

**DEPARTMENT OF THE TREASURY****Fiscal Service****31 CFR Part 208**

RIN 1510-AA56

**Management of Federal Agency Disbursements**

**AGENCY:** Financial Management Service, Fiscal Service, Treasury.

**ACTION:** Final rule.

**SUMMARY:** This regulation implements the provisions of section 31001(x) of the Debt Collection Improvement Act of 1996 (Act) that require that, subject to the authority of the Secretary of the Treasury (Secretary) to grant waivers, all Federal payments (other than payments under the Internal Revenue Code of 1986) made after January 1, 1999, must be made by electronic funds transfer (EFT). This regulation establishes the circumstances under which waivers are available; sets forth requirements for accounts to which Federal payments may be sent by EFT; provides that any individual who receives a Federal benefit, wage, salary, or retirement payment shall be eligible to open a low-cost Treasury-designated account at a financial institution that offers such accounts; and sets forth the responsibilities of Federal agencies and recipients under the regulation.

In addition, this regulation provides for the designation of financial institutions as Financial Agents for purposes of implementing electronic benefits transfer (EBT) programs. EBT is the provision of Federal benefit, wage, salary, and retirement payments electronically, through disbursement by a Financial Agent. EBT includes payment through an electronic transfer account (ETA<sup>SM</sup>) as well as payment through a Federal/State program.

**DATES:** This rule is effective January 2, 1999.

**ADDRESSES:** This rule is available on the Financial Management Service's EFT web site at the following address: <http://www.fms.treas.gov/eft/>.

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**SUPPLEMENTARY INFORMATION:****I. Background****A. Introduction**

Section 31001(x) of the Act amends 31 U.S.C. 3332 to require that agencies convert from paper-based payment methods to EFT under regulations issued by the Secretary. The Act, which exempts only payments under the Internal Revenue Code of 1986, provides that the conversion from checks to EFT be made in two phases. During the first phase, recipients who became eligible to receive Federal payments on or after July 26, 1996, are required to receive such payments by EFT unless they certify in writing that they do not have an account with a financial institution or an authorized payment agent. Treasury issued an interim rule on July 26, 1996, to implement these requirements. 61 FR 39254. The interim rule will remain in effect through January 1, 1999.

The second phase begins January 2, 1999. Beginning on that date, all Federal payments, except payments under the Internal Revenue Code, must be made by EFT unless waived by the Secretary. This regulation (Part 208), which was published for comment on September 16, 1997 (62 FR 48714)(208 NPRM), implements the second phase requirements.

Part 208 provides guidance to agencies and recipients regarding compliance with the Act's requirements. In developing this rule, Treasury followed four principles: (1) The transition to EFT should be accomplished with the interests of recipients being of paramount importance; (2) Treasury's policies should maximize private sector competition for the business of handling Federal payments, so that recipients not only have a broad range of payment options, but also receive their payments at a reasonable cost, with substantial consumer protections, and with the greatest possible convenience, efficiency, and security; (3) recipients, especially those having special needs, should not be disadvantaged by the transition to EFT; and (4) recipients without accounts at financial institutions should be brought into the mainstream of the financial system to the extent possible.

**Proposed 31 CFR Part 207**

Part 208 also incorporates selected provisions from the proposed rule 31 CFR Part 207, Electronic Benefits Transfer; Selection and Designation of Financial Institutions as Financial Agents (207 NPRM) published for comment on May 9, 1997. 62 FR 25572.

As described below, the EBT system is a system for making certain types of Federal payments available electronically (by EFT) to recipients. In EBT, the payments are disbursed to the recipient by a financial institution acting as Treasury's Financial Agent. Legislation enacted in 1996 authorized the Secretary of the Treasury to designate financial institutions as Financial Agents to provide EBT services. Section 664, Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208.

At the time the 207 NPRM was published, Treasury contemplated fulfilling the mandate in the Act that it assure that individuals required to have an account in order to receive electronic payments have access to an account at a reasonable cost and with the same consumer protections as other account holders at the same financial institution, by establishing one or more EBT systems through a competitive selection process, and thus provide for the electronic delivery of payments to those individuals who did not have an account with a financial institution. The 207 NPRM proposed to establish a legal framework for obtaining the services of financial institutions as Financial Agents to perform the disbursement of public funds that is central to the Federal EBT program.

As indicated below in the discussion on § 208.5, Treasury has determined that the statutory mandate to assure recipients access to accounts is better implemented by designing an ETA<sup>SM</sup> that may be offered by any Federally-insured financial institution that enters into an ETA<sup>SM</sup> Financial Agency Agreement with Treasury. It has also determined that the ETA<sup>SM</sup> should be made available to any individual who receives a Federal benefit, wage, salary, or retirement payment. Under Part 208, an ETA<sup>SM</sup> falls within the definition of "EBT."

Also within the definition of EBT are Federal/State programs under which a recipient who receives benefit payments from both the Federal government and a State government can receive his or her payments through the same system. This is consistent with the National Performance Review implementation plan for nationwide EBT encouraging Federal agencies, in partnership with State and local governments, to develop a nationwide integrated EBT system utilizing the existing commercial infrastructure to provide combined access to Federal payments and State-administered benefits for a recipient on a single card. As discussed below in the analysis of § 208.5, Treasury intends, where requested by States to do so, to work with States in implementing joint

Federal/State EBT programs. Individuals who are in States with a Federal/State program and who receive both Federal and State benefit payments will have the option of participating in the program.

Based on the shift in focus from a competitive selection process for obtaining EBT services to the development of an ETA<sup>SM</sup> to be offered at the option of Federally-insured financial institutions, as well as on comments to the 207 NPRM indicating some confusion over the relationship of the 207 NPRM to Part 208 and other related documents, Treasury believes that a separate Part 207 rulemaking is no longer necessary or desirable. Instead, those portions of the 207 NPRM that relate to the statutory authority of the Secretary to designate financial institutions to provide EBT services, including the offering of ETAs<sup>SM</sup>, as Treasury's Financial Agents, have been modified and incorporated in Part 208. Those portions of the 207 NPRM that outline the duties of financial institutions designated as Financial Agents, some of which may vary depending on a specific EBT program, will be included in the Financial Agency Agreement for that particular program, e.g., the ETA<sup>SM</sup> Financial Agency Agreement or the Financial Agency Agreement governing the disbursement of Federal benefits in a Federal/State EBT program. Selected duties, e.g., the duty related to complying with Regulation E, 12 CFR Part 205, will also be reflected in the notice of ETA<sup>SM</sup> attributes to be published at a later date in the **Federal Register**.

#### *B. Participation in Rulemaking Process*

As part of the rulemaking process for Part 208, Treasury has provided multiple forums for public comment and discussion. Since the publication of the 208 NPRM, Treasury has actively solicited the views of interested parties, including consumer and community-based organizations, most of which are advocates for Federal recipients likely to be most affected by the rule. For example, focus groups were held nationwide to understand better the needs of Federal payment recipients and to test public education messages and materials developed to explain EFT to recipients. Also, the public was invited to attend four Treasury-sponsored public hearings in the cities of Baltimore, Dallas, Los Angeles, and New York. Over 50 interested parties testified as to their views and concerns regarding EFT. In addition, representatives from consumer and community-based organizations and from financial

institutions, financial institution trade associations, and ATM networks were invited to participate in two public meetings to discuss the account to be made available pursuant to § 208.5.

Finally, through an EFT Interagency Policy Workgroup, Treasury has worked with Federal agencies to solicit input on EFT conversion as well as to understand better agency implementation concerns. Agency feedback has been essential to formulating a final rule that meets both Federal agency and recipient needs.

## **II. Comments**

### *A. 208 NPRM*

Treasury received 212 comment letters in response to the 208 NPRM that was published on September 16, 1997. Copies of the comments are available on the Financial Management Service's (Service's) web site at <http://www.fms.treas.gov/eft/>. Comments were received from consumer and community-based organizations, recipients, financial institutions, non-financial institutions, Federal agencies, and other interested parties. In addition, comments were received in the form of testimony at the four public hearings on EFT.

In general, commenters supported the use of EFT for Federal payments. Although comments were received on a multitude of issues, the principal issues addressed in the comment letters were the expansion of hardship waivers; the availability and features of the ETA<sup>SM</sup> to be made available by Treasury pursuant to § 208.5 of the 208 NPRM; and the regulation of accounts other than the ETA<sup>SM</sup> to which Federal payments may be sent.

These issues are discussed below in the section-by-section analysis.

### *B. 207 NPRM*

Treasury received 33 comment letters on the 207 NPRM that was published on May 9, 1997. Copies of the comments are available on the Service's web site at <http://www.fms.treas.gov/eft/>. Comments were received from consumer organizations, financial institutions, financial trade associations, a representative of non-bank financial service providers, State government organizations, and a software development company. The comment letters generally supported the use of EFT to make Federal payments.

Some of the comments on the 207 NPRM related to issues that were the subject of Part 208, in particular § 208.5, Availability of the ETA<sup>SM</sup>. Those comments have been addressed below in the section-by-section analysis of Part 208.

Other comments related to issues that will be the subject of a notice of proposed ETA<sup>SM</sup> features to be published in the **Federal Register** and, therefore, will be addressed in that document. Comments related to the attributes of the ETA<sup>SM</sup> include comments on provisions in proposed § 207.3 that an account established by a Financial Agent may be closed only at the direction of Treasury; that Financial Agents must comply with Regulation E; and that recipients must be provided debit card access to the account.

Still other comments, related to the duties and compensation of Financial Agents, will be reflected in the Financial Agency Agreement between Treasury and any financial institution that elects to provide EBT services, e.g., ETAs<sup>SM</sup>, as Treasury's Financial Agent. The characteristics and requirements of EBT programs, including the duties of the Financial Agent for a particular program, may vary according to the program. Therefore, Treasury believes that these duties are best incorporated in the Financial Agency Agreement for the particular program.

## **III. Section-by-Section Analysis of Part 208**

### *A. Section 208.1—Scope and Application*

Final § 208.1, which is unchanged from proposed § 208.1, states that this rule applies to all Federal payments made by an agency and, except as waived by the Secretary, requires that such payments be made by EFT. This part does not apply to payments under the Internal Revenue Code of 1986.

### *B. Section 208.2—Definitions*

All definitions contained in the 208 NPRM are substantively unchanged in the final Part 208 rule. Definitions for the terms "ETA<sup>SM</sup>," "Federal/State EBT program," and "Federally-insured financial institution" have been added to the rule. In addition, definitions from the 207 NPRM for "Direct Federal electronic benefits transfer (EBT)" and "disburse" have been modified and incorporated into Part 208 as "electronic benefits transfer (EBT)" and "disbursement." The definitions of "eligible financial institution" and "Financial Agent" have been combined as "Financial Agent." Comments were received on the 208 NPRM definitions of "authorized payment agent" and "Federal payment." For the reasons discussed below, Treasury has left these two definitions unchanged in the final rule.

