

## Notes on the Crises Legal Memorandum No. 1

From: Ashley Burke

To: Nathan Tankus

Re: Federal Government Use of the Automated Clearing House System

Date: March 13, 2025

Link: <https://www.crisisnotes.com/content/files/2025/03/notc-legal-memo-no-1>

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### 1. *Overview of the Automated Clearing House System*

The Automated Clearing House (ACH) system is a [network](#) through which banks send each other batches of electronic credit and debit transfers. Federal government agencies also use the ACH system to make payments, intermediated through the Department of Treasury (“Treasury”) Bureau of Fiscal Service (“BFS”). *See* BFS Green Book at 1. The ACH system is made up of two operators, FedACH—which is run by the Federal Reserve Banks—and the Electronic Payment Network (“EPN”)—which is run by The Clearing House, a private entity.

Each ACH [transaction](#) involves an originator, a receiver, an Originating Depository Financial Institution (“ODFI”), and a Receiving Depository Financial Institution (“RDFI”). The originator initiates the transaction, and may transmit a credit or a debit to the account of the receiver. A credit pushes funds from the originator’s account to the receiver’s account, and a debit pulls funds from the receiver’s account into the originator’s account. When the originator initiates a transaction, the ODFI processes an ACH file and routes it to an ACH operator. The ACH operator then routes each entry in the ACH file to the designated RDFI. An ACH file might be composed of multiple batches, which contain one or more transactions or entries. Each batch belongs to the same originator, while a file can include batches from multiple originators. ACH operators allow ODFIs to send multiple transactions or entries originated by multiple customers all rolled into one file, and the operator then sends those transactions to the appropriate RDFIs.

Unlike FedWire, the other payment system run by the Federal Reserve, ACH payments [do not settle immediately](#). Rather, the Federal Reserve Banks settle ACH files according to a pre-arranged [settlement schedule](#). As further explained below, an ACH payment can be reversed even after settlement in some narrow circumstances.

### 2. *ACH and the United States government*

Five sets of rules and guidance apply to the federal government’s use of the ACH system: (1) 31 C.F.R. Part 210; (2) the Operating Rules & Guidelines written and maintained by the National Automated Clearinghouse Association (Nacha), a private association [funded and governed](#) by financial institutions and payment associations (“Nacha Rules”); (3) the Federal Reserve Board’s [Operating Circular No. 4](#); (4) the [Green Book](#), a comprehensive guide for financial institutions that receive ACH transactions from the federal government, issued each year by BFS; and (5) the [Treasury Financial Manual](#), the Treasury’s official publication of

policies, procedures, and instructions concerning financial management in the federal government.<sup>1</sup> Thirty-one C.F.R. Part 210 is a BFS rulemaking authorized under 5 U.S.C. § 5525, 12 U.S.C. § 391; 31 U.S.C. §§ 321, 3301, 3302, 3321, 3332, 3335, and 3720. The Nacha Rules, Operating Circular No. 4, and the Green Book all acknowledge that Part 210 ultimately controls the U.S. government’s use of the ACH system. *See* Nacha Rules Section 1.1.2; Appendix D, Federal Reserve Operating Circular No. 4; Green Book at II.

### 3. *Federal Regulations and the Nacha Rules*

Government agencies and all entities that originate or receive government payments agree to be bound by 31 C.F.R. Part 210—which incorporates the 2021 Nacha Rules by reference—in their use of the ACH system.<sup>2</sup> *See* 31 C.F.R. § 210.3(b)(1), (c). The Federal Reserve Banks act as fiscal agents for the federal government whenever an agency is party to an ACH transaction. *See* 12 U.S.C. § 391; 31 C.F.R. § 210.7(a); Appendix D, Federal Reserve Operating Circular No. 4. As the preamble to the final rulemaking establishing Part 210 describes it, BFS functionally acts as the ODFI for federal agencies, while the Federal Reserve Banks act as originating ACH operators. *See* 64 Fed. Reg. 17,472, 17,473 (Apr. 9, 1999). The Nacha Rules bind all participating Depository Financial Institutions (“DFIs”), but “do not impose direct liability upon originators and receivers.” *Id.* For ACH entries to which the government is not a party, the Nacha Rules hold the ODFI or RDFI liable for any losses resulting from an act or omission by an originator or receiver. *See id.* However, an ODFI or RDFI can seek recourse against an originator or receiver if it has the right to do so under the contract between the parties or applicable state law. *See id.*

