

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:** Notice of proposed rulemaking; notice of public hearings.

SUMMARY: Section 31001(x) of the Debt Collection Improvement Act of 1996 (the "Act") amends 31 U.S.C. 3332 to require Federal agencies ("agencies") to convert all Federal payments (other than payments under the Internal Revenue Code) from checks to electronic funds transfer ("EFT") in two phases. Phase one began July 26, 1996. All recipients who become eligible to receive Federal payments on or after that date are required to receive such payments by EFT unless the recipient certifies in writing that the recipient does not have either an account with a financial institution or an authorized payment agent. The Department of the Treasury ("Treasury") issued an interim rule on July 26, 1996, to implement these requirements.

Phase two begins January 2, 1999. The Act provides that, subject to the authority of the Secretary of the Treasury (the "Secretary") to grant waivers, all Federal payments (other than payments under the Internal Revenue Code) made after January 1, 1999 must be made by EFT. This proposed rule, to implement the requirements that take effect after January 1, 1999, is being published for comment.

DATES: Written comments on the proposed rule must be received no later than December 16, 1997. Public hearings on the proposed rule will be held in Dallas on October 14, 1997, in New York City on October 27, 1997, and in Baltimore on October 30, 1997. Requests to speak at one of the three public hearings must be received 14 days before the date of that hearing. See the Supplementary Information for further details concerning the hearings.

ADDRESSES: Comments should be sent to Cynthia L. Johnson, Director, Cash Management Policy and Planning Division, Financial Management Service, U.S. Department of the Treasury, Room 420, 401 14th Street S.W., Washington, D.C. 20227. A copy of the proposed rule is available on the Financial Management Service's EFT web site at <http://www.fms.treas.gov/>

eft/. Public hearings will be held in Dallas on October 14, 1997, in New York City on October 27, 1997, and in Baltimore on October 30, 1997. Requests to present oral comments at one of the public hearings should be directed to Martha Thomas-Mitchell by calling (202) 874-6757, or by sending an Internet e-mail to martha.thomas-mitchell@fms.sprint.com. See the **SUPPLEMENTARY INFORMATION** for further details concerning the hearings. Comments on the proposed rule and transcripts of the hearings will be available for public inspection and downloading at the web site address shown above and for public inspection and copying at the Department of the Treasury Library, Room 5030, 1500 Pennsylvania Avenue, N.W., Washington, D.C. To make an appointment to inspect comments and transcripts, please call (202) 622-0990.

FOR FURTHER INFORMATION CONTACT: Robyn Schulhof, Financial Program Specialist, at (202) 874-6754; Diana Shevlin, Financial Program Specialist, at (202) 874-7032; Cynthia L. Johnson, Director, Cash Management Policy and Planning Division, at (202) 874-6590; Sally Phillips, Senior Financial Program Specialist, at (202) 874-6749; Margaret Marquette, Attorney-Advisor at (202) 219-3320; or Natalie Diana, Attorney-Advisor at (202) 874-6827.

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

Section 31001(x) of the Act amends 31 U.S.C. 3332 to require agencies to 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, which began July 26, 1996, all Federal payments to recipients who become eligible to receive those payments on or after that date must be made by EFT unless the recipient provides a written certification that the recipient does not have an account with a financial institution¹ or an authorized payment agent. On July 26, 1996, Treasury issued an interim rule to implement these requirements. 61 FR 39254. The interim rule will

¹ As used herein, "financial institution" means any institution included in the definition of depository institution in 12 U.S.C. 461(b)(1)(A), excluding subparagraphs (v) and (vii), and any agency or branch of a foreign bank as defined in 12 U.S.C. 3101. See also the related section-by-section discussion of this term defined in the proposed rule at §208.2(e).

remain in effect through January 1, 1999.

Phase two begins on January 2, 1999; after that date all Federal payments must be made by EFT unless a waiver is available. Under 31 U.S.C. 3332(f)(2), the Secretary is authorized to waive the EFT requirement in specified circumstances based on standards developed by the Secretary. The Act requires recipients of Federal payments (1) to designate a financial institution or authorized agent to which the Federal payments shall be made and (2) to provide the agency that makes the payments with the information needed to make the payments by EFT. 12 U.S.C. 3332(g). The final rule, which will take effect on January 2, 1999, is intended to provide guidance to agencies and recipients regarding compliance with these requirements.