## Disbursement

The final rule includes a definition for "disbursement." This definition is similar to that for "disburse" in the 207 NPRM. The term "disbursement" is used in the definition of "electronic benefits transfer (EBT)" as meaning the performance of a series of functions by a financial institution that has been designated by Treasury as a Financial Agent. The functions are: the establishment of an account that meets the requirements of the Federal Deposit Insurance Corporation or the National Credit Union Administration Board for deposit or share insurance; the maintenance of the account; the receipt and crediting of Federal payments to the account; and the provision of access to the account on terms specified by Treasury.

The broad definition of "disbursement" in Part 208 reflects Treasury's determination that all of the functions must be performed in order to accomplish Treasury's goal of providing recipients access to their payments through an ETA<sup>SM</sup> or a Federal/State EBT program. By contrast, the term "disburse" is used in a narrower sense in 31 CFR Part 206, Treasury's regulation dealing with the management of Federal agency receipts and collections. "Disburse" is defined in 31 CFR 206.2 as the initiation of an EFT because, in the context of agency cash management where all the parties have accounts at financial institutions, the only function that needs to be performed in order to deliver public money by EFT to the intended recipient is the initiation of the EFT.

The definition of "disburse" in proposed § 207.3(a)(1) required that the Financial Agent establish an account in the name of each unbanked recipient. Part 208 deletes the requirement that the account be "in the name of" the recipient because this requirement, and certain exceptions, are already set forth in § 208.6 of the final rule.

However, the reference in the definition of "disbursement" to the establishment of an EBT account "for the recipient" is intended to clarify that the account is established on behalf of the recipient and that the recipient has an ownership interest in the account. While Treasury controls the nature of the account and imposes certain obligations on the Financial Agent, the account itself, once established, is the recipient's account. Accordingly, when Treasury sends a Federal payment to the account, the funds transferred to the account cease to be public monies and become the property of the recipient. In addition, it is the recipient's account for

deposit or share insurance purposes. Also, the recipient is entitled to any available protection under Regulation E and other consumer protection laws with respect to the account. Just as with any other account to which Federal payments are sent, Treasury's liability to the recipient is extinguished upon final crediting of the transfer of the funds to the recipient's account.

The final rule adds the phrase "or other electronic means" to the definition of "disbursement" to clarify that EBT may not necessarily be effected through the Automated Clearing House (ACH) system. In addition, the final definition incorporates, with minor modifications, the requirement in proposed § 207.3, Duties of the Financial Agent, that the account established by the Financial Agent be eligible for Federal deposit insurance.

## Electronic Benefits Transfer (EBT)

The final rule includes a definition for "electronic benefits transfer (EBT)" to make clear that certain types of Federal payments disbursed by a Financial Agent through an ETA<sup>SM</sup> or a Federal/State EBT program are considered to be EBT payments. "EBT" is defined specifically as the provision of Federal benefit, wage, salary, and retirement payments electronically, through disbursement by a Financial Agent. This definition has been modified from the definition of "direct Federal electronic benefits transfer (EBT)" that appeared in the 207 NPRM. For reasons discussed below in the section-by-section analysis of § 208.5, the definition of "EBT" is no longer limited to the disbursement of payments to recipients who do not have an account at a financial institution.

In 1996, Congress amended the Federal laws that govern Treasury's designation of financial institutions as Financial Agents. The amendments clarify the broad authority of the Secretary to define EBT and to utilize any process deemed appropriate to select Financial Agents to provide EBT services:

Notwithstanding the Federal Property and Administrative Services Act of 1949, as amended, the Secretary may select [financial institutions] as financial agents in accordance with any process the Secretary deems appropriate and their reasonable duties may include the provision of electronic benefit transfer services (including State-administered benefits with the consent of the States), as defined by the Secretary.

Section 664, Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208 amending 12 U.S.C. 90. Conforming amendments were made to 12 U.S.C. 265, 266, 391, 1452(d), 1767, 1789a,

2013, 2122 and to 31 U.S.C. 3122 and 3303.

Part 208 defines the term "EBT" for purposes of Pub. L. 104-208 as the provision of certain types of Federal payments electronically, through disbursement by a financial institution acting as a Financial Agent. As indicated above, the term "EBT" includes disbursement through ETAs<sup>SM</sup> and Federal/State EBT programs.

EBT is distinguished from Direct Deposit, the program used by agencies, at the request of the payment recipient, to send funds through the ACH system to an account established by the recipient at a financial institution. Although Direct Deposit and EBT are similar in that both involve the movement of funds by EFT to an account at a financial institution, there are significant distinctions between them. In Direct Deposit, Treasury initiates an electronic payment to a recipient's account, but has no responsibilities with respect to the account or the nature or quality of the account services provided. In contrast, in an EBT program, the attributes of the account to which the Federal payments are sent are determined by Treasury, and the financial institution provides recipients access to their payments in the manner and on terms specified by Treasury. The financial institution holding the EBT account acts as Treasury's Financial Agent in establishing and maintaining the account for the recipient, and thus has a legal relationship with Treasury with respect to the account.

In addition, as mentioned above, although both Direct Deposit and EBT involve the disbursement of public funds, what is involved in accomplishing the disbursement differs. In Direct Deposit, Treasury disburses public funds by originating an ACH credit to the financial institution designated by the recipient as the financial institution that holds the recipient's account. In EBT, disbursement is a multi-step process that includes, in addition to the origination of an ACH credit, the establishment of an account for the recipient by Treasury's Financial Agent and the provision of access to that account by the Financial Agent in accordance with the terms specified by Treasury.

## ETA<sup>SM</sup>

The final rule includes a definition for "ETA<sup>SM</sup>". The 208 NPRM did not use the term "ETA<sup>SM</sup>" and, therefore, did not define the term. Since the final rule uses the term in § 208.5 as well as selected other sections, a definition has been

added to facilitate the referencing of the Treasury-designated account to which Federal payments may be made electronically. The definition states that an ETA<sup>SM</sup> is a Treasury-designated account, i.e., Treasury will determine the features of the account. In addition, the definition makes clear that a financial institution offering an ETA<sup>SM</sup> does so as Treasury's Financial Agent. As indicated above in the discussion on "EBT," an ETA<sup>SM</sup> falls within the definition of "EBT."

#### Federal/State EBT Program

The final rule includes a definition for "Federal/State EBT program" to distinguish an account offered through this type of program from an ETA<sup>SM</sup>. As defined, a Federal/State EBT program is a program that provides access to Federal payments and State-administered benefits through a single delivery system and in which Treasury designates the Financial Agent to disburse the Federal payments.

#### Federally-Insured Financial Institution

The final rule includes a definition for "Federally-insured financial institution." This definition was added because of the requirement in § 208.5 that all financial institutions that offer an ETA<sup>SM</sup> must be Federally insured.

#### Financial Agent

The final rule includes a definition for "Financial Agent." "Financial Agent" is defined as a financial institution that has been designated by Treasury as a Financial Agent for EBT pursuant to any statutory Financial Agent designation authority. The definition makes reference to certain selected United States Code sections, amended by Pub. L. 104-208, that authorize the designation of financial institutions as Financial Agents.

As indicated in the discussion on "EBT," Pub. L. 104-208 clarifies the Secretary's authority to designate financial institutions as Financial Agents to provide EBT services. As also indicated, for purposes of Part 208, EBT services include disbursement of Federal payments through ETAs<sup>SM</sup> as well as through Federal/State EBT programs, where applicable.

The Part 208 definition of "Financial Agent" combines the 207 NPRM definitions of "eligible financial institution" and "Financial Agent." The substance of the definition remains the same.

#### Financial Agent—Designation

A number of financial institutions and financial trade associations commenting on the 207 NPRM requested clarification

as to whether a financial institution could be designated as a Financial Agent and compelled to provide EBT services even if the institution did not wish to do so. These entities urged Treasury to allow financial institutions to decide whether or not they wish to act as Financial Agents for the provision of EBT services and to clarify in the rule that participation is voluntary. Treasury does not intend to designate as Financial Agents financial institutions that do not wish to provide EBT services. To clarify this point, § 208.5 has been modified to read, "Any Federally-insured financial institution shall be eligible, but not required, to offer ETAs<sup>SM</sup> as Treasury's Financial Agent."

#### Financial Agent—Liability

A number of commenters on the 207 NPRM requested clarification regarding the responsibilities and liabilities of financial institutions that are designated as Financial Agents for the provision of EBT services. Some financial institutions and financial trade associations were concerned about the potential liabilities that financial institutions would face in serving as Financial Agents. Several of these organizations commented that, in particular, the regulations should be more specific regarding the potential liability of a Financial Agent for erroneous payments. Other financial institutions commented that since Financial Agents will be required to accept recipients as customers and will not have the discretionary right to freeze or close an EBT account, the risk of loss associated with such accounts may be significantly higher than for regular customer accounts. For example, losses could be incurred if the Financial Agent is required, pursuant to Regulation E, to provide provisional funds as a result of an account dispute and the funds are subsequently withdrawn. In light of the higher risk that commenters believe EBT accounts might involve, Treasury was urged to indemnify Financial Agents against all losses associated with providing EBT services.

With respect to the issue of erroneous payments, Federal payments made pursuant to an EBT program through the ACH system will be governed by 31 CFR Part 210, Treasury's regulation establishing the rights and liabilities of parties in connection with ACH credit entries, debit entries, and entry data originated or received by a Federal agency through the ACH system. A Notice of Proposed Rulemaking to revise Part 210 was published for public comment on February 2, 1998. 63 FR 5426.

Treasury has not included in Part 208 any reference to the closing of accounts. Rather, Treasury will include in the Financial Agency Agreement a provision that the account may only be closed in circumstances that have been approved by Treasury. It is not Treasury's intent to restrict a Financial Agent's ability to prevent losses arising from fraudulent or abusive activity in the account. However, Treasury is concerned that the closure of EBT accounts could pose a significant hardship to recipients who are relying on the availability of such accounts in order to receive their Federal payments. Treasury believes that the hardship to recipients that could result from the closing of EBT accounts must be balanced against the need to detect and limit fraudulent activity on the accounts. Treasury also believes that the bases upon which it is appropriate to permit a Financial Agent to close an account may vary among EBT programs, depending on the nature and features of the accounts. The Financial Agency Agreement will include program-specific criteria for the closing of accounts, i.e., will establish the circumstances under which a Financial Agent may close an account. The Financial Agency Agreement will also address the allocation of any resulting losses.