Although BFS views itself as a functional ODFI and federal agencies as functional originators, BFS does not believe it is well situated to assume liability for the acts and omissions of agencies originating and receiving ACH entries. *See id.* BFS therefore decided “to impose upon agencies that originate or receive ACH entries the obligations and liabilities imposed on ODFIs and RDFIs, respectively, for purposes of the [Nacha] Rules.” *Id.* Part 210 is written in light of BFS’s decision to subject all agencies to the obligations and liabilities imposed on ODFIs and RDFIs under the Nacha Rules. *See id.* However, “[i]n view of the special nature of Government entries, and the importance of protecting public funds,” BFS preempts certain provisions of the Nacha Rules. *Id.* Some Nacha Rules are preempted entirely, while others are preempted in part by the operation of specific sections of Part 210. *See id.*

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<sup>1</sup> The Green Book and Treasury Financial Manual are guidance for users of these systems rather than rules.

<sup>2</sup> This memorandum uses the 2025 Basic Edition of the Nacha Operating Rules, which are freely available on Nacha’s website. This more recent edition has not yet been incorporated into Part 210, and therefore does not apply to government ACH transactions to the extent that it meaningfully differs from the 2021 version.

a. Enforcement of Part 210 and the Nacha Rules against federal agencies

Subsections 1.2.2, 1.2.3, 1.2.4, 1.2.5 and 1.2.6; Appendix Seven; Appendix Eight; and Appendix Nine of the Nacha Rules govern enforcement and claims for compensation. Under these rules, a participating DFI must:

- conduct annual audits of its compliance with the Nacha Rules, and produce documentation supporting the completion of each audit upon request by Nacha. *See* Nacha Rules Subsection 1.2.2;
- conduct an assessment of the risks of its ACH activities, implement a risk management program on the basis of such assessment, and comply with regulator requirements with respect to such assessment and risk management program. *See* Nacha Rules Subsection 1.2.4;
- upon settlement of a claim for violation of the Nacha Rules with another participating DFI, provide compensation according to Appendix Seven;
- comply with the arbitration procedures provided under Appendix Eight when applying for an arbitration proceeding conducted by Nacha; and
- submit to the procedures laid out in Appendix Nine for rules enforcement proceedings initiated by participating DFIs, ACH Operators, or Nacha.<sup>3</sup>

All of these rules are preempted entirely under 31 C.F.R. § 210.2(d)(1). A participating DFI may not use Nacha’s enforcement provisions to bring an action for fines against a government agency.<sup>4</sup> As Appendix 9 is preempted, it seems that a DFI also could not seek the suspension of a government agency from the ACH system through Nacha’s enforcement procedures.

Part 210 establishes some rights and obligations for originators and receivers not found in the Nacha Rules. Significantly, an agency will be liable to a receiver for losses “sustained as a result of the agency’s failure to originate a credit or debit entry in accordance with” Part 210, and “will be liable to an RDFI for losses sustained in processing duplicate or erroneous credit and

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<sup>3</sup> More specifically, Appendix 9 provides that a participating DFI, ACH Operator, or Nacha may initiate a rules enforcement proceeding against a participating DFI for any violation of the Nacha Rules. A participating DFI or ACH Operator must submit a Report of Possible ACH Rules Violation that (i) identifies the parties to the relevant transaction; (ii) includes a summary of the facts of the alleged rule violation as well as the rule violated; and (iii) attaches all documents relating to the alleged rules violation. Depending on the severity of the violation and the recidivism of the offending DFI, Nacha will either issue a notice granting the DFI the chance to correct the violation or refer the violation to the ACH Rules Enforcement Panel for consideration. The ACH Rules Enforcement Panel has the power to impose a fine, which is collected by transmitting an ACH debit to the account of the affected respondent. Subparts 9.4.7.3-5 detail the criteria for determining the size of the fine. Finally, for an egregious violation of the rules relating to a specific originator, the ACH Rules Enforcement Panel may direct the ODFI to suspend the originator from originating additional entries. A suspension can be lifted only by the ACH Rules Enforcement Panel or by an Appeals Panel.