The Act makes EFT the standard for Federal payments. In implementing the Act, Treasury seeks to bring into the mainstream of the financial system those millions of Americans who receive Federal payments and who currently do not use the financial system to receive funds, make payments, save, borrow or invest. Treasury's goals in the implementation process are simple, and focus on payment recipients. These goals include the following: making certain that recipients have access to their funds at a reasonable cost; providing appropriate consumer protection; ensuring that the system delivers payments and information accurately, conveniently, and in a timely manner; and significantly increasing participation by recipients in the country's financial system.

The Financial Management Service (the "Service"), a bureau in the Department of the Treasury, is responsible for implementation of the Act. As the Federal Government's financial manager, the Service is responsible for collecting and disbursing public money. In fiscal year 1996, the Service issued more than 850 million payments. Approximately 81 percent of those payments (685 million payments) were made to individuals under various benefit programs such as Social Security; the remaining payments consisted of salary, vendor, loan, grant, and tax refund payments.

In fiscal year 1996, approximately 53 percent of Treasury payments were made by EFT. Making payment by EFT benefits both recipients and the Government. Agency records indicate that recipients are 20 times less likely to have a problem with an electronic payment than with a paper check. Unlike check payments, electronic

payments are not susceptible to being lost, stolen, or damaged in transit. In those few cases where an electronic payment is misrouted, it can be traced and rerouted to the recipient, usually within 24 hours after a claim of non-receipt is received, compared to an average of 14 days for a check. Further, electronic payments are far less susceptible to forgery or alteration than checks. Each year, the Government handles claims relating to approximately \$60 million in forged checks, \$1.8 million in counterfeit checks, and \$3.3 million in altered checks.

EFT payments are also less costly than checks. A check costs the Government approximately 43 cents, including postage, paper check stock and labor costs. An EFT payment costs approximately two cents. Full implementation of the Act is expected to achieve Government-wide savings of about \$100 million per year.

Over the past two decades, Treasury has developed numerous products and services to enable agencies to make EFT payments. These include Direct Deposit, Vendor Express, the Automated Standard Application for Payments ("ASAP") and electronic benefits transfer ("EBT").

The Direct Deposit program is used by agencies to make benefit payments, as well as wage, salary, retirement, allotment, and travel advance and reimbursement payments.

The Vendor Express program transfers payments directly into the accounts of vendors and other commercial payees. It also provides identifying information about the payment, referred to as remittance data, in an addendum to the payment.

The ASAP system is an electronic payments system used to deliver time-sensitive Federal funds to organizations that have a continuing relationship with the Federal Government. ASAP is used for grant payments and "same day" payments to contractors.

The above products primarily use the Automated Clearing House ("ACH") network, a nationwide processing and delivery facility that provides for the distribution and settlement of electronic financial transactions. Some of Treasury's payment services use Fedwire, a funds transfer system operated by the Federal Reserve System. Fedwire is used primarily for large dollar, small volume payments that need to be confirmed immediately, such as payments to businesses, State and local governments, and educational institutions.

Treasury, along with other agencies, is continuously researching and

developing new electronic payment products. In the near future, Treasury expects to publish for comment a proposal to amend its regulation dealing with the use of the ACH network by agencies. The revision of 31 CFR Part 210 will accommodate the current and future use of the ACH network by agencies.

B. Participation in Rulemaking Process

Treasury believes that the success of the conversion to EFT depends on the involvement of all interested parties in the rulemaking process. In developing the proposed rule, Treasury used a wide variety of approaches to obtain data and solicit input from these parties.

The interim rule specifically invited the public to comment on obstacles to receiving payments electronically, the availability of banking services, suggestions for new and improved electronic payment methods, the role of authorized payment agents, and the needs of recipients without bank accounts. The financial industry was invited to discuss electronic payment processing capabilities and suggestions for new and improved electronic payment methods. Agencies were asked to submit implementation plans that describe the types of payments they make by check, the obstacles they face in converting such payments to EFT, suggestions for removing these obstacles, timetables for converting payments, and whether assistance is needed.

Since the publication of the interim rule, Treasury has held numerous meetings with representatives from consumer interest organizations and the financial industry. Treasury also hosted a consumer briefing session attended by representatives from over 30 consumer organizations and a similar briefing for industry that was attended by representatives from 13 financial trade associations.

In addition, Treasury contracted for two research studies related to the electronic payment mandate. The studies were used primarily to obtain information regarding the characteristics of Federal check recipients and to better understand the needs of those recipients, particularly with respect to Federal benefit payments. The studies are available on the Service's EFT web site at <http://www.fms.treas.gov/eft/>.