With respect to losses to Financial Agents resulting from recipients' abuse of EBT accounts, Treasury's legal authority to indemnify Financial Agents must be determined on a case-by-case basis. Treasury does not believe that, as a general matter, it is necessary or appropriate to indemnify Financial Agents for all losses associated with providing the EBT services. Any unusual risks that might be presented by the structure of a particular EBT program will be evaluated and addressed on a program-specific basis.

#### Financial Agent—Compliance With Regulation E

Several financial trade associations and financial institutions requested clarification on the responsibilities of Financial Agents regarding Regulation E. Section 207.3(a)(2) of the 207 NPRM proposed to require all Financial Agents to comply with Regulation E. At the same time, § 207.3(b) of the 207 NPRM proposed that the Financial Agent "be accountable only to the Treasury," which appeared to some commenters to conflict with the obligations that a financial institution would have to recipients under Regulation E. In addition, several State government entities requested clarification on how Regulation E claims would be handled

in cases where both State and Federal funds are included in the same account. Two financial trade associations commented that the Regulation E exemption for small financial institutions should be available for such institutions. Another financial institution trade association commented that Financial Agents should be allowed to delegate Regulation E compliance requirements to a third party, such as a corporate credit union (in the case of credit unions).

The rule language of Part 208 does not incorporate the 207 NPRM provision on Regulation E. The extent to which Regulation E applies to an account established under a particular EBT program will be addressed on a program-by-program basis, including in the context of a Federal/State EBT program. The Board of Governors of the Federal Reserve System is responsible for the implementation and interpretation of Regulation E. See 15 U.S.C. 1693b. Accordingly, Treasury does not believe it is appropriate for Treasury to address the availability of the exemption for small financial institutions or the ability of financial institutions to delegate Regulation E requirements. For purposes of the ETA<sup>SM</sup>, requirements related to Regulation E will be included in the notice of proposed ETA<sup>SM</sup> attributes and in the ETA<sup>SM</sup> Financial Agency Agreement.

Treasury has not included in Part 208 the accountability language of § 207.3(b) of the 207 NPRM. Treasury notes, however, that a Financial Agent will be accountable to Treasury for any failure of the Financial Agent to comply with its obligations under the agreement between Treasury and the Financial Agent.

#### Authorized Payment Agent

The 208 NPRM defined "authorized payment agent" as any individual or entity that is appointed or otherwise selected as a representative payee or fiduciary, under regulations of the Social Security Administration, the Department of Veterans Affairs, the Railroad Retirement Board, or other agency making Federal payments, to act on behalf of an individual entitled to a Federal payment. The final rule makes no change in this definition.

Treasury received comments from non-financial institutions requesting Treasury to expand the definition of an authorized payment agent to include non-financial institutions. Commenters stated that the current financial infrastructure is not sufficiently extensive to reach all Federal recipients required to receive payments

electronically. Many of these entities stressed their extensive network of agents in locations in rural areas and low and moderate income neighborhoods. These locations include convenience stores, supermarkets, pharmacies, travel agents, gas stations, and other retail outlets. In their comments, money transmitters, currency exchanges, and check cashers stressed their current role in providing financial services in locations where there are few bank branches.

Treasury has considered the role of non-financial institutions in two contexts in the rule: § 208.5 related to the ETA<sup>SM</sup> and § 208.6 related to account requirements. A discussion of comments received and Treasury's response is included in the section-by-section analysis of the respective sections.

#### Federal Payment

The definition of "Federal payment" in the final rule is identical to the definition of that term in the proposed rule.

Treasury received many comments from agencies seeking clarification on whether payments made to recipients through third parties are required to be made by EFT. For example, the Department of Health and Human Services requested that Treasury clarify whether payments made by third-party contractors to doctors and hospitals for Medicare claims are required to be made by EFT. Typically, when an agency relies on a third-party contractor for payment services, the contractor makes a payment to a Federal payment recipient on behalf of the Government and the Government either (1) funds the payment by sending the funds to the contractor before the contractor makes the payment, or (2) reimburses the contractor for amounts already paid on the Government's behalf.

Treasury will consider on a case-by-case basis situations in which an agency makes an EFT payment to a third-party contractor for purposes of funding a paper payment issued by that third party to a recipient. Treasury believes that some of these arrangements comply with this part. For example, in light of certain specific statutory provisions governing the issuance of Medicare payments, as well as the overall structure of the program, the issuance of paper Medicare payments by intermediaries and carriers would be in compliance with this part. However, Treasury does not believe that other arrangements in which a Federal agency reimburses a contractor by EFT for the contractor's issuance of checks to the

agency's payees necessarily comply with this part.

Several agencies also requested clarification on whether third-party drafts and certain other paper-based instruments such as credit card convenience checks utilized by some agencies are considered to be in compliance with the Act. Under current third-party draft and convenience check arrangements, agencies make payments using drafts and checks drawn against an account held by a third party. After the draft or check has been presented to and paid by the third party's bank, the third party bills the agency and the agency reimburses the third party by EFT. Several agencies commented that the issuance of a check or draft in these circumstances is only a component of the overall transaction which, viewed in its entirety, should be considered to be a Federal payment made by EFT because the agency is reimbursing the third party by EFT.

It is Treasury's view that a payment made by a third-party draft or convenience check in this manner is a Federal payment, and therefore must be made by EFT unless a waiver is available. The fact that third-party drafts and convenience checks are not drawn against an account of the United States Government does not exclude them from the category of Federal payments. The essential nature of such arrangements is simply the issuance of a paper check, with the added step of utilizing an account owned by a third party. One goal of the Act is to save the Government money by eliminating checks and the incremental costs associated with them and converting all payments to less costly EFT. Third-party draft arrangements involve all the costs associated with paper instruments, plus the additional expense of reimbursing the third party for the agency's use of the account. Accordingly, third-party drafts, credit card convenience checks, and similar arrangements utilizing paper-based instruments may only be used when the requirement to make payment by EFT is waived under the waiver categories found at § 208.4.

#### C. Section 208.3—Payment by Electronic Funds Transfer

This section, which is unchanged from § 208.3 of the 208 NPRM, implements 31 U.S.C. 3332(f)(1) and provides that, subject to § 208.4 and notwithstanding any other provision of law, effective January 2, 1999, all Federal payments made by an agency shall be made by EFT. Pursuant to the definition of Federal payment, payments made under the Internal

Revenue Code of 1986 are not required to be made by EFT.

#### D. Section 208.4—Waivers

##### Waiver Standards

Section 208.4 lists waivers from the requirement that Federal payment be made by EFT. As explained in the preamble to the 208 NPRM, the waiver categories are based on the following four standards developed by the Secretary: (1) Hardship on the recipient; (2) impossibility; (3) cost-benefit; and (4) law enforcement and national security. The 208 NPRM provided eight waiver categories; for the reasons described below, the final rule provides seven waiver categories.

The waivers contained in the 208 NPRM related to standards two through four named above remain the same, except for a minor change in wording in proposed § 208.4(e) from “armed forces” to “uniformed services” to reflect the use of that term in 10 U.S.C. 101(1)(13) defining contingency operations. Those waivers, contained in the 208 NPRM as §§ 208.4(c) through (h), appear in the final rule as §§ 208.4(b) through (g).

##### Hardship Waivers

Sections 208.4(a) and (b) of the 208 NPRM, related to standard one (hardship on the recipient), have been revised and combined into § 208.4(a) in the final rule. As with §§ 208.4(a) and (b) of the 208 NPRM, the hardship waivers referenced in final § 208.4(a) apply only to recipients who are individuals as defined under § 208.2.

##### Hardship Waivers—Recipients With and Without Accounts

Final § 208.4(a) broadens the hardship waivers available to individuals. The final rule does not distinguish between recipients who have an account with a financial institution and those who do not. Rather, it simply refers to individuals who determine that payment by EFT would impose a hardship.

Treasury received a number of comments from consumer organizations, recipients, and Government agencies stating that the hardship waivers should apply to all Federal payment recipients, regardless of whether they have an account at a financial institution. Commenters stated that by limiting the financial hardship provision in the 208 NPRM to individuals who do not have an account at a financial institution, no accommodation is made for recipients who may have an account but, for whatever reason, may not be able to afford keeping such an account. This could happen if, for example, account

fees or charges increase to what becomes an unaffordable amount for the recipient. It could also happen if the recipient's overall financial situation were to change for the worse for some reason beyond the recipient's control, such as a job loss, a serious illness of a dependent, or the death of an income provider.

Commenters also noted that, as proposed, the financial hardship provision would not be available to those recipients who opened accounts because of the fear of losing or interrupting their benefits. A number of consumer organizations stated that some of their constituents had enrolled in high cost programs with financial and non-financial institutions in the mistaken belief that they needed to have an account in order to continue to receive Federal benefit payments. In response to these comments, Treasury has deleted from the hardship waiver category any reference to persons having or not having an account at a financial institution.

##### Hardship Waivers—Date of Eligibility

The final rule does not distinguish between recipients who became eligible for a Federal payment before July 26, 1996, and those who became eligible on or after that date. Final § 208.4(a) provides that certain hardship waivers are available to individuals, regardless of when they became eligible to receive their Federal payments.

The majority of consumer organizations, recipients, and Government agencies commenting on the 208 NPRM objected to the “date of eligibility” distinction in the NPRM. As proposed, there were no hardship waivers for recipients who had an account with a financial institution and who became eligible for a Federal payment on or after July 26, 1996. Commenters stated that a recipient's physical condition and geographic location have no direct relationship to the recipient's date of eligibility for his or her Federal payments. For example, recipients who are physically disabled may need a hardship waiver, regardless of when they began receiving their benefits. In addition, commenters pointed out that the date of eligibility distinction makes no allowance for future changes in the circumstances of a recipient. For example, a recipient who was receiving payment by EFT and then becomes physically disabled should be eligible for a physical hardship waiver.

Benefit agencies presented other reasons for removing the “date of eligibility” distinction from the hardship waiver provisions. Several

agencies expressed concern about the complexity of implementing a system to track waivers where a hardship waiver would be available for one type of payment for which an individual became eligible prior to July 26, 1996, and not available for another type of payment for which the same individual became eligible after that date.

Several other agencies, however, defended the “date of eligibility” distinction in the NPRM, based on their past experiences in enrolling Federal payment recipients in EFT. These agencies stated that even though there is no direct relationship between a recipient's ability to receive an EFT payment and his or her date of eligibility for Federal benefits, this policy makes sense from an operational perspective, since the majority of new payment recipients voluntarily enroll in EFT. For example, the Social Security Administration is currently enrolling 85% of its new benefit recipients in EFT. In addition, these agencies expressed concern that Treasury would diminish the effectiveness of the EFT mandate by providing liberal waiver policies. However, even though there is clear evidence that the majority of new Federal payment recipients voluntarily enroll in EFT, it is not clear that those for whom EFT would impose a hardship are proportionately represented. Based on this and on the comments received, Treasury has determined that there is not sufficient justification to distinguish between recipients based on their date of eligibility for payment.