<sup>4</sup> The preamble to Part 210 specifically provides that “the requirement under the ACH Rules that participants agree to be subject to a national system of fines to ensure compliance with the ACH Rules” is “preempted entirely.” 64 Fed. Reg. 17,472, 17,473 (Apr. 9, 1999).

debit entries originated by the agency.” 31 C.F.R. § 210.6(d). However, the agency’s liability is limited to the amount of the entry(ies), and must be “reduced by the amount of the loss resulting from the failure of the RDFI to exercise due diligence and follow standard commercial practices in processing the entry(ies).”<sup>5</sup> *Id.*

It seems clear from the preamble to Part 210 and the language of Part 210 itself that government agencies cannot be subjected to Nacha enforcement proceedings. As Part 210 “has the force and effect of Federal law,” the most appropriate enforcement mechanism may be a federal court filing.<sup>6</sup> 31 C.F.R. § 210.3(a).

b. Reversals

Section 2.10—the Nacha Rule governing reversals—is partially preempted by Part 210. Subsection 2.10.3 of the Nacha Rules provides that an ODFI must indemnify a RDFI for any loss relating to a reversal. This indemnification provision is preempted by 31 C.F.R. § 210.6(f), which limits the government’s indemnification of an RDFI or ACH Operator to the amount of the reversal entry. *See* 55 Fed. Reg. 17,472, 17,474 (Apr. 9, 1999). The rest of the Nacha Rules described below, including all other subsections of Section 2.10, are incorporated into Part 210.

Section 2.8 of the Nacha Rules provides that “[n]either an originator nor an ODFI has the right to recall an Entry or File, to require the return of or adjustment to an Entry, or to stop the payment or posting of an entry, once the Entry or File has been received by the Originating ACH Operator, except as allowed by Section 2.9 (Reversing Files), Section 2.10 (Reversing Entries), and Section 2.11 (Reclamation of Entries and Written Demands for Payment).” Reversals of entries originated by government agencies are also governed by 31 C.F.R. § 210.6(f), which provides that an agency may reverse “any duplicate or erroneous entr[ies].” Section 8.38 of the Nacha Rules defines an erroneous entry as

an Entry that (a) is a duplicate of an Entry previously initiated by the Originator or ODFI; (b) orders payment to or from a Receiver different from the Receiver intended to be credited or debited by the Originator; [or] (c) orders payment in a dollar amount different than what was intended by the Originator[.]<sup>7</sup>

When initiating a reversal, the agency must certify to BFS “that the reversal complies with applicable law related to the recovery of the underlying payment.” *See* 31 C.F.R. §210.6(f).

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<sup>5</sup> As detailed *infra*, reversals are subject to a similar liability provision.

<sup>6</sup> The civil procedure involved in such a filing requires further research.

<sup>7</sup> The Nacha Rules were [amended](#) after the publication of the 2021 version to include a “wrong date” error. This wrong date error appears in the 2025 Nacha Rules as subpart (d) of Section 8.38, but has been excluded here to adhere to the 2021 version incorporated by reference under Part 210.

Reversing entries must be transmitted to the RDFI within 5 banking days<sup>8</sup> following the settlement date for the erroneous entry. *Id.*; Nacha Rules Subsection 2.10.1.

#### 4. FEMA's removal of \$80.5 million from New York City's central account

On February 11, 2025, FEMA removed approximately \$80.5 million from New York City's ("the City") central treasury account with Citibank. A week later Cameron Hamilton, the Senior Official Performing the Duties of the FEMA Administrator, sent a [letter](#) to the New York City Office of Management and Budget alleging that the City used "a substantial portion" of the \$80.5 million to house immigrants at a hotel that had been "taken over" by a "vicious Venezuelan gang", according to a New York Post article cited in the letter. Because the same New York Post article reported that the gang had used this hotel to "plan a variety of crimes," the letter also argued that FEMA has the authority under 2 C.F.R. §§ 200.208 and 200.339 to "place special conditions on an award" or "place a hold on funds until the matter is corrected." The letter states that until FEMA completes additional monitoring and review of the awards, "payments under the grant award(s) will be temporarily held," including the \$80.5 million that FEMA "recently clawed back." The "clawed back" language is identical to language in a February 11, 2025 [tweet](#) by Secretary of Homeland Security Kristi Noem.