Treasury obtained input from agencies through a number of forums, including 11 regional meetings that were attended by more than 1100 agency representatives. Treasury also established an EFT Interagency Policy Workgroup consisting of representatives from 25 executive branch agencies.

Finally, Treasury has reviewed the agency implementation plans submitted in response to the interim rule.

C. Public Hearings

In addition, Treasury will hold three public hearings on the proposed rule. The first hearing will be held in Dallas on October 14, 1997, at the Federal Reserve Bank of Dallas, 2200 North Pearl Street, Dallas, Texas. The second hearing will be held in New York City on October 27, 1997, at the U.S. Alexander Hamilton Customs House, 1 Bowling Green, New York, New York. The third hearing will be held in Baltimore on October 30, 1997, at the Baltimore Branch of the Federal Reserve Bank of Richmond, 502 South Sharp Street, Baltimore, Maryland. The hearings in Baltimore and Dallas will begin at 9:00 a.m. The hearing in New York City will begin at 10:00 a.m.

Requests to present oral comments at one of the public hearings should be directed to Martha Thomas-Mitchell by calling (202) 874-6757 or by sending an Internet e-mail to martha-thomas-mitchell@fms.sprint.com not later than 14 days before the date of the hearing. Requests to present oral comments must be accompanied by an outline of topics to be discussed. In order to facilitate the distribution of the comments to attendees at the hearings, presenters must submit, in writing, the text of the comments to be made, at least three business days prior to the hearing. Presentations will be limited to approximately 10 minutes or less. Treasury reserves the right to impose further time or other restrictions on all presentations.

Please notify Martha Thomas-Mitchell prior to the date of the public hearing if any special arrangements or auxiliary aids or services are needed.

II. Comments on the Interim Rule

Treasury received 33 comment letters on the interim rule.² The letters were submitted by four consumer organizations, nine trade and labor organizations and associations, two banks, four non-financial institutions, two State government agencies, and nine Federal agencies and offices. Three organizations submitted two letters. The comment letters generally supported the Act and the interim rule, although commenters expressed a wide range of views regarding how best to achieve the Act's objectives.

The principal issues addressed in the comment letters were the needs of

² Comments on the interim rule are available for public inspection and copying at the Treasury Library, Room 5030, 1500 Pennsylvania Avenue, N.W., Washington, D.C.

recipients who do not have bank accounts; the need for consumer protection in connection with EFT; the definition of authorized payment agent and the regulation of such entities; the costs associated with EFT; waivers; vendor payments; and the importance of educating recipients about the EFT mandate. Specific comments are discussed below in the section-by-section analysis.

III. Section-by-Section Analysis

A. Section 208.1—Scope and Application

With one exception, proposed § 208.1 is the same as the corresponding provision in the interim rule. The interim rule requires agencies to make payments by EFT, “unless a waiver is granted.” Treasury proposes to replace this phrase with a reference to § 208.4 indicating that agencies and recipients may rely upon the waivers described in that section.

B. Section 208.2—Definitions

Section 208.2(a)—Agency

The definition of *agency* is identical to the definition in the interim rule. For a discussion of this term, see 61 FR 39254, 39255.

Section 208.2(b)—Authorized Payment Agent

The term *authorized payment agent* was the focus of extensive comment and discussion. Some consumer organizations urged Treasury to prohibit certain entities from acting as authorized payment agents, while other organizations suggested that Treasury impose a variety of substantive restrictions on such entities. Some commenters supported defining this term as including non-financial institutions as well as financial institutions on the ground that this would allow recipients without bank accounts to have greater access to electronic payments, while others urged Treasury to limit the category to Federally-insured financial institutions. Concern was expressed about non-financial institutions that charge what was described as excessively high fees for check cashing and other financial services. Treasury was urged to limit the fees charged by authorized payment agents for recipients to access their funds and to regulate the contractual arrangements between authorized payment agents and recipients.

One commenter recommended that if non-financial institutions were included in the definition of “authorized payment agent,” they should be required to provide the same level of

consumer protection as financial institutions.

One consumer organization argued that only financial institutions and “possibly the U.S. Post Office” should be permitted to act as authorized payment agents because no limitations on the contractual relationship between the non-financial institution and the recipient could protect the recipient adequately. A group representing the elderly expressed concern that if nursing homes, assisted living facilities, or other institutions with a financial interest in the recipient’s payment are permitted to act as payment agents, they could impose excessive service fees.

