

attempt to collect such claims, referred to in this Part as “reclamation debts,” using the reclamation procedures codified in §§ 240.7 and 240.8 of NPRM II. Under those procedures, Treasury will attempt to collect by means of a demand letter, referred to as a “REQUEST FOR REFUND (CHECK RECLAMATION).” If the presenting bank or other indorser from whom Treasury seeks payment, referred to in this Part as the “reclamation debtor,” fails to refund the amount of the check in response to the demand letters, Treasury will attempt to collect by means of offset in accordance with § 240.9 of NPRM II. By employing offset, Treasury will seek to collect the debt owed by reducing, or “offsetting,” by the amount of the debt, any payment due to the reclamation debtor by another Federal agency. If Treasury still is unable to collect the full amount of the debt, Treasury will collect the amount through the Treasury Check Offset (TCO) procedures codified at § 240.10 of NPRM II. TCO is a collection mechanism, specifically authorized under 31 U.S.C. 3712(e), which allows FMS to collect reclamation debts by directing a Federal Reserve Bank to withhold credit from a debtor bank presenting Treasury checks for ultimate charge to the account of the United States Treasury. By presenting Treasury checks for payment, presenting banks are deemed to authorize this offset.

Previous NPRMs. NPRM I, published May 30, 1997 (62 FR 29314), which was a re-issuance of a notice originally published on September 21, 1995 (60 FR 48940), addressed four issues: (1) Setting the time for FMS to conduct its first examination of Treasury checks at 150 days; (2) superseding Federal common law by apportioning the risk of loss on checks bearing a forged drawer's signature, including counterfeit checks, to presenting banks; (3) authorizing Federal Reserve Banks to intercept checks payable to deceased payees and return them unpaid to depository banks; and (4) making definitions in Part 240 consistent with other FMS regulations.

FMS did not require commenters to resubmit comments originally submitted in response to the notice published on September 21, 1995; all comments received in response to that notice were treated as responses to NPRM I. FMS received a total of 24 comments on NPRM I. Eight responses were received from individual banks, three from banking associations, two from clearinghouse associations, five from credit unions and credit union organizations, and one from a Federal Reserve Bank. Five of the respondents

provided comments in response to both notices.

On May 24, 2002, FMS issued an Interim Rule (67 FR 36517) (hereinafter “Interim Rule”) which revised 31 CFR Part 240 to incorporate procedures relating to TCO, a new debt collection tool established by the Debt Collection Improvement Act of 1996 (DCIA), Public Law 104–134, Title III, section 31001(d)(4). Under that authority, Treasury is authorized to collect certain debts, owed to the Treasury by financial institutions presenting Treasury checks to a Federal Reserve Bank, by directing Federal Reserve Banks to withhold credit from such presenting banks.

NPRM II addresses all of the issues discussed in NPRM I, as well as issues not previously raised. It also incorporates the substance of the Interim Rule. In particular, NPRM II codifies existing procedures whereby presenting banks can administratively protest a Treasury decision to decline final payment of a particular check. The proposal also clarifies that the reclamation protest procedures at § 240.8, must be exhausted before a civil suit may be filed against Treasury. Under § 10(c) of the Administrative Procedure Act, 5 U.S.C. 704, an agency action is not judicially reviewable until it becomes final. The Supreme Court, in interpreting this section, has held that an agency action is final, and therefore subject to judicial review, unless the agency rule expressly requires exhaustion of administrative remedies as a prerequisite to judicial review. *See, e.g., Darby v. Cisneros*, 509 U.S. 137 (1993). Treasury is adding language that makes it clear that reclamation decisions are not final until the protest procedures have been exhausted.

In addition, NPRM II expands the use of powers of attorney as a basis for negotiating Treasury checks by allowing them to be used in more instances, and by eliminating the requirement that a specific Treasury power of attorney form be used. Finally, NPRM II clarifies Treasury regulations relating to the charging of administrative costs, penalties and interest when payments of reclamations are not submitted timely.

Given the passage of time since the issuance of NPRM I and the comprehensive nature of the revisions included in NPRM II, comments provided in response to NPRM I, including those provided in response to the NPRM issued on September 21, 1995, will not be considered as comments submitted in response to NPRM II. Those wishing to comment on NPRM II must provide written comments by the date indicated.

Structure of Part 240

This revision alters the structure of Part 240 by: (1) Moving existing provisions relating to limitations on payments from §§ 240.3(a) and (b) to § 240.4, and §§ 240.3(c) through (e) to § 240.5; (2) moving existing provisions relating to guarantees of indorsement from § 240.5 to § 240.3; (3) deleting existing rules governing the release of original checks from § 240.10, and substituting new provisions governing TCO at § 240.10; (4) moving existing rules governing reclamations of amounts of paid checks from § 240.6 to § 240.7; (5) moving rules governing reclamation demand and protest from § 240.7 to § 240.8; (6) moving rules governing offset from § 240.8 to § 240.9; (7) adding new rules at § 240.6 governing declination protests; (8) moving existing rules governing the processing of checks from § 240.9 to § 240.11; (9) moving existing rules relating to the indorsement of checks by payees from §§ 240.11(a) through (e) to § 240.12, and specific rules regarding Social Security checks from § 240.11(f) to § 240.14; (10) redesignating rules currently promulgated at §§ 240.12 through 240.15 to §§ 240.13 through 240.16; (11) adding new rules relating to the lack of authority for financial institutions to shift liability at § 240.17; (12) adding new provisions relating to implementing instructions at § 240.18; and (13) deleting appendix A to part 240 (Standard Forms for Power of Attorney and Their Application).

Summary of Substantive Changes

1. *Time for first examination.* As stated in the current Part 240, Treasury has the usual right of a drawee to examine checks presented for payment and to refuse payment of any check. The current rule states that Treasury has a reasonable amount of time to make such examination.

As indicated in the preamble to NPRM I, Treasury has tried to develop a policy which allows itself the time necessary to perform the functions required to complete first examination, while meeting the desire of the financial community for a date certain after which all Treasury payments are final. In NPRM I, Treasury attempted to address the concerns of the financial community by defining the term “first examination” and providing a date certain after which all payments would be deemed paid. NPRM I set that date at 150 days from the date that a check is presented to a Federal Reserve Bank for payment.

Comments on this issue varied widely among the respondents. Six responses