##### Expansion of Hardship Waivers

Final § 208.4(a) expands the hardship waiver provisions to accommodate recipients with mental disabilities or language or literacy barriers. Comments on the 208 NPRM from consumer and community-based organizations and payment recipients presented reasons as to why EFT may not be a viable option for recipients with such disabilities and barriers. A recurring argument heard for each of these categories was that there are factors specific to EFT payments that present greater challenges to recipients than do check payments. For example, a recipient with a mental disability or a language or literacy barrier may be able to sign his or her name on a check but may not be able to navigate through the information on ATM screens.

Consumer and community-based organizations also took issue with the position taken in the 208 NPRM that agencies currently accommodate recipients with mental disabilities by allowing for representative payees to manage the recipients' benefit payments, and that the method by

which payment is made to the representative payee has no effect on the actual recipient. These commenters stated that many recipients with mental disabilities are able to perform tasks necessary to negotiate a check payment on their own and do not need to rely on a representative payee to do so. However, this is not usually the case with EFT payments, since an electronic system is more difficult to conceptualize. As a result, the EFT requirement can drastically reduce a recipient's financial independence and subject him or her to the inherent risks associated with relying on a third party to access a payment.

Broadening the hardship waivers available to recipients is consistent with the legislative history of the Act which refers specifically to "individuals who have geographical, physical, mental, educational, or language barriers" and a concern that these individuals may not be able to receive their benefits if payment is required to be made by EFT. See 142 Cong. Rec. H4090 (April 25, 1996).

#### Waiver Process

In addition to broadening the hardship waivers available to individuals, the final rule makes clear Treasury's intent that the waiver process will be based on an individual's self-determination that a hardship exists. By changing the language from "certifies" to "determines" and adding the phrase "in his or her sole discretion," Treasury is indicating that an individual has the right to determine whether he or she qualifies for a waiver. As discussed below in the section-by-section analysis of § 208.7, an agency may request that the individual inform the agency of his or her election to rely upon a waiver. However, the agency may not require evidence of any condition underlying the recipient's election of a waiver. In addition, if the agency receives no response from a recipient, the agency must continue to make payment by check.

The change from "certifies" to "determines" also addresses a concern raised by the Social Security Administration and other agencies that collecting and documenting written waiver certifications would impose a heavy administrative burden on those agencies. Under the final rule, there is no requirement that written certifications be obtained.

In contrast to § 208.4(a), the availability of a waiver under §§ 208.4(b) through (g) is to be determined in the first instance by the agency responsible for making the payment. Under the regulation, there is

no requirement that Treasury approve or certify the applicability of a waiver under circumstances described in §§ 208.4(b) through (g). Treasury believes that, as a general matter, agencies are in the best position to determine whether the criteria set forth at §§ 208.4(b) through (g) are met in a particular set of circumstances. Treasury does not intend to review routinely agency decisions to make payment by check or cash in circumstances addressed in §§ 208.4(b) through (g). However, Treasury may consider the appropriateness of check or cash payments in reliance on §§ 208.4(b) through (g) on a case-by-case basis.

#### Automatic Waiver

In addition to the changes mentioned above, the final rule contains three changes in the automatic waiver provision for individuals who do not have an account with a financial institution. In the 208 NPRM, this waiver was until the earlier of January 2, 2000, or the date as of which the Secretary determines that the ETA<sup>SM</sup> is available.

First, the final rule adds the phrase "who are eligible to open an ETA<sup>SM</sup>" to reflect the change made in final § 208.5 limiting eligibility for an ETA<sup>SM</sup> to individuals who receive a Federal benefit, wage, salary, or retirement payment. Second, the final rule deletes the phrase "who certify" to emphasize that individuals who do not have an account with a financial institution do not need to take any action in order to invoke the automatic waiver. Third, the final rule deletes the reference to January 2, 2000, and states that an automatic waiver is granted until such date as the Secretary determines that the ETA<sup>SM</sup> is available. Agencies stated that they will need six to nine months after the ETA<sup>SM</sup> becomes operationally available to enroll recipients who elect to have access to their payment through this account. In order to ensure that agencies have the necessary lead time, Treasury has deleted the January 2, 2000, date reference.

#### Waiver for Non-Recurring Payments

Agency comments were received on proposed § 208.4(g), which provides a waiver for payment by EFT where the agency does not expect to make more than one payment to the same recipient within a one-year period, i.e., the payment is non-recurring, and the cost of making the payment via EFT exceeds the cost of making the payment by check. This waiver was intended to address those situations in which payment by check might be more cost-effective than payment by EFT given the

administrative cost of enrolling a recipient for an EFT payment.

One agency requested clarification as to who would be responsible for the cost/benefit analysis. Another agency requested clarification as to whether a cost/benefit analysis must be documented to support an agency's decision to issue a check. While the cost/benefit of making an EFT payment over a check payment is generally known, the cost to each agency of enrolling a recipient for EFT payment is best determined by that agency. Therefore, Treasury is leaving it to the agency to determine if it is more cost-effective to make a non-recurring payment by check rather than electronically. Agencies will not be expected to document a cost/benefit analysis for every non-recurring payment, but should establish internal procedures for determining when such payments are to be made by check.

As pointed out in the preamble to the 208 NPRM, this waiver category was not meant to suggest that the dollar amount of the payment is at any time a determining factor for the application of the waiver. Rather, the determining factor is whether the payment is a one-time payment as opposed to a recurring payment.

#### No Waiver for Vendor Payments

As with the 208 NPRM, the final rule contains no specific waiver for vendor payments. Treasury received several comments from agencies and Federal Government vendors citing a need for a waiver in those circumstances where remittance data, i.e., information that identifies the payment, is not available to the vendor. This may happen because a financial institution is not capable operationally of delivering the data to the vendor in human readable form or because the cost to the vendor of obtaining the data is determined to be unacceptably high. Vendors require this payment-related information to reconcile payments against outstanding invoices.

Since the publication of the 208 NPRM, much progress has been made in the effort to provide vendors with access to remittance data. As of September 1998, the National Automated Clearing House Association rules require that upon request of a recipient, a financial institution receiving a payment to be credited to the recipient's account through the ACH must provide all payment-related information sent with the payment. To assist in this effort, the Board of Governors of the Federal Reserve System has acquired low-cost software that will enable financial institutions to capture payment

information and present it to the vendor in readable form. This software, expected to be released in the fourth quarter of 1998, will be made available to approximately 12,000 financial institutions through Fedline, the Federal Reserve's telecommunication service.

Also, the Service's Austin Financial Center has developed an online internet site where vendors can use a password to access information about a Federal payment. This service currently is available to all Federal agencies and their vendors. Other ongoing efforts include training for agencies on correctly formatting the addenda record in which payment information is contained and outreach through literature and local ACH association workshops for financial institutions and their customers. In addition, Treasury has developed a standard check insert, which agencies are encouraged to use, to assist in enrolling vendors in Direct Deposit.

Treasury expects that these efforts will result in readily available solutions to this problem by the January 2, 1999, deadline. Treasury will continue to monitor the development of these solutions to determine if some modification is needed.

#### *E. Section 208.5—Availability of the ETAS<sup>SM</sup>*

Proposed § 208.5 provided that where the requirement to pay by EFT is not waived and an individual either certifies that he or she does not have an account with a financial institution or fails to provide information necessary to send the payment by EFT, Treasury would provide the individual with access to an account at a Federally-insured financial institution selected by Treasury.

In response to comments and as a result of further research and analysis, Treasury has taken a different approach to account access in the final rule. Final § 208.5 states that an individual who receives a Federal benefit, wage, salary, or retirement payment shall be eligible to open an ETAS<sup>SM</sup> at a financial institution that offers ETAS<sup>SM</sup>. Any Federally-insured financial institution will be permitted (but not required) to offer ETAS<sup>SM</sup> as Treasury's Financial Agent upon entering into an ETAS<sup>SM</sup> Financial Agency Agreement. (The designation of the financial institution as Treasury's Financial Agent is authorized under Pub. L. 104-208.) The final regulation provides that Treasury shall publish required attributes for ETAS<sup>SM</sup> and that any ETAS<sup>SM</sup> offered by a financial institution must comply with those requirements. Further, it clarifies that the offering of an ETAS<sup>SM</sup> constitutes

the provision of EBT services within the meaning of Pub. L. 104-208.

#### Eligibility for an ETAS<sup>SM</sup>

The final rule limits eligibility for an ETAS<sup>SM</sup> to individuals who receive a Federal benefit, wage, salary, or retirement payment. The comments received indicate that it is this group of recipients of Federal payments—rather than recipients of vendor or miscellaneous payments—who most need, and would benefit from, a low-cost account such as the ETAS<sup>SM</sup>. It is Treasury's objective to encourage this group of individuals to move into the financial mainstream through access to ETAS<sup>SM</sup>.

The 208 NPRM stated that Treasury would provide access to an account "where the requirement to pay by electronic funds transfer is not waived" and "an individual either certifies that he or she does not have an account with a financial institution, or fails to provide information pursuant to § 208.8." All of these conditions have been removed in the final rule. Under final § 208.5, any recipient of a Federal benefit, salary, wage, or retirement payment is eligible to open an ETAS<sup>SM</sup>. However, if a recipient does not affirmatively elect electronic deposit to an ETAS<sup>SM</sup> or another account at a financial institution, the recipient will receive payment by check.

Comments received from consumer and community-based organizations urged Treasury to allow recipients to receive their Federal payments through an ETAS<sup>SM</sup> even if the recipient has another account at a financial institution. Several commenters expressed the concern that some recipients are opening accounts which are too costly because of the fear that their payments would be stopped or interrupted if an account was not opened. Some commenters were concerned that financial institutions' fee structures are confusing for some recipients and that account-related fees may increase, with the result that recipients can no longer afford to maintain an account that was affordable when opened. Other commenters expressed a concern that a recipient's financial circumstances can change, so that the recipient can no longer afford to maintain an account at a financial institution. Some consumer and community-based organizations also commented that individuals may have established accounts for certain limited uses, such as a savings account set up for a special purpose, which they do not wish to use to access their Federal payment.

The final rule addresses all of these concerns by making any individual who receives a Federal benefit, wage, salary, or retirement payment eligible for an ETAS<sup>SM</sup>, regardless of whether the individual has an account at a financial institution.

#### Regulation of Non-ETAS<sup>SM</sup> Accounts

Treasury believes that expanding eligibility for the ETAS<sup>SM</sup> mitigates the concern expressed by several consumer organizations that the provision of the ETAS<sup>SM</sup> as contemplated in the 208 NPRM would not fully satisfy the Act's "reasonable cost" and "same consumer protections" requirements.