A group representing check cashers urged Treasury to define “authorized payment agent” in a manner that would allow check cashers to be designated as authorized payment agents. The group commented that check cashers were in a unique position to deliver payments to Federal recipients because of their locations in areas where there are few bank branches and because of the customer service they provide.

A national money transmitter commented that Treasury should allow money transmitters to be authorized payment agents because of their numerous locations nationwide and because of their experience in serving those without bank accounts.

In formulating the proposed regulation, Treasury has considered the language of the Act, as well as the protection of recipients, the comments received, and consistency with other Treasury regulations.

The Act refers to “authorized payment agent,” “authorized agents,” and “agent.” Section 3332(e)(2) directs an agency to waive the requirement to receive payment by EFT during phase one of the EFT mandate if the recipient certifies in writing that he or she “does not have an account with a financial institution or an authorized payment agent.”

Section 3332(g) provides that:

Each recipient of Federal payments required to be made by electronic funds transfer shall—

(1) designate 1 or more financial institutions or other *authorized agents* to which such payments shall be made; and

(2) provide to the Federal agency that makes or authorizes the payments information necessary for the recipient to receive electronic funds transfer payments through each institution or *agent* designated under paragraph (1). (Emphases added.)

The Act, however, does not define “authorized payment agent,” and the legislative history is silent on the meaning of this term. Treasury believes

that all three terms—“authorized payment agent,” “authorized agents,” and agent”—refer to the same entity or entities and are to be construed identically. The language quoted above suggests that an authorized payment agent is an entity other than a financial institution. Further, this language could be read as meaning that payment may be made to an authorized payment agent, either directly to an account held by an authorized payment agent, or to an account held by a financial institution in the name of the authorized payment agent.

At the present time, however, Treasury cannot deliver a Federal payment by EFT directly to an entity other than a financial institution because electronic financial transactions are made primarily through the ACH network and membership in the ACH network system is limited to financial institutions. Further, as a general rule, the Federal Reserve Banks provide ACH and wire services only to financial institutions. Therefore, it is not possible from an operational standpoint to deliver Federal payments by EFT directly to any entity that is not a financial institution.

It is possible operationally to deliver a payment by EFT to an account in the name of an authorized payment agent held by a financial institution. However, the deposit of a Federal payment into an account controlled by a third party other than the person entitled to the payment raises concerns about the protection of the recipient’s interests. Specifically, Treasury is concerned about the potential failure of agents to honor their obligations, especially since, except in limited cases, there is no Federal oversight of such arrangements. Additionally, non-financial institutions may not be subject to Federal consumer protection laws. Therefore, defining “authorized payment agent” broadly and 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 authorized payment agents. However, there is one situation in which experience suggests that it is in the best interest of the recipient to make a Federal payment to someone other than the recipient. This situation involves recipients who are physically or mentally incapable of managing their payments.

Proposed § 208.2(b) defines “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 (“SSA”), the Department of Veterans

Affairs ("VA"), the Railroad Retirement Board ("RRB") (collectively, the "benefit agencies" for purposes of the section-by-section analysis), or other agency making Federal payments, to act on behalf of an individual entitled to a Federal payment. The Social Security Act permits the SSA to make a benefit payment to "another individual, or an organization" when doing so is in the best interest of the recipient.³ The Veterans' Benefits Act⁴ and the Railroad Retirement Act⁵ contain similar provisions. SSA and the RRB use the term "representative payee" to refer to individuals and organizations that have been selected to receive benefits on behalf of a beneficiary who is "legally incompetent or mentally incapable of managing benefit payments." The VA uses the term "fiduciary" to refer to individuals or organizations appointed to serve in similar circumstances.

Other agencies, such as the Office of Personnel Management, also make Federal payments to individuals and provide for representative payees and fiduciaries. While not included by name, the phrase "or other agency" in the proposed definition is intended to refer to these agencies.

SSA, the VA, and the RRB have issued detailed regulations addressing the qualifications and duties of representative payees and fiduciaries.⁶ The rules governing these representational relationships are long-standing and well established. In addition, the definition of the term "recipient" in Treasury's regulation governing the use of ACH by agencies refers to representative payees and fiduciaries. See 31 CFR 210.2. In fiscal year 1996, approximately 10 percent of Social Security benefit payments (60 million payments) were made to approximately five million representative payees. Therefore, Treasury believes that it is appropriate to define the term "authorized payment agent" by reference to existing practice and the regulations of the agencies making Federal payments.