On February 21, 2025, the City filed a [Complaint](#) and a [Motion for Preliminary Injunction and Temporary Restraining Order](#) ("Motion for PI & TRO") challenging the legality of FEMA's actions. These filings employ terms such as "grabbed," "took," and "seized" to describe FEMA's removal of the \$80.5 million from the City's central bank account. *See e.g.* Complaint ¶¶ 1, 11, 18, 20, 22, 32-33, 69-71; Motion for PI & TRO at 1, 5, 9-10. New York City Comptroller Brad Lander has used the term "[revocation](#)" to describe the removal. In an interview, Comptroller Lander also [confirmed](#) that the City had moved the funds out of the central account before the funds were removed, so "when they actually did the clawback, it caused the account to overdraft by \$79.5 million."

In his [declaration](#) submitted in support of the City's Complaint, Jacques Jiha, Director of the New York City Mayor's Office of Management and Budget, stated that "[o]n February 4, 2025, the City received payments by ACH wire transfer of \$58,581,446.08 and \$21,900,415.34, the full amount that FEMA had approved for reimbursement to the City."<sup>9</sup> Jiha Decl. ¶ 38. Dr. Jiha did not describe the removal in the same level of detail, stating that "[o]n Wednesday, February 12, 2025, OMB learned from the City's Department of Finance that at 4:03 pm on February 11, 2025, \$80,481,861.42 had been removed from the City's central treasury account

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<sup>8</sup> Section 8.15 of the Nacha Rules defines banking day as "any date on which [a] Participating [Depository Financial Institution] is open to the public during any part of such day for carrying on substantially all of its banking functions, and, with reference to an ACH Operator, any day on which the applicable facility of such ACH Operator is being operated."

<sup>9</sup> The funds were disbursed in two separate payments because they were awarded through two different types of grants—allocated and competitive. These grant types are further defined and explained in the Complaint. *See* Complaint ¶¶ 39, 46.

where the funds had been deposited on February 4.”<sup>10</sup> *Id.* ¶ 41. It is relevant in this context to mention that the New York City Comptroller’s office has “accounting” access to New York City bank accounts for the purposes of reconciling payments but is not privy to ACH payment details. That is the purview of the New York City Department of Finance. *See* New York City Charter §§ 93(b)-(d), 1504(3)(a).<sup>11</sup>

On February 28, 2025, the Department of Justice filed a [Memorandum of Law in Opposition to the City’s Motion for PI & TRO](#) on behalf of the defendants. In their Opposition, the defendants recount that Secretary Noem issued a [memorandum](#) on January 28, 2025 (“Noem Memo”) placing “on hold pending review” all grant disbursements and assessments of grant applications that go to non-profit organizations or for which non-profit organizations are eligible and which touch in any way upon immigration. *See* Opposition at 6; Noem Memo. The defendants argue that FEMA made the two disbursement payments amounting to approximately \$80.5 million based on a misapprehension of the terms of the January 28, 2025 memorandum. Attached to the Opposition as an exhibit is a [declaration](#) by Cameron Hamilton wherein he states that he was advised on February 10, 2025 that the \$80.5 million payment was made under a misapprehension of the terms of the Noem Memo, and that FEMA did not have the authority to make the payment. Hamilton Decl. ¶ 9. Hamilton further states that

[FEMA’s] Acting Chief Financial Officer contacted the Treasury by telephone to inform them of the mistaken, improper payment and request assistance. After the Acting Chief Financial Officer certified by phone that the payment was improper, FEMA submitted to Treasury an Improper Recovery Request via the Treasury Check Information System to recover the payment pursuant to 31 C.F.R. § 210.6(f). The United States Treasury processed this request and returned the payment to FEMA as a Treasury cancellation.