Specifically, the Act provides:

Regulations under this subsection shall ensure that individuals required under subsection (g) <sup>1</sup> to have an account at a financial institution because of the application of subsection (f)(1) <sup>2</sup>—

(A) Will have access to such an account at a reasonable cost; and

(B) Are given the same consumer protections with respect to the account as other account holders at the same financial institution. 31 U.S.C. 3332(i).

As discussed in the preamble to the 208 NPRM, the requirement that Treasury ensure access to an account could be read very broadly to refer to all individual recipients who are required to receive their Federal payments by EFT, whether or not they already have an account. 62 FR 48714, 48723. The Act also could be read more narrowly as referring to those individuals who have not voluntarily selected or opened an account at a financial institution, who are not eligible for a waiver, and who will need access to an account in order to receive a Federal payment by EFT. Several commenters urged Treasury to read the requirement in the broader fashion and to regulate the pricing and terms of all accounts at financial institutions to which Federal payments may be sent by EFT. Consumer and community-based organizations in favor of such regulation stated that some financial institutions charge fees for basic banking services that are excessive or inadequately disclosed. These groups were particularly concerned with the development of arrangements between financial institutions and non-financial institution payment service providers in

<sup>1</sup> Subsection (g) requires each recipient of Federal payments required to be made by EFT to designate a financial institution or other authorized agent to which payments shall be made and to provide the paying agency with the information necessary for the recipient to receive EFT payments through the institution or agent.

<sup>2</sup> Subsection (f)(1) requires that, with certain exceptions, all Federal payments made after January 1, 1999, be made by EFT.

which individuals may have access to their Federal payments only through the service provider under terms and conditions that the individuals may not understand. Consumer and community-based organizations stated that the fees charged in connection with accessing payments through these types of arrangements may be both substantial and complicated.

In contrast to comments received from consumer and community-based organizations, financial institutions commented that Treasury should not regulate banking fees and services because such regulation would interfere with the efficient operation of the free market. Both financial institutions and other providers of financial services, including check cashers, urged Treasury not to regulate arrangements in which recipients establish and access accounts at financial institutions through check cashers, stating that check cashers provide convenient hours and locations and a variety of services not otherwise available to recipients.

Treasury has decided in this rulemaking not to engage in a broad regulation of accounts, other than ETAs<sup>SM</sup>, offered directly by financial institutions. By providing that all recipients of Federal benefit, wage, salary, and retirement payments are eligible for an ETA<sup>SM</sup>, Treasury believes that many of the concerns expressed by consumer organizations should be allayed. Regulating all accounts opened voluntarily by Federal payment recipients would create a significant burden on bank regulatory agencies and the banking industry and would interfere with the functioning of the market for financial services. Treasury believes that the emphasis of the Act is on ensuring that individuals required to have an account in order to receive Federal payments will not be disadvantaged by establishing an account for receipt of their payments. To this end, the Act requires that these individuals be afforded access to an account at a reasonable cost and with the same consumer protections made available to other individuals who maintain accounts at the same financial institution.

#### Non-Financial Institution Payment Service Providers

Treasury believes that a majority of Federal payment recipients receiving electronic Federal payments have chosen or will choose an account that best suits their needs and resources. However, Treasury is very concerned with the nature of certain arrangements that some financial institutions have entered into with non-financial

institution providers of payment services, such as check cashers, currency exchanges, or money transmitters. Such arrangements may involve giving recipients access to EFT deposits in their insured accounts through the uninsured service provider. Some commenters stated that non-financial institutions provide payment services in rural areas and low and moderate income neighborhoods not served by banks and other financial institutions. While arrangements between financial institutions and non-financial institution payment service providers could provide recipients with an expanded range of alternatives for payment services, they also raise the possibility that recipients would not be clearly informed of the fee structures involved, the legal nature of the relationship, the application of deposit insurance, or the other options available under the Act. At present, there is no comprehensive Federal regulation of non-financial institution payment service providers and, except in limited cases, no Federal oversight of arrangements between financial institutions and non-financial institution service providers.

Treasury has advised the Federal bank regulatory agencies that supervise financial institutions that an insured financial institution should provide appropriate disclosures to customers when it participates in arrangements with non-financial institution providers of payment services. Such disclosures should fully and fairly convey information about the fees and costs imposed by all of the parties to the arrangement, as well as the legal relationships involved, and should explain the applicability of federal deposit insurance insofar as it is relevant to the arrangement. In addition, disclosures should be framed so as not to mislead recipients as to the requirements of the Act.

Treasury is monitoring the development of arrangements between financial institutions and uninsured non-financial institution payment service providers and may propose a regulation covering these arrangements. Any such action would be undertaken as a new regulatory action and will be published for public comment.

#### Notice of ETA<sup>SM</sup> Attributes

With respect to the particular features and structure of the ETA<sup>SM</sup>, the preamble to the 208 NPRM requested comment on several questions related to the ETA<sup>SM</sup>, including the role of non-financial institutions in providing access to the ETA<sup>SM</sup>. Treasury expects to publish shortly in the **Federal**

**Register** a notice of proposed ETA<sup>SM</sup> features with a request for comment. Following the comment period, Treasury will publish a notice setting forth the required attributes for ETAs<sup>SM</sup>.

#### Access to an ETA<sup>SM</sup>

In formulating a final rule that allows, but does not require, any Federally-insured financial institution to offer ETAs<sup>SM</sup>, Treasury's goal is to provide maximum convenient access for recipients. However, Treasury is aware that not all financial institutions may opt to offer ETAs<sup>SM</sup> and that some recipients may not have convenient access to an ETA<sup>SM</sup>. In such cases, the recipient will have the option of relying on a geographic, financial, or other hardship waiver in order to continue receiving payment by check.

#### Participation by Credit Unions

Treasury received comments from a number of credit unions expressing an interest in providing ETAs<sup>SM</sup>. Credit unions emphasized their long tradition of providing low-cost banking services and financial education to their members. Credit unions were concerned, however, that the common bond and field of membership limitations contained in the Federal Credit Union Act (FCUA) would limit their ability to provide ETAs<sup>SM</sup> to non-members.

Treasury recognizes that credit unions' current common bond and field of membership requirements may limit their ability to offer accounts to non-members, and is aware of recent legislation that broadens the common bond requirements of the FCUA. Treasury encourages credit unions to participate in making low-cost accounts available to recipients, subject to any applicable constraints on their legal authority to do so.

#### Federal/State EBT Programs

Several States submitted comments requesting clarification of the relationship between the ETA<sup>SM</sup> and State EBT programs. One State sought reassurance that the development of the ETA<sup>SM</sup> would not conflict with the ongoing development of joint Federal/State EBT programs. Another State requested clarification of whether the use of existing account structures for Federal/State EBT programs would be in compliance with this regulation. Two States raised concerns about the relationship between a Financial Agent designated for the Federal/State EBT program and a Financial Agent designated for the ETA<sup>SM</sup>. One State expressed the concern that different requirements for Regulation E coverage

for State-administered benefits and for Federal benefits would hinder efforts to have both State and Federal benefits on a single card. One State commented that States should be allowed to participate in the selection of a Financial Agent in situations in which the State wishes to credit payments to an account opened by Treasury on behalf of a recipient. A financial institution providing State EBT services urged Treasury to make Federal benefit card services available through a State EBT program on a voluntary basis and regardless of whether or not a recipient was receiving State EBT services.

It is Treasury's intention to continue working with States in designing and implementing Federal/State EBT programs. States will play an active role in developing the linkage between State and Federal EBT programs and will have an opportunity to provide input on many of the duties and qualifications of the Financial Agents designated by Treasury in connection with Federal/State EBT programs.

Treasury anticipates that many individuals who receive both Federal and State benefit payments may elect to participate in a Federal/State EBT program in light of the convenience of receiving both Federal and State payments through a single delivery system. Those individuals will also have the option of receiving their State payments through a State EBT program, if available, and their Federal payments through Direct Deposit or an ETA<sup>SM</sup>.

#### *F. Section 208.6—General Account Requirements*

Section 208.6 provides requirements for accounts held by recipients at a financial institution and designated by the recipient for deposit of a Federal payment. These accounts include ETAs<sup>SM</sup> as well as accounts other than ETAs<sup>SM</sup> to which a Federal payment is sent.

Proposed § 208.6 required that all Federal payments made by EFT be deposited into an account at a financial institution. It further required that the account at the financial institution be in the name of the recipient with two exceptions: (1) where an authorized payment agent has been selected and (2) where payment is to be deposited into an investment account established through a registered broker/dealer, provided the account and associated records are structured so that the recipient's interest is protected under applicable Federal or State deposit insurance regulations.

#### *Account Title Requirement*

Treasury received numerous comments regarding the requirement that the account be in the name of the recipient. Several vendors pointed out that, for operational reasons, it may be advantageous for vendor payments to be deposited into an account other than one in the name of the vendor. For example, to avoid a proliferation of bank accounts, a vendor that is a subsidiary of a corporation may designate that payment be made to an account in the general corporate name rather than one in the name of the subsidiary. Other vendors, especially small businesses, commented that they routinely designate a bank account in the name of an accountant or other service provider to receive payments on behalf of the business.

Other commenters explained that Federal wage, salary, and retirement payments are sometimes deposited into savings, debt repayment, and other accounts that may not be in the recipient's name. In the case of Federal wage and salary payments, recipients may request that their payment be directed to a third party's account for a variety of reasons including those related to child support and payments to designated charities. For retirement payments, it is common for a surviving spouse to be entitled to a portion of a deceased recipient's retirement payment. In these cases, the payment may be deposited into an account in the name of the surviving spouse.

The requirement that an account be in the name of the recipient is designed to ensure that a payment reaches the intended recipient. Treasury acknowledges, however, that there may be valid reasons for allowing payments to be made to accounts in names other than those of the payment recipient. In the case of vendor payments, Treasury believes that the benefits of allowing payments to be deposited into an account in a name other than that of the vendor outweigh the risks of doing so. Therefore, Treasury has modified the "in the name of the recipient" requirement in § 208.6 to exclude vendor payments.

Treasury has not made any changes to final § 208.6 with respect to wage, salary, and retirement payments. Treasury has considered the concerns expressed in the comment letters and believes that such concerns are in most, if not all, cases already addressed by existing rules. For example, where a recipient's payment is garnished for child support purposes or where a recipient has designated a discretionary allotment for a charity, such

garnishment or allotment is made prior to the time the recipient's payment is deposited into an account at a financial institution and, therefore, would not fall within the "in the name of the recipient" requirement. Where a surviving spouse is entitled to a deceased recipient's retirement payment, the surviving spouse is considered to be the recipient and, therefore, the payment would be deposited into the surviving spouse's account.