The effect of the proposed definition in § 208.2(b), together with the requirement in § 208.6, which outlines account requirements for purposes of this rule, is that all Federal payments will be made to an account at a financial institution. Such account must be in the name of the recipient or in the name of an authorized payment agent who stands in the shoes of the recipient for

purposes of payment.⁷ The involvement of a financial institution at this stage provides recipients and agencies with important protections, namely, deposit insurance in most cases⁸ and the safety and soundness associated with a regulated financial institution. Treasury specifically invites public comment on the proposed definition of "authorized payment agent" in § 208.2(b) and the provision, § 208.6, in which this term is used.

Section 208.2(c)—Electronic funds transfer

The proposed definition of *electronic funds transfer* in § 208.2(c) is similar to the definition of that term in the Act. It is identical to the definition in the statute and the interim rule except that the proposed definition includes a statement that the term includes a credit card transaction.

Treasury recognizes that the definition of "electronic funds transfer," as proposed, is somewhat broader than the definition of that term in the Electronic Fund Transfer Act, 15 U.S.C. 1693 ("EFTA"). Specifically, the credit card transactions referred to in the proposed rule do not satisfy the definition of an EFT in the EFTA in that the transaction does not debit or credit a consumer asset account. In addition, ACH transactions to or from a commercial account would not be covered by the EFTA.

Section 208.2(d)—Federal Payment

The definition of *Federal payment* is the same in the proposed rule as in the interim rule, except for minor technical changes in the miscellaneous payments section.

Section 208.2(e)—Financial Institution

The definition of *financial institution* has been changed from the definition of that term in the interim rule. The proposed rule defines "financial institution" to mean a depository institution as defined in 12 U.S.C. 461(b)(1)(A), excluding subparagraphs (v) and (vii), and an agency or branch of a foreign bank as defined in 12 U.S.C. 3101. Under this definition, banks, savings banks, credit unions, savings associations, and United States-based

⁷ Section 208.6 also permits a Federal payment to be deposited into an account in the name of a securities broker or dealer. See discussion below.

⁸ Treasury is aware that a few financial institutions that are capable of receiving Federal payments through the ACH system may not have deposit insurance. The proposed rule does not place any additional requirements on these institutions, i.e., recipients who currently receive Federal payments by EFT through such institutions will not be required to make any changes to existing arrangements.

foreign bank branches would be considered "financial institutions." This change has been made to reflect the class of entities that can participate directly in the ACH, i.e., financial institutions that are authorized by law to accept deposits.

Section 208.2(f)—Individual

Treasury proposes to add a definition of *individual*. Proposed § 208.2(f) defines "individual" to mean a natural person.

Section 208.2(g)—Recipient

Treasury proposes to add a definition of *recipient*. Proposed § 208.2(g) is based on the definition of "recipient" in 31 CFR 210.2 and provides that "recipient" means an individual, corporation, or other public or private entity that is authorized to receive a Federal payment from an agency.

Section 208.2(h)—Secretary

Proposed § 208.2(h) defines *Secretary* to mean Secretary of the Treasury.

Section 208.2(i)—Treasury

Proposed § 208.2(i) defines *Treasury* to mean the United States Department of the Treasury.

The interim rule contains a definition of the terms "benefit payment" and "payment." Since the proposed rule defines the term "Federal payment," Treasury proposes to omit the definition of "benefit payment" and "payment" from the rule.

C. Section 208.3—Payment by Electronic Funds Transfer

Proposed § 208.3 implements 31 U.S.C. 3332(f)(1) and provides that, notwithstanding any other provision of law, all Federal payments made by an agency after January 1, 1999, must be made by EFT, unless one of the waivers set forth in § 208.4 applies. Under the definition of "Federal payment," payments made under the Internal Revenue Code of 1986 (i.e., tax refunds) are excluded from the EFT mandate.

D. Section 208.4—Waivers

The Act authorizes the Secretary to waive the requirement to make Federal payments by EFT for individuals or classes of individuals for whom compliance imposes a hardship; for classifications or types of checks; and in other circumstances as may be necessary. 31 U.S.C. 3332(f)(2)(A). Subparagraph (B) of § 3332(f)(2) directs the Secretary to make waiver determinations based on standards developed by the Secretary.

The interim rule invited public comment on the need for waivers. In the

³ 42 U.S.C. 1383(a)(2)(A)(ii)(I).

⁴ 38 U.S.C. 5502.

⁵ 45 U.S.C. 231k.