Hamilton Decl. ¶ 11. The City filed a [Reply in Further Support of its Motion for TRO & PI](#) (“Reply”) on March 3, 2025, which argues that the reversal of the funds was clearly not an error “akin to sending a check to the wrong address, and then cancelling it,” as the reversal was “preceded by a series of public statements from Defendants” criticizing the City’s use of the funds, criticizing Congress for enacting the legislation authorizing the program under which the

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<sup>10</sup> BFS [publishes on its website](#) the maximum dollar ranges that can be sent by ACH payment through the Secure Payment System (SPS). This guidance provides that “[e]ach ACH Type A or Type B payment can be up to 10 digits (99,999,999.99). For single payments \$100M or over, agencies will generate two payments. The same invoice number may be used in the addenda.”

<sup>11</sup> *See* [Notes on the Crises Mar. 13th. 2025] “While we cannot comment on the specifics due to ongoing litigation, as the City’s Chief Financial Officer, the Comptroller’s office has accounting oversight of the city’s ledgers, including City bank account activities. Because of our role in monitoring the City’s cash balances, the Comptroller’s office was able to uncover the overdraft associated with the \$80.5m clawback,” said Chloe Chik, spokesperson for the New York City Comptroller.

payment was appropriated, and calling for the money to be returned. Reply at 3-4. A footnote in the Reply specifically addresses the ACH reversal:

Notably, Defendants did not comply with the applicable rules or regulations for a reversal of an Automated Clearing House (“ACH”) payment. Under 31 C.F.R. § 210.6(f), which incorporates by reference the National Automated Clearing House Association (“NACHA”) 2021 Operating Rules & Guidelines (“NACHA Rules”) an “erroneous entry” subject to reversal is (1) an exact duplicate of an earlier ACH payment; (2) a payment not to the intended recipient; (3) an incorrect dollar amount or date; or (4) a payment to a former employee duplicative of a check already delivered to that employee. An ACH reversal is improper if initiated for any other reason. FEMA’s reasons for reversal are not within any of the allowable criteria.

Reply at 4 n.1 (citing 31 C.F.R. 210.3(b) and 2021 Nacha Rules Subsection 2.9.5). After oral argument held on March 5, 2025, the Honorable Jennifer H. Rearden denied the City’s motion for a temporary restraining order and directed the parties to file a joint letter setting forth proposed next steps. On March 10, 2025, the City submitted a letter requesting to withdraw its motion for a preliminary injunction without prejudice, and stating that it is considering whether to file an amended complaint as of right prior to March 20, 2025. The defendants consented to the City’s request to withdraw its motion, and Judge Rearden granted the request that same day.

##### *5. Implications of the reversal in light of ACH rules and regulations*

The Hamilton Declaration confirms that FEMA initiated a reversal entry on February 11, 2025. Under the Nacha Rules and Part 210, ACH entries that have already been settled can only be reversed where the entry was a duplicate or sent in the wrong amount or to the wrong account. As the City argued in its Reply, those circumstances do not apply in this case, especially given the City provided [multiple documents](#) confirming FEMA’s approval of the award in the amounts credited to the City’s account, even after the date of the removal. Therefore, the funds were reversed for an impermissible reason in violation of 31 C.F.R. Part 210 and the Nacha Rules.

FEMA would also have needed to certify to BFS that the reversal complied with applicable law related to the recovery of the underlying payment. *See* 31 C.F.R. § 210.6(f). According to the Hamilton Declaration, the Acting Chief Financial Officer of FEMA “certified by phone” to the Treasury that the payment was “improper.” It is unclear whether “the Treasury” employee or employees was a BFS employee or employees. It is also unclear whether the BFS itself ever accepted this certification. The City’s Complaint names “an as-yet unidentified department, agency, or other unknown entity of the United States with the ability and/or authority to return \$80 million in unlawfully grabbed funding to the City’s bank account” and “a John or Jane Doe Official . . . with the ability and/or authority to return \$80 million in unlawfully grabbed funding to the City’s bank account” as defendants. Complaint ¶¶ 32-33. Perhaps the

Treasury employee or employees who reviewed and approved FEMA’s request by phone would fit the description of the unknown defendants named in the City’s Complaint. It would be useful to know if this phone certification followed the usual process for approval of reversals, if FEMA circumvented a more formal customary certification process, or if a customary process exists for reversing entries that can only be initiated in extremely narrow circumstances.

