants (including the Treasury) to increased fraud losses. Those losses could grow once organized perpetrators of check fraud, be these groups domestic or international, learn of the flaw in the system.

Fairness and Consistency

The reliance on the check presenter's concurrence rather than the Receiver's authorization conflicts with the Treasury's statement contained in the proposal that "the check writer's interests would be adequately protected by applying the accounts receivable rule because the check writer will receive prior written notice in the form of Appendix C to part 210 and because the check will be destroyed." As stated above, Bank of America cannot agree to conversion to the ACH of these instruments. Bank of America believes it would be unfair for Treasury to implement a regulation that would accept the check presenter's authorization in lieu of our own.

We would also like to note that the U.S. Treasury has adapted a number of high tech methods to determine authenticity of documents including the checks it has issued. This investment is described in the lead article in the April/May 2003 issue of FMS's quarterly publication, *Financial Connection* (Vol. 12, No. 2). That same issue includes a FMS Q&A on the conversion of business checks. We believe it is inappropriate for the

Treasury to invest in the very technology the private sector has developed to make check issuance safer while at the same time undermining by regulation the value of the investment made by these payments systems participants.

These inconsistencies also get to the broader issue that the Treasury has essentially reversed the direction it had been taking to align its practices with NACHA Rules. There are many issues related to corporate check conversion to the ACH, many industry groups have been working to resolve these problems. The creation of inconsistent standards, one for the Federal Government, one for all other payment system participants, has already created confusion in the payments system. The extension to other payment instruments will add to that confusion. This is especially true for remitters who purchased cashier's checks, money orders, travelers checks and the like thinking that they had an understanding of the procedures they would use regarding proof of payment and timeframes for error resolution.

Executive Order 12866

Despite claims to the contrary, the FMS's proposal to convert "additional instruments" does represent a "significant regulatory action" under the definition of Executive Order 12866 because it would have a major impact on the fraud losses incurred on these instruments, undermine the public's confidence in a set of payment methods that are among the nation's more secure and protected payment instruments and expose the nation's automated clearing house system to "reputational risk".

In addition, the proposal meets the test of significant regulatory action as defined by the Order because of the impact on banking industry's service costs, which will almost certainly exceed the \$100 million threshold set forth in the Order. Every financial institution issuing these instruments will incur substantial costs. As an indication, Bank of America's system development costs to post and reconcile these converted items would exceed \$ 5 million dollars. We believe that our costs are representative of what other banks will need to spend, meaning that the cost to the industry would far exceed the \$100 million threshold set for in Executive Order 12866.

Given how substantive the cost of compliance would be, and given the increased vulnerability to fraud losses on these instruments, we ask that the Treasury reconsider this aspect of the proposed rule. We believe excluding these instruments would have minimal impact on the Treasury's program, since the Treasury has already stated in the proposal that it is not operationally feasible for the agencies to convert these items at this time.

Operational Issues and Liability

There are a number of operational issues that are not addressed in the Treasury's proposal and it would be beneficial to all participants if these were clarified:

- a.) **Return Timeframe.** Absent any comment to the contrary, it would appear that the timeframe for an RDFI to return a converted check entry is the same as for other CCD entries. That is, the return must be delivered to the Operator by so as to be available to the Treasury by the opening of business two days after

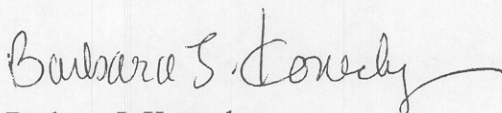
settlement. There needs to be provision for an extended return timeframe particularly when the item is unauthorized owing to forged endorsement, altered payee name or amount, and the like. We believe that at a minimum, a unique SEC code should be used to identify conversion of these bank-issued items and that the return timeframe for this SEC code should be at least the 60-day timeframe in place for ARC payments.

- b.) **Liability and Standard of Ordinary Care.** We question whether banks can be held wholly liable for check fraud on items that have been converted to the ACH and the check destroyed. Cashiers checks can be issued for very large dollar amounts and the "Official Bank Checks" used for payroll, while smaller in dollar size, are frequent targets of fraud. FMS needs to clarify where it will assume liability for fraudulent items.
- c.) **Location and Formatting of the Check Serial Number Field.** There is no discussion in the proposal as to the location or formatting of the check serial field in a CCD entry. The check serial number is critical for reconciliation of these items. Proper formatting of the check serial number is vital to banks since many of these items are issued for the same amount and many remain outstanding for extended periods of time. Moreover, various state laws on escheatment, which require banks to remit to their respective states the funds associated with items that remain outstanding for lengthy timeframes, adds to the liability banks could incur for improper identification of paid items. FMS needs to carefully define where this numeric field will be located, presumably in positions 40-54 of the entry detail record.

We fully support the Treasury's objectives for an all electronic environment, but believe the conversion of these items should be done under the legal framework surrounding the implementation of the Check 21 legislation now pending approval. Alternatively, FMS could wait for development of an infrastructure to convert these items within the framework of NACHA Rules. As it stands today, the Treasury's proposal circumvents the safeguards that have carefully been built into the new law and seizes on solutions that put all players at risk.

We would be happy to discuss our views in greater detail, or to discuss any new ideas that FMS would like to pursue. In that regard, please contact me at (415) 622-0311.

Sincerely,



Barbara J. Konecky
Senior Vice President
Global Product Management