#### *Exceptions to Account Title Requirements*

As with the 208 NPRM, final § 208.6 contains two exceptions to the "in the name of the recipient" requirement. The first exception related to authorized payment agents is unchanged from the 208 NPRM. The second exception related to investment accounts contains two changes from the 208 NPRM.<sup>3</sup> First, the exception has been expanded to cover investment accounts established through an investment company registered under the Investment Company Act of 1940 in addition to investment accounts established through a securities broker or dealer registered under the Securities Exchange Act of 1934. Second, the requirement contained in the 208 NPRM that the investment account and all associated records be structured so that the recipient's interest is protected under applicable Federal or State deposit insurance regulations has been deleted.

#### *Authorized Payment Agent Exception*

Numerous comments were received on the two exceptions to the "in the name of the recipient" requirement contained in proposed § 208.6(b). Some commenters argued for expanding the first exception related to authorized payment agent. As discussed above in the section-by-section analysis of § 208.2, these commenters believed that the definition of "authorized payment agent" should be expanded beyond its present definition of an authorized payment agent as representative payee or fiduciary under payment agency regulations.

Two types of entities that requested either an expansion of the definition or another exception to the requirement that the account be in the name of the recipient were nursing homes and non-financial institutions. According to the

<sup>3</sup>This exception from the requirement that the account be "in the name of the recipient" would not be available for an ETA<sup>SM</sup> since ETAs<sup>SM</sup> will not be investment accounts established through a securities broker or dealer or through an investment company.

comments received from nursing homes, many nursing home residents sign their monthly benefit checks over to the nursing home for payment of services rendered and funds maintenance. To comply with EFT, these check recipients would be required to establish individual bank accounts to receive their Federal benefit payments unless a representative payee or fiduciary is designated. According to one nursing home, many of their residents are not able to designate the nursing home as representative payee or fiduciary because the residents in question do not satisfy the required qualifications issued by benefit agencies. Comments from nursing homes indicate that by allowing Federal payments to be deposited into a trust account held by the nursing home, not only would the cost to the recipient decrease, since one account would replace a myriad of accounts, but this would allow for more efficient and convenient service to recipients.

In the 208 NPRM, Treasury noted that the determination of who can act on behalf of a payment recipient is addressed under the rules of the various agencies, e.g., the Railroad Retirement Board, the Social Security Administration, and the Department of Veterans Affairs. The rules governing these representational relationships are longstanding and well established. In the 208 NPRM, Treasury deferred to the administering agencies in determining who is authorized to receive payment on behalf of a beneficiary and, therefore, left any questions regarding who is or who may be considered a representative payee or fiduciary to the agency making the payment.<sup>4</sup> While recognizing that there may be specific circumstances not addressed in the current regulations, Treasury believes that these issues are better left to the payment agencies. Therefore, Treasury has left unchanged the exception related to authorized payment agent.

Numerous comments were also received from non-financial institutions requesting an exception to the requirement that the account be in the name of the recipient. According to non-financial institutions, an exception would streamline the process by which non-financial institutions would have access to Federal payments. Instead of

<sup>4</sup> Several nursing homes requested clarification on whether a trust account could be established to receive benefit payments on behalf of all residents that had designated the nursing home as representative payee. Treasury's regulations require only that the account be titled in accordance with the regulations governing the representative payee or fiduciary, i.e., the account may be titled in any manner that satisfies the regulations of the payment agency.

the funds being deposited into an account in the name of the recipient and then swept into a master account held by the non-financial institution, the funds could be directly deposited to the master account. In its comments to the 208 NPRM, one money transmitter pointed out that it is far more efficient and cost-effective to maintain one master account than a multitude of individual transaction accounts. According to the money transmitter, a reduction in the costs incurred to set up the accounts would result in a reduction in the cost passed on to the recipient.

Treasury acknowledges that allowing payments to be deposited into a master account in the name of a non-financial institution could potentially be a cost savings to a recipient. However, as discussed in the preamble to the 208 NPRM, Treasury is concerned that such arrangements might not provide the same level of consumer protection as do the arrangements otherwise provided for in § 208.6. Specifically, Treasury is concerned about the potential failure of entities to honor their obligations, especially since there is no comprehensive Federal regulation of non-financial institution service providers and, except in limited cases, no Federal oversight of arrangements such as were proposed in the comment letters. Therefore, permitting Federal payments to be deposited into accounts controlled by a wide range of entities may expose recipients to the credit risk associated with the failure of such entities. For the above reasons, Treasury has decided not to extend the authorized payment agent exception to non-financial institutions or provide an additional exception for such institutions.

#### Investment Account Exception

In addition to comments on the authorized payment agent exception contained in proposed § 208.6(b), Treasury also received comments on the investment account exception. Investment advisors and investment management companies generally commented that limiting the exception to investment accounts established through a broker or dealer registered under the Securities Exchange Act of 1934 was too restrictive and requested that the exception be broadened. Commenters stated that, as proposed, this exception would not permit the deposit of Federal payments directly into money market mutual funds. Rather, a recipient would be required to have the payment first deposited into his or her own account or into a brokerage account and then transferred to the mutual fund account.

In support of their request, commenters emphasized that registered investment companies, like registered brokers and dealers, are highly regulated entities. The Investment Company Act of 1940 imposes comprehensive requirements on the organization and operation of investment companies. Before making a public offering, an investment company must register under the Investment Company Act, and it must register its securities under the Securities Act of 1933. Among other things, the Investment Company Act imposes requirements regarding custody of assets, capital structure, investment activities, valuation of assets, and conflicts of interest.

Treasury has carefully considered these comments and has consulted with the Securities and Exchange Commission regarding the regulation of registered investment companies. Based on the information received, Treasury believes it is appropriate to expand the "investment account" exception to include investment accounts established through an investment company registered under the Investment Company Act of 1940, and has modified proposed § 208.6(b)(2) accordingly.

Another provision in proposed § 208.6(b)(2) that received comment was the requirement that, for an account in the name of the broker or dealer, the account and all associated records be structured so that the recipient's interest is protected under applicable Federal or State deposit insurance regulations. Commenters urged Treasury to reconsider this requirement. They stated that the costs and burden of restructuring operations to establish and maintain a system that would provide individual deposit insurance coverage would far outweigh any possible benefit to payment recipients.

According to commenters, funds deposited into an account in the name of a broker or dealer generally remain in the account for a very short period of time. In most cases, the funds, once deposited, are transferred immediately to an investment vehicle. Therefore, the required deposit insurance would only apply for the short period of time that the funds remained in the account. Commenters also stated that any recipient depositing a payment into a broker or dealer account would have already established an account with the broker or dealer and therefore would be aware of the uninsured nature of an investment and the associated risks.

Based on these comments and after consultation with the Securities Investor Protection Corporation and the Federal Deposit Insurance Corporation, Treasury has determined that the nature of

investment accounts makes it impractical to require that deposit insurance apply to such accounts. Treasury has, therefore, deleted in the final rule the requirement that any account in the name of the broker or dealer and all associated records be structured so that the recipient's interest is protected under applicable Federal or State deposit insurance regulations.

#### *G. Section 208.7—Agency Responsibilities*

Final § 208.7 requires agencies to notify check recipients and newly-eligible payment recipients of options available to them and to establish procedures that allow recipients to indicate that they elect to have payment deposited by EFT to an account held by them.

##### Requirement To Make Disclosures

Final § 208.7(a) requires agencies to notify each individual who is eligible to receive a Federal benefit, wage, salary, or retirement payment and who is not already receiving payment by EFT, of the individual's rights and obligations under §§ 208.3, 208.4(a), and 208.5. The agency disclosure requirement does not extend to individuals to whom the agency is not required to make payments electronically pursuant to a waiver provided in §§ 208.4(b) through 208.4(g).

Treasury received comments from consumer and community-based organizations urging Treasury to fully inform Federal benefit payment recipients of all options available to them so that these recipients would not enter into costly or otherwise inappropriate account arrangements. Some community-based organizations asked that Treasury's public education efforts be stopped until the features of the ETA<sup>SM</sup> and waiver categories are established. One benefit agency requested that it be exempted from the January 2, 1999, deadline for all payments and instead be allowed to begin its enrollment for all recipients after the features of the ETA<sup>SM</sup> have been established.

Treasury agrees that fully informing recipients of all options is a critical component of EFT implementation. Treasury sees no benefit to stopping the public education effort or delaying implementation of EFT but will instead focus on ensuring that recipients are aware of available waiver categories and options concerning the ETA<sup>SM</sup>. As of the effective date of this regulation, agencies are required to begin providing such disclosures to all individuals eligible to receive a Federal benefit, wage, salary, or retirement payment and who are not

already receiving payment by EFT. In addition, once the ETA<sup>SM</sup> is available, agencies will be expected to notify all eligible individuals who are not receiving payment by EFT, including those who may have received a prior disclosure, of the availability of the ETA<sup>SM</sup> and other options.

Agencies must provide the required disclosure to newly eligible recipients and those currently receiving checks, but not to those currently receiving their payments by EFT. Requiring agencies to notify recipients who currently receive payments by EFT would place a heavy administrative and financial burden on agencies. However, to ensure that all recipients are aware of their options, including those recipients who currently receive their payments electronically, it is Treasury's intent to provide, through the public education effort, ongoing disclosure and notification.

##### Model Disclosure Language

To facilitate compliance with § 208.7(a), Appendices A and B set forth model language for agency use. Appendix A is for use until the date the Secretary determines the ETA<sup>SM</sup> is available. Appendix B is for use on and after the date the Secretary determines the ETA<sup>SM</sup> is available. The phrase "substantially similar" in § 208.7 gives an agency the flexibility to tailor the model disclosure to its recipients. For example, the Social Security Administration might prefer to use the phrase "Social Security payment" instead of "Federal payment" in communicating with its recipients.

##### Requirement To Establish Procedures

In addition to requiring disclosure, the final rule requires agencies to establish procedures that allow recipients to indicate that the recipient elects to have payment deposited by EFT to an account held by the recipient. Proposed § 208.7 required that the agency "obtain" either 1) information to make an EFT payment if the recipient had an account at a financial institution or 2) a written certification that the recipient did not have an account or that receiving an EFT payment would impose a hardship on the recipient. The word "obtain" implied that a written response was necessary and also implied that the recipient must respond in all cases.

The requirement in final § 208.7(b) that agencies "put into place procedures that allow recipients to indicate that the recipient elects to have payment deposited by electronic funds transfer to an account held by the recipient" replaces the requirement in the 208

NPRM that agencies "obtain" account information or written waiver certifications from recipients. The word "indicate" is used to make it clear that the communication need not be in writing, as was implied by the use of the term "certification" in the 208 NPRM. The term "elect" is used to clarify that individuals have a range of options.