Following the phone certification, FEMA submitted an “Improper Recovery Request” via the Treasury Check Information System. According to BFS’s website, the [Treasury Check Information System](#) (“TCIS”) allows agencies to see information about payments or claims relating to ACH payments, ask for payment information using an ACH trace number, or make a stop payment request. Further research is needed to determine if this is the usual system used for ACH reversals, and if an “Improper Recovery Request” is a meaningful term of art at the BFS. Internet searches do not turn up any previous use of this phrase besides reporting on this testimony.

The \$80.5 million was transferred to the City on February 4, 2025, and reversed on February 11, 2025. *See* Complaint ¶¶ 67, 69. The fact that the payment was reversed almost exactly five weekdays after it was initially credited likely means that FEMA attempted to reverse the funds within the allowed time period under the Nacha Rules.

Finally, it is notable that Citibank—the RDFI in this situation—processed the government’s ACH reversal entry despite the lack of funds in the City’s account. RDFIs may return an entry for any reason.<sup>12</sup> *See* Nacha Rules Section 3.8. A return entry is a new entry which must be assigned new batch and trace numbers, and which is formatted like any ACH entry, except that it must include a return reason code.<sup>13</sup> *See* Appendix Four, Nacha Rules. The first return reason code, R01, is used when the available balance is not sufficient to cover the dollar value of the debit entry. *See id.* While the Nacha Rules give RDFIs the right to return debit entries for insufficient funds, the rules do not require that an entry be returned in those circumstances. Citibank appears to have decided not to return FEMA’s reversal entry because the City’s line of credit was sufficient to cover the entry’s dollar value. Citibank’s decision may raise safety and soundness concerns, but it probably does not violate the Nacha Rules.<sup>14</sup>

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<sup>12</sup> There are two limited exceptions. RDFIs may not return an entry due to the type of entry, and may not return an entry based on MICR data. *See* Nacha Rules Subsection 3.8.1.

<sup>13</sup> Return entries also must be made available to the ODFI no later than the opening of business on the second banking day following the settlement date of the original entry. *See* Nacha Rules Section 3.8.

<sup>14</sup> It is the ODFI’s responsibility to warrant that each entry is compliant with the Nacha Rules. *See* Nacha Rules Subsection 2.4.1.2. RDFIs must accept entries that are compliant with the Nacha Rules, subject to their right to return entries. *See* Nacha Rules Section 3.1.1. Given the ODFI’s responsibility to ensure compliance with the rules, it is likely that Citibank processes incoming ACH entries without checking for Nacha Rules compliance.



6. *Questions for further research*

FEMA's reversal of the \$80.5 million deposit to New York City's central treasury account raises several questions for further research:

1. Under current law, could an administration engage in administrative agency rulemaking revising 31 C.F.R. Part 210 to allow ACH reversal entries for entries that are improper for reasons other than duplication or error? Could they pursue more expansive definitions that increase their legal discretion without engaging in administrative agency rulemaking? How extensive would revisions need to be if administrative agency rulemaking is required?
2. The governmental use of the ACH system to accomplish policy goals is largely mediated by Nacha, an industry trade association. What are the full legal implications and scope for executive branch discretion that this provides given what appears to be quite significant executive discretion to promulgate rules that preempt Nacha rules?
3. What are the implications of the recently established "Major Questions Doctrine" for the legal discretion provided to the executive branch in making more extensive use of payment reversals and the possibility of regularly utilizing the operational capacity to issue separate debit entries without clear authorization from non-ACH law statutes?
4. Under current ACH rules, whose accounts can the government debit without specific authorization for each entry? What changes to statutes, regulations, agency guidance, or Nacha Rules would be required for agencies to debit the accounts of individuals who have not previously consented to receive ACH entries from the government?