

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:PA:APJP;B02/BTWarren  
FILES-127479-03

date: June 5, 2003.

to: Peter J. Stipek  
Director, Submission Processing  
S:CAS:SP

*Carol P. Nachman*  
from: Carol P. Nachman  
Special Counsel  
(Administrative Provisions and Judicial Practice)  
CC:PA:APJP

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subject: New Electronic Tax Payment Initiatives

This is in response to your request for assistance of April 29th, 2003, in which you presented two initiatives involving the Electronic Federal Tax Payment System (EFTPS) for legal review by our office.

Consistent with the informal discussion we have had with your office, we reserve discussion of a third issue presented in your request of April 29<sup>th</sup>, 2003. This third issue does not involve an initiative for the EFTPS program but instead involves a specific case. We will respond to that issue separately.

[REDACTED]

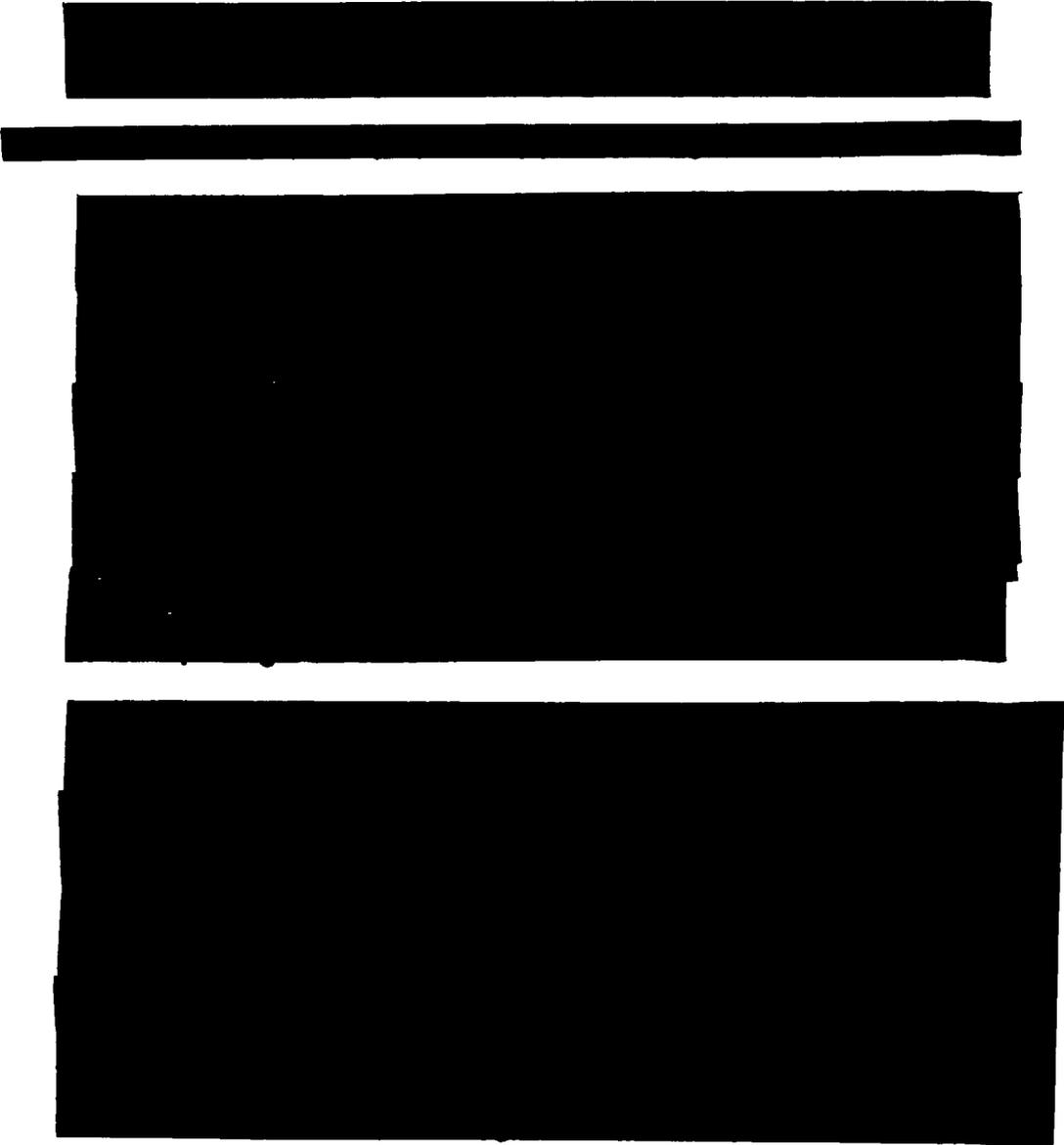
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Issues:

1. Is it permissible for the Service to enroll taxpayers automatically in EFTPS when they apply for EINs?
2. Is it permissible for the Service to stop providing automatically paper coupons to taxpayers who apply for EINs?

Conclusions

1. Yes. Automatically enrolling taxpayers in EFTPS is permissible because doing so merely helps to facilitate taxpayers making use of all their deposit options.
2. No. The Employment Tax Regulations state that "a new employer should receive its initial supply of FTD coupon books after receiving its employer identification number." We interpret this statement in this final guidance as requiring the Service to provide at least an initial supply of FTD coupons as is done with current practice. [REDACTED] DP  
[REDACTED] Provided that taxpayers are given sufficient notice that they must affirmatively request the coupon books, the Service need not continue to provide the coupon books automatically.