Under final Part 208, agencies are not required to obtain written waiver determinations, and in the case of the automatic waiver, recipients need not respond at all. The language in final § 208.7(b) makes it clear that although the agency must have a procedure in place for collecting account information if the recipient elects to receive payment electronically, the agency is not required to gather waiver information from the recipient. Rather, the agency may decide, at its discretion, whether or not to request information from the recipient, in writing or orally, indicating that a hardship waiver has been invoked. However, if the recipient does not respond to such a request, the agency must presume that the recipient has invoked a waiver until further communication is received and may not delay or withhold the recipient's payment.

#### *H. Section 208.8—Recipient Responsibilities*

The wording of final § 208.8 is identical to that in proposed § 208.8(a). In the 208 NPRM, however, the phrase "an account with a financial institution" referred only to non-ETA<sup>SM</sup> accounts. In the final rule "an account with a financial institution" refers to ETAs<sup>SM</sup> as well other accounts held by recipients at financial institutions. As with the 208 NPRM, the phrase "who is required to receive payment by electronic funds transfer" is an acknowledgment that waivers will apply in some cases.

Under proposed § 208.8(b), any individual required to receive payment by EFT who does not have an account with a financial institution would have been required to certify in writing that he or she does not have an account, and would have been provided with an ETA<sup>SM</sup>. As discussed in connection with § 208.5, the final rule provides that the ETA<sup>SM</sup> is available to all individuals who are eligible to receive a Federal benefit, wage, salary, or retirement payment and who request an ETA<sup>SM</sup>, whether or not they already have an account at a financial institution. Therefore, final § 208.8 removes this provision.

Proposed § 208.8(c) required that each individual who qualifies for, and wishes to apply for, a waiver must certify that

election in writing. As discussed above in connection with § 208.4(a), the recipient has the sole discretion to determine whether he or she qualifies for a waiver. There is no longer an application and written certification requirement. Therefore, proposed § 208.8(c) is removed from the final rule.

#### *I. Section 208.9—Compliance*

##### Monitoring Compliance

Final § 208.9 is unchanged from proposed § 208.9 except that the 208 NPRM stated that Treasury may require agencies to provide information about "the methods by which they make payments," whereas the final regulation provides that Treasury may require agencies to provide information about "their progress in converting payments to electronic funds transfer." This change was made to clarify that Treasury intends to monitor agencies' progress in converting payments to EFT. If Treasury has reason to believe that sufficient progress is not being made, notwithstanding payments made by check as a result of waivers, an agency may be required to furnish to Treasury information concerning their conversion efforts.

##### Documentation of Waivers

Comments were received from several agencies requesting guidance on documenting compliance with this section. Agencies requested clarification as to what information they must provide to Treasury to document compliance, particularly with respect to the documentation of waivers. One agency asked if Treasury would ever challenge a waiver. Another agency urged Treasury to clearly state that check payments that result from the invocation of a waiver will not result in the assessment of a charge pursuant to 31 U.S.C. 3335.

Treasury does not intend to challenge, or to permit agencies to challenge, the bases upon which individuals invoke waivers. As discussed in connection with § 208.8, individuals are given discretion to determine their eligibility for waivers under § 208.4(a). Check payments made by an agency on the basis of such a waiver will not result in the assessment of a charge. Moreover, Treasury does not intend to review routinely agency decisions to make payment by check or cash in circumstances addressed in §§ 208.4(b) through (g). However, Treasury may consider the appropriateness of check or cash payments by agencies in reliance on §§ 208.4(b) through (g) on a case-by-case basis.

Treasury expects that agencies will document their policies and procedures regarding the use of waivers (including any presumption that a waiver has been invoked where a recipient has not responded to the agency). If Treasury finds such documentation to be sufficient for determining compliance, Treasury will not assess a charge to the agency pursuant to 31 U.S.C. 3335. If there is no documentation for a waived payment or classes of payments, Treasury may determine whether those payments are in compliance with this part on a case-by-case basis.

#### *J. Section 208.10—Reservation of Rights*

This section states that the Secretary reserves the right to waive any provision(s) of this regulation in any case or class of cases. Treasury received a comment on this section from a consumer advocacy organization concerned that the Secretary's discretion in waiving any provision(s) of Part 208 was overly broad and potentially harmful to those recipients currently protected from hardship by waiver provisions set forth in § 208.4(a). Treasury has no intention of withdrawing any hardship waivers set forth in this rule. The intent of this section is to give Treasury flexibility to grant waivers, without amending the rule, for any unforeseen situation where an EFT payment is impossible or impracticable and for which no waivers set forth in § 208.4 may be relied upon.

#### **IV. Special Analysis**

Although it has been determined that this regulation is a significant regulatory action for purposes of § 3(f)(4) of Executive Order 12866, the Office of Management and Budget ("OMB") has waived the preparation of a Regulatory Assessment.

Pursuant to the Regulatory Flexibility Act, it is hereby certified that the regulation will not have a significant economic impact on a substantial number of small entities. Treasury has included seven categories of waivers in the final rule. Further, the rule does not restrict small entities who are currently participating in the delivery of services to recipients who receive their Federal payments by EFT from continuing to do so in the future. Therefore, Treasury believes the rule does not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis is not required.

The collection of information contained in the final rule has been reviewed and approved by the Office of Management and Budget under section 3507(d) of the Paperwork Reduction Act

of 1995 (44 U.S.C. Chapter 35) under Control Number 1510-0066. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

The collection of information in this regulation is contained in § 208.8. The information (name of financial institution, routing number, and account number) is required to enable an agency to pay a recipient of a Federal payment by EFT. The collection of information is mandatory. 31 U.S.C. 3332(g), as amended, requires recipients of Federal payments to "provide to the Federal agency that makes or authorizes the payments information necessary for the recipient to receive electronic funds transfer payments." The likely respondents vary depending on the agency making the payment. For the Service, the likely respondents are employees of the Service who currently receive payments, such as payments for salary, travel reimbursement, or retirement, by check; and individuals and vendors that currently receive vendor payments by check.

The estimated total annual reporting burden is 46 hours. The estimated burden hours per respondent is 0.25 hours. The estimated number of respondents is 183. These figures represent the burden imposed by the Service. The reporting burden imposed by other agencies will be addressed by those agencies.

Comments on the accuracy of the estimate for this collection of information or suggestions to reduce the burden should be sent to the Office of Information and Regulatory Affairs of the Office of Management and Budget, Attention: Desk Officer for Department of the Treasury, Financial Management Service, Washington, D.C., 20503, with copies to Jacqueline Perry, Public Reports Clearance Officer, Financial Management Service, 3361 75th Avenue, Landover, MD, 20785.

#### **List of Subjects in 31 CFR Part 208**

Accounting, Automated Clearing House, Banks, Banking, Electronic funds transfer, Financial institutions, Government payments.

#### **Authority and Issuance**

For the reasons set out in the preamble, 31 CFR Part 208 is revised to read as follows:

#### **PART 208—MANAGEMENT OF FEDERAL AGENCY DISBURSEMENTS**

- Sec.  
208.1 Scope and application.  
208.2 Definitions.

- 208.3 Payment by electronic funds transfer.  
 208.4 Waivers.  
 208.5 Availability of the ETA<sup>SM</sup>.  
 208.6 General account requirements.  
 208.7 Agency responsibilities.  
 208.8 Recipient responsibilities.  
 208.9 Compliance.  
 208.10 Reservation of rights.

**Appendix A—Model Disclosure for Use Until ETA<sup>SM</sup> Becomes Available**

**Appendix B—Model Disclosure for Use After ETA<sup>SM</sup> Becomes Available**

**Authority:** 5 U.S.C. 301; 12 U.S.C. 90, 265, 266, 1767, 1789a; 31 U.S.C. 321, 3122, 3301, 3302, 3303, 3321, 3325, 3327, 3328, 3332, 3335, 3336, 6503; Pub. L. 104–208, 110 Stat. 3009.

**§ 208.1 Scope and application.**

This part applies to all Federal payments made by an agency and, except as specified in § 208.4, requires such payments to be made by electronic funds transfer. This part does not apply to payments under the Internal Revenue Code of 1986 (26 U.S.C.).

**§ 208.2 Definitions.**

(a) *Agency* means any department, agency, or instrumentality of the United States Government, or a corporation owned or controlled by the Government of the United States.

(b) *Authorized payment agent* means any individual or entity that is appointed or otherwise selected as a representative payee or fiduciary, under regulations of the Social Security Administration, the Department of Veterans Affairs, the Railroad Retirement Board, or other agency making Federal payments, to act on behalf of an individual entitled to a Federal payment.

(c) *Disbursement* means, in the context of electronic benefits transfer, the performance of the following duties by a Financial Agent acting as agent of the United States:

(1) The establishment of an account for the recipient that meets the requirements of the Federal Deposit Insurance Corporation or the National Credit Union Administration Board for deposit or share insurance;

(2) The maintenance of such an account;

(3) The receipt of Federal payments through the Automated Clearing House system or other electronic means and crediting of Federal payments to the account; and (4) The provision of access to funds in the account on the terms specified by Treasury.

(d) *Electronic benefits transfer (EBT)* means the provision of Federal benefit, wage, salary, and retirement payments electronically, through disbursement by a financial institution acting as a

Financial Agent. For purposes of this part, EBT includes disbursement through an ETA<sup>SM</sup> and through a Federal/State EBT program.

(e) *Electronic funds transfer* means any transfer of funds, other than a transaction originated by cash, check, or similar paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account. The term includes, but is not limited to, Automated Clearing House transfers, Fedwire transfers, and transfers made at automated teller machines and point-of-sale terminals. For purposes of this part only, the term electronic funds transfer includes a credit card transaction.

(f) *ETA<sup>SM</sup>* means the Treasury-designated electronic transfer account made available by a Federally-insured financial institution acting as a Financial Agent in accordance with § 208.5 of this part.

(g) *Federal payment* means any payment made by an agency.

(1) The term includes, but is not limited to:

(i) Federal wage, salary, and retirement payments;

(ii) Vendor and expense reimbursement payments;

(iii) Benefit payments; and

(iv) Miscellaneous payments including, but not limited to: interagency payments; grants; loans; fees; principal, interest, and other payments related to U.S. marketable and nonmarketable securities; overpayment reimbursements; and payments under Federal insurance or guarantee programs for loans.

(2) For purposes of this part only, the term "Federal payment" does not apply to payments under the Internal Revenue Code of 1986 (26 U.S.C.).

