

counterfeit checks. In Treasury's view, this is a logical distinction which places the ultimate risk of loss on the party with the best opportunity to discover a counterfeit. As noted by the Court in *Chase National Bank*, when an authentic Treasury check bearing a forged drawer's signature is paid, it is proper to allocate the loss to the drawee bank because it is incumbent on the drawee to know the drawer's signature, and there can be no recovery from an innocent holder not chargeable with fault. In the context of an authentic Treasury check bearing a forged drawer's signature, this proposed rule recognizes that, absent actual knowledge that the drawer's signature is forged, a depository bank generally has no basis for questioning the drawer's signature. That is not the case with counterfeit checks. Treasury checks include numerous security features which can be used to quickly detect most counterfeit checks. One example is the watermark. Every authentic Treasury check carries a watermark and includes, on the back, the statement, "WARNING—DO NOT CASH CHECK WITHOUT NOTING WATERMARK * * * HOLD TO LIGHT TO VERIFY WATERMARK."

Despite such security features, some counterfeit checks will go undetected during first examination and will be deemed paid under § 240.5(d) of NPRM II. Only in those situations where the depository bank fails to act with reasonable care when accepting a Treasury check will the risk of loss be shifted from the Government to the depository bank. An example would be a situation where the depository bank ignores the warning to verify the watermark. Treasury will reclaim on a counterfeit check if it determines that the counterfeit check does not have a watermark.

In recognition of the United States Court of Federal Claims decision in *ABN AMRO Bank, N.V. v. United States*, 34 Fed. Cl. 126 (1995), which held that Treasury had failed to act in a manner which made evident an intent to modify by regulation the holdings of *United States v. Chase National Bank* and *Price v. Neal*, NPRM II explicitly supercedes common law to the extent that such law applies to counterfeit checks. Treasury is cognizant of relevant United States Supreme Court precedent interpreting the common law in this area and, by this regulation, removes any ambiguity regarding Treasury having supplanted that common law. In so acting, Treasury relies on the Secretary's general rulemaking authority, 31 U.S.C. 321, as well as the specific statutory authority of the Secretary to prescribe regulations

governing the payment of drafts, found at 31 U.S.C. 3328(e).

3. *Deceased payee check intercepts.* As noted in NPRM I, where a payment has been issued and negotiated after a payee's death, Treasury historically has recovered funds associated with payment from financial institutions through the reclamation process. In response to concerns raised by financial institutions that reclamation actions generally occur only after final payment has been made and most, if not all, of the funds have been withdrawn from depositor accounts, Treasury, working with Federal Reserve Banks, developed procedures whereby checks can be intercepted when a payment has been issued and negotiated after a payee's death. Under these procedures, the intercept will take place in situations where an agency has advised Treasury via an unavailable check cancellation (UCC) that the payee is deceased and not entitled to the payment. Checks associated with such payments will be intercepted upon presentation to a Federal Reserve Processing Center. The check will be stamped "Not Negotiable Payee Deceased/Not Entitled Questions—Contact Authorizing Agency" and will be returned unpaid before financial institutions are required under Federal Reserve Regulation CC (12 CFR Part 229) to make funds permanently available to their depositors. The provisions in § 240.14(c) of the proposed rule codify procedures that already have been implemented and which should result in fewer payments to non-entitled payees. If the UCC is received after the check has been presented for payment, Treasury will recover the funds associated with the payment from financial institutions through the reclamation process.

4. *Declination protests.* The current Part 240 does not include provisions relating to protests of Treasury decisions to decline payment of a check. NPRM II includes such procedures at § 240.6 (Declination protest). Treasury's promulgation of declination protest procedures serves two purposes: (1) Providing public notice of the opportunity for a presenting bank to protest a declination; and (2) establishing an administrative adjudication process for declination protests. The new protest provisions for declinations formalize procedures which allow a presenting bank to protest a declination and, under certain circumstances, to receive back the original amount of the check issued by a United States disbursing officer.

In order to receive back such amounts, a presenting bank must be able to provide sufficient, credible evidence

that the factual basis for the declination was in error.

For example, if Treasury declined payment of a check upon determining during first examination that the amount of the check had been altered from \$400 to \$4,000, the presenting bank, to succeed in its protest, would have to provide sufficient, credible evidence that the check, in fact, was issued in the amount of \$4,000. Consistent with the recent decision by the United States Court of Appeals for the Federal Circuit in *Casa de Cambio Comdiv S.A. de C.V. v. U.S.*, 291 F.3d 1356 (Fed. Cir. 2002), § 240.6 of NPRM II also clarifies that protests may be filed only by the presenting bank, and not by other indorsers on the check that is the subject of the declination.

5. *Use of debt collection tools in the collection of reclamation debts.*

a. *Collection of reclamation debts.* Existing rules, codified at § 240.6, provide the framework for the collection process for amounts relating to checks that, after final payment by Treasury, are determined to have been negotiated over a forged or unauthorized indorsement or contain a material defect or alteration. Under the current rule, the reclamation process includes the following debt collection tools: (1) Issuance of a demand letter, referred to as a "REQUEST FOR REFUND (CHECK RECLAMATION)"; (2) collection of interest, late payment penalties and administrative collection costs; (3) follow-up on the initial demand with at least three monthly interest billing statements including outstanding balances and notices of subsequent collection actions; (4) referral to other Federal agencies for administrative offset; and (5) any other actions necessary to protect the interests of the United States should debt collection tools (1)–(4) fail. Since the issuance of the Interim Rule on May 24, 2002, the current rule has also included provisions relating to TCO, a debt collection tool authorized by the DCIA. The DCIA authorizes Treasury to collect amounts owed to the Treasury by presenting banks, *i.e.*, financial institutions presenting Treasury checks to the Federal Reserve for payment by the United States. Under TCO, Treasury will direct a Federal Reserve Bank to withhold credit from such presenting banks and, instead, use the funds to satisfy a presenting bank's debt to the Treasury. In accordance with the DCIA, Treasury will collect by means of TCO only if efforts to collect by means of Reclamation and Administrative Offset are unsuccessful. This proposal revises the current provisions in a number of ways.