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Discussion

The frequency and manner of a taxpayer's deposits are governed by Section 31.6302-1 of the Employment Tax Regulations. The use of EFTPS is governed by section 31.6302-1(h) of those regulations. Under §31.6302-1(h)(2)(ii), mandatory use of EFTPS to make deposits is required only for those taxpayers whose aggregate deposits of specified taxes for the relevant look-back year exceed \$200,000. Given that the Presumed EFTPS initiative is directed at taxpayers who have newly acquired EINs, such taxpayers will not be subject to mandatory EFTPS usage because their deposits for the relevant look-back years will be zero.

Voluntary use of EFTPS is permitted for non-mandated EFTPS taxpayers under §31.6302-1(h)(2)(ii). Under the regulations, if a non-mandated EFTPS taxpayer does not wish to use EFTPS voluntarily, the only option remaining to deposit is through paper coupons, as required by §31.6302-1(h)(3).

EFTPS and paper coupons are equally available options under the Employment Tax Regulations. It is permissible for the Service to enroll taxpayers in EFTPS automatically because such automatic enrollment does not deny the taxpayer a deposit option. Automatic enrollment in EFTPS does not mean that taxpayers have to use EFTPS. It merely helps to facilitate taxpayers making use of all their options.

It is also permissible to advertise the benefits of EFTPS in the CP 57X or other notices. Such advertisement, however, cannot go so far as to falsely imply that the taxpayer does not have an unrestricted right to deposit through paper coupons.

Further, Treas. Reg. 31.6302-1(l)(3) provides, in pertinent part, that "a new employer should receive its initial supply of FTD coupon books after receiving its employer identification number." We interpret this provision of the regulations as requiring the Service to provide the coupon books to taxpayers in a prompt and direct manner after receiving their EINs. It is possible for the Service to act promptly and directly and yet still require an additional affirmative request by a taxpayer in order to receive the coupon books. When requiring an additional affirmative request beyond what is currently required, however, the Service must provide the taxpayer with prompt advance notice. This prompt advance notice is necessary so that the taxpayer can easily have the paper coupon books on hand when they are wanted. In a similar vein, the Service must continue to provide automatically the initial supply of four blank coupons so that the taxpayer has paper coupons available to meet immediate deposit obligations.



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As EFTPS and paper coupons are equally permissible deposit options under the Regulations, it is permissible for the Service to encourage taxpayers to try the benefits of EFTPS. Given the many advantages of EFTPS, the Service may expect many taxpayers to voluntarily use EFTPS and not request paper coupons. Notwithstanding such expectation, however, it must be kept in mind that EFTPS and paper coupons are equally available options under the regulations. In particular, the Service should be sensitive to creating a false "opt-out" system in which it is artificially difficult for taxpayers to obtain paper coupons. Additionally, it is important that taxpayers are properly informed about their unrestricted right to use paper coupons.

As requested above, please coordinate with our office the review of the relevant language included in the CP 57X package and any related notices or publications.

Initiative Two: EFTPS Mailbox Rule for 1040 Remittances.

We recite the following description of this proposal from your request:

Current process: Today, non-depository taxes (payment with a return, instalment payment, 1040ES payments) are required to be entered in EFTPS the day before the due date to be considered timely. We believe that this is a disincentive to electronic payments as with the paper process they have until the due date to put their payment into the

mail. And while the Service does have an administrative grace period, the Department of the Treasury does not advertise the grace period.



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Issues

1. Is It permissible for the Service to implement an EFTPS mailbox rule under the current regulations.
2. Could the Service effectuate an EFTPS mailbox rule through a regulatory change?

Conclusions

1. No. The regulations require an EFTPS payment to be deemed made only when the amounts are withdrawn from the taxpayer's account. Grace periods may not be publicly disclosed and accordingly could not be employed to effectuate a mailbox rule.
2. Yes. The Secretary is authorized to prescribe regulations that specify when payment by commercially acceptable means will be considered received. The creation of an EFTPS mailbox rule would come within such authority.

Discussion

Payment of tax is governed by Section 6311 of the Code. Section 6311 provides, in pertinent part, that the "Secretary shall prescribe such regulations as the Secretary deems necessary to receive payment by commercially acceptable means, including regulations that....specify when payment by such means will be considered received."

Section 301.6311-2(a)(2) of the Regulations on Procedure and Administration provides that payments by electronic funds transfer other than credit card and debit card are governed by Section 6302, governing deposits, and the regulations issued under that section. Thus, the regulations governing electronic payments are currently governed by the Employment Tax regulations governing deposits.

Section 31.6302(h)(8) of the Employment Tax Regulations provides that a "deposit of taxes by electronic funds transfer will be deemed made when the amount is withdrawn from the taxpayer's account, provided the U.S. Government is the payee and the amount is not returned or reversed."

We conclude that, in order to implement the EFTPS Mailbox Initiative, we would have to amend the regulations cited above. Under Treas. Reg. §31.6302(h)(8), the Service cannot deem an electronic payment as being made on the day payment is initiated. Rather, such payment must be completed, so that funds are withdrawn from the taxpayer's account. Your request correctly notes that Treasury does not advertise grace periods. Grace periods may not be publicly acknowledged, and, as such, cannot be used to implement a mailbox rule.

As evident in the authorities cited above, the Secretary does have the authority under Section 6311 to prescribe a different result by regulation.

In the event your office wishes to pursue a regulations project, you should consult with your SB/SE Counsel representative so that the item can be considered for next year's priority guidance plan.

If you have any questions regarding this memorandum, please contact Brinton T Warren at (202) 622-8477.