(h) *Federal/State EBT program* means any program that provides access to Federal benefit, wage, salary, and retirement payments and to State-administered benefits through a single delivery system and in which Treasury designates a Financial Agent to disburse the Federal payments.

(i) *Federally-insured financial institution* means any financial institution, the deposits of which are insured by the Federal Deposit Insurance Corporation under 12 U.S.C. Chapter 16 or, in the case of a credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund under 12 U.S.C. Chapter 14, Subchapter II.

(j) *Financial Agent* means a financial institution that has been designated by Treasury as a Financial Agent for the

provision of EBT services under any provision of Federal law, including 12 U.S.C. 90, 265, 266, 1767, and 1789a, and 31 U.S.C. 3122 and 3303, as amended by the Omnibus Consolidated Appropriations Act, 1997, Section 664, Public Law 104–208.

(k) *Financial institution* means:

(1) Any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to make application to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(2) Any mutual savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to make application to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(3) Any savings bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) or any bank which is eligible to make application to become an insured bank under section 5 of such Act (12 U.S.C. 1815);

(4) Any insured credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752) or any credit union which is eligible to make application to become an insured credit union under section 201 of such Act (12 U.S.C. 1781);

(5) Any savings association as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813) which is an insured depository institution (as defined in such Act) (12 U.S.C. 1811 et seq.) or is eligible to apply to become an insured depository institution under the Federal Deposit Insurance Act (12 U.S.C. 1811 et seq.); and

(6) Any agency or branch of a foreign bank as defined in section 1(b) of the International Banking Act, as amended (12 U.S.C. 3101).

(l) *Individual* means a natural person.

(m) *Recipient* means an individual, corporation, or other public or private entity that is authorized to receive a Federal payment from an agency.

(n) *Secretary* means Secretary of the Treasury.

(o) *Treasury* means the United States Department of the Treasury.

**§ 208.3 Payment by electronic funds transfer.**

Subject to § 208.4, and notwithstanding any other provision of law, effective January 2, 1999, all Federal payments made by an agency shall be made by electronic funds transfer.

**§ 208.4 Waivers.**

Payment by electronic funds transfer is not required in the following cases:

(a) Where an individual determines, in his or her sole discretion, that payment by electronic funds transfer would impose a hardship due to a physical or mental disability or a geographic, language, or literacy barrier, or would impose a financial hardship. In addition, the requirement to receive payment by electronic funds transfer is automatically waived for all individuals who do not have an account with a financial institution and who are eligible to open an ETA<sup>SM</sup> under § 208.5, until such date as the Secretary determines that the ETA<sup>SM</sup> is available;

(b) Where the political, financial, or communications infrastructure in a foreign country does not support payment by electronic funds transfer;

(c) Where the payment is to a recipient within an area designated by the President or an authorized agency administrator as a disaster area. This waiver is limited to payments made within 120 days after the disaster is declared;

(d) Where either:

(1) A military operation is designated by the Secretary of Defense in which uniformed services undertake military actions against an enemy, or

(2) A call or order to, or retention on, active duty of members of the uniformed services is made during a war or national emergency declared by the President or Congress;

(e) Where a threat may be posed to national security, the life or physical safety of any individual may be endangered, or a law enforcement action may be compromised;

(f) Where the agency does not expect to make more than one payment to the same recipient within a one-year period, i.e., the payment is non-recurring, and the cost of making the payment via electronic funds transfer exceeds the cost of making the payment by check; and

(g) Where an agency's need for goods and services is of such unusual and compelling urgency that the Government would be seriously injured unless payment is made by a method other than electronic funds transfer; or, where there is only one source for goods or services and the Government would be seriously injured unless payment is made by a method other than electronic funds transfer.

**§ 208.5 Availability of the ETA<sup>SM</sup>.**

An individual who receives a Federal benefit, wage, salary, or retirement payment shall be eligible to open an ETA<sup>SM</sup> at any Federally-insured

financial institution that offers ETAs<sup>SM</sup>. Any Federally-insured financial institution shall be eligible, but not required, to offer ETAs<sup>SM</sup> as Treasury's Financial Agent. A Federally-insured financial institution that elects to offer ETAs<sup>SM</sup> shall, upon entering into an ETA<sup>SM</sup> Financial Agency Agreement with the Treasury, be designated as Treasury's Financial Agent for the offering of the account pursuant to Public Law 104-208. Treasury shall make publicly available required attributes for ETAs<sup>SM</sup> and any ETA<sup>SM</sup> offered by a Federally-insured financial institution shall comply with such requirements. The offering of an ETA<sup>SM</sup> shall constitute the provision of EBT services within the meaning of Public Law 104-208.

**§ 208.6 General account requirements.**

(a) All Federal payments made by electronic funds transfer, including those made through an ETA<sup>SM</sup>, shall be deposited into an account at a financial institution. For all payments other than vendor payments, the account at the financial institution shall be in the name of the recipient, except as provided in paragraph (b) of this section.

(b)(1) Where an authorized payment agent has been selected, the Federal payment shall be deposited into an account titled in accordance with the regulations governing the authorized payment agent.

(2) Where a Federal payment is to be deposited into an investment account established through a securities broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, or an investment account established through an investment company registered under the Investment Company Act of 1940 or its transfer agent, such payment may be deposited into an account designated by such broker or dealer, investment company, or transfer agent.

**§ 208.7 Agency responsibilities.**

(a) An agency shall disclose to each individual who is eligible to receive a Federal benefit, wage, salary, or retirement payment and who is not already receiving payment by electronic funds transfer the individual's rights and obligations under §§ 208.3, 208.4(a) and 208.5 of this part, unless payment by electronic funds transfer is not required pursuant to any provision of subsections (b) through (g) of § 208.4.

(1) Prior to the date the ETA<sup>SM</sup> becomes available, the disclosure shall be in a form substantially similar to the model disclosure set forth in appendix A of this part.

(2) On and after the date the ETA<sup>SM</sup> becomes available, the disclosure shall be in a form substantially similar to the model disclosure set forth in appendix B of this part.

(b) An agency shall put into place procedures that allow recipients to indicate that the recipient elects to have payment deposited by electronic funds transfer to an account held by the recipient at a financial institution. In addition, an agency may put into place procedures to request that individuals who are invoking a hardship waiver under § 208.4(a) indicate, in writing or orally, that a hardship waiver has been invoked. However, an agency may not delay or withhold payment if a recipient does not respond to such a request.

**§ 208.8 Recipient responsibilities.**

Each recipient who is required to receive payment by electronic funds transfer and who has an account with a financial institution must, within the time frame specified by the agency making the payment, designate a financial institution through which the payment may be made and provide the agency with the information requested by the agency in order to effect payment by electronic funds transfer.

**§ 208.9 Compliance.**

(a) Treasury will monitor agencies' compliance with this part. Treasury may require agencies to provide information about their progress in converting payments to electronic funds transfer.

(b) If an agency fails to make payment by electronic funds transfer, as prescribed under this part, Treasury may assess a charge to the agency pursuant to 31 U.S.C. 3335.

**§ 208.10 Reservation of rights.**

The Secretary reserves the right, in the Secretary's discretion, to waive any provision(s) of this regulation in any case or class of cases.

**Appendix A to Part 208—Model Disclosure for Use Until ETA<sup>SM</sup> Becomes Available**

The Debt Collection Improvement Act of 1996 requires that most Federal payments be made by electronic funds transfer after January 2, 1999.

If you are currently receiving your Federal payment by check or you have just become eligible to begin receiving a Federal payment, you have several choices:

(1) Receive your payment by Direct Deposit through the financial institution of your choice.

The Government makes payments electronically through a program called Direct Deposit. Direct Deposit is a safe, convenient, and reliable way to receive your Federal payment through a financial institution. (A financial institution can be a

bank, credit union, savings bank, or thrift.) Many financial institutions offer basic, low-cost accounts in addition to full-service checking or savings accounts.

(2) Do nothing now and wait for a basic, low-cost account, called an ETA<sup>SM</sup>, to become available.

If you do not have an account with a financial institution, you do not need to do anything now. In the future a low-cost account, called an ETA<sup>SM</sup>, will be available at many financial institutions. Like Direct Deposit, the ETA<sup>SM</sup> (which stands for electronic transfer account) is a safe, convenient, and reliable way to receive your Federal payment through a financial institution. You are eligible to open this account, at a low monthly fee, if you receive a Federal benefit, wage, salary, or retirement payment. [Agency name] will contact you and let you know when the ETA<sup>SM</sup> is available and which financial institutions in your area offer the account.

(3) Continue to receive a check.

If receiving your payment electronically would cause you a hardship because you have a physical or mental disability, or because of a geographic, language, or literacy barrier, you may receive your payment by check. In addition, if receiving your payment electronically would cause you a financial hardship because it would cost you more

than receiving your payment by check, you may receive your payment by check.

Please call [agency name] at [agency customer service number] if you would like more information on Direct Deposit, the ETA<sup>SM</sup>, or hardship waivers.

#### **Appendix B to Part 208—Model Disclosure for Use After ETA<sup>SM</sup> Becomes Available**

The Debt Collection Improvement Act of 1996 requires that most Federal payments be made by electronic funds transfer after January 2, 1999.

If you are currently receiving your Federal payment by check or you have just become eligible to begin receiving a Federal payment, you have several choices:

(1) Receive your payment by Direct Deposit through the financial institution of your choice.

The Government makes payments electronically through a program called Direct Deposit. Direct Deposit is a safe, convenient, and reliable way to receive your Federal payment through a financial institution. (A financial institution can be a bank, credit union, savings bank, or thrift.) Many financial institutions offer basic, low-cost accounts in addition to full-service checking or savings accounts.

(2) Receive your payment through a basic, low-cost account called an ETA<sup>SM</sup>.

If you receive a Federal benefit, wage, salary, or retirement payment, you are eligible to open an ETA<sup>SM</sup>. This account is available for a low monthly fee at many financial institutions. Like Direct Deposit, the ETA<sup>SM</sup> (which stands for electronic transfer account) is a safe, convenient, and reliable way to receive your Federal payment through a financial institution. Please call the customer service number listed below to find out which financial institutions in your area offer the ETA<sup>SM</sup>.

(3) Continue to receive a check.

If receiving your payment electronically would cause you a hardship because you have a physical or mental disability, or because of a geographic, language, or literacy barrier, you may receive your payment by check. In addition, if receiving your payment electronically would cause you a financial hardship because it would cost you more than receiving your payment by check, you may receive your payment by check.

Please call [agency name] at [agency customer service number] if you would like more information on Direct Deposit, the ETA<sup>SM</sup>, or hardship waivers.

Dated: September 21, 1998.

**Richard L. Gregg,**

*Commissioner.*

[FR Doc. 98-25667 Filed 9-24-98; 8:45 am]

BILLING CODE 4810-35-P