⁶ See 20 CFR Parts 404, 410, 416, 266, and 348; and 38 CFR Part 13.

public comments and in meetings with agencies, the public, and industry, several themes were expressed repeatedly, regarding the standards that should be developed for waivers.

The first standard is the need for waivers where the conversion from check to EFT imposes a hardship on the recipient. Consumer organizations urged Treasury to make waivers readily available to all recipients who assert that receiving payment by EFT would impose a hardship.

The second standard is "impossibility." Agencies noted that, for a payment to be made by EFT and for the recipient to gain access to the funds, certain conditions must be present. EFT requires a modern communications system and the participation of financial institutions with the requisite operational capabilities. In addition, in foreign countries, EFT requires a reasonably stable political environment. If these conditions are not present, EFT becomes more difficult and, in some cases, impossible.

The third standard is "cost-benefit." Agencies described cases in which they make small dollar payments or one-time payments and urged Treasury to authorize agencies to take into account the costs and benefits of using EFT in such cases.

The fourth standard relates to law enforcement and national security. Agencies engaged in law enforcement and national security described circumstances in which making a payment by EFT would endanger the safety of an agent or a person cooperating with an agency.

Based on these four standards, Treasury proposes to adopt the eight waiver categories set forth in § 208.4. Treasury considered adopting a process under which agencies would apply to Treasury for a waiver. However, Treasury believes that an application process would impose an unnecessary administrative burden on the agencies and Treasury and could delay the processing of Federal payments. For these reasons, the proposed regulation does not require agencies to apply to Treasury for the waivers that are available to an agency. Instead, the proposal contemplates that agency officials will determine whether a payment or class of payments falls within one of the waiver categories described in subsections (c) through (h). As appropriate, Treasury will provide guidance to agencies regarding the various waiver categories.

In the case of the waivers available for individuals, Treasury plans to develop, and make available to agencies, model language that an individual would use

to certify to the agency that receiving payment by EFT would impose a hardship due to one of the enumerated barriers. The certification would be based on the individual's own evaluation of his or her circumstances. Treasury believes that this subjective approach is consistent with Congressional interest in minimizing the hardship associated with conversion from check to EFT for some recipients, and recognizes the wide variety of circumstances in which recipients live and work. The proposed rule does not anticipate that agencies will evaluate an individual's circumstances; rather, Treasury expects that a waiver from payment by EFT will be automatic and based solely on the individual's certification.

Proposed § 208.4 (a) and (b) provide waivers from the requirement to receive payment by EFT for certain classes of individuals for whom such requirement would impose a hardship. Specifically, proposed § 208.4(a) sets forth two waivers for those individuals who have an account with a financial institution and who became eligible for a Federal payment before July 26, 1996, and § 208.4(b) sets forth three waivers for individuals who do not have an account with a financial institution, regardless of when they became eligible for payment. There are no waivers for individuals who have an account with a financial institution and who become eligible for a Federal payment on or after July 26, 1996 ("newly-eligible recipients"), although there may be circumstances in which an individual is paid by check because the agency's obligation to pay by EFT is waived pursuant to a waiver described in subsections (c) through (h).

Treasury's proposal to tie the availability of a waiver for an individual who has a bank account to the date an individual became eligible for the Federal payment is based on a review of its experience, and the experience of the agencies responsible for the vast majority of Federal payments, during phase one. As noted above, the Act and Treasury's interim rule provide that newly-eligible recipients must receive payment by EFT unless the recipient certifies in writing that he or she does not have an account with a financial institution. The SSA, which certifies 71% of the payments made by Treasury each month, reports that approximately 76% of the recipients who became eligible to receive Social Security and Supplemental Security Income payments since July 26, 1996, are receiving payment by EFT.⁹ Benefit agencies report that very few of these

recipients have indicated that receiving payment by EFT would cause a hardship of any kind.

Based on the favorable experience of SSA and the other benefit agencies, and the fact that newly-eligible recipients do not have a history of receiving their Federal benefit payments by check and, therefore, would not experience a change in the manner in which they receive payment, Treasury proposes to take an approach with respect to newly-eligible recipients who have an account with a financial institution that parallels the approach taken during phase one. Therefore, the proposed rule provides no waivers for these recipients, although one or more of the waivers described in subsections (c) through (h) may apply.

Under proposed § 208.4(a), an individual who has an account with a financial institution and who became eligible to receive payment before July 26, 1996, would not be required to receive payment by EFT where the use of EFT would impose a hardship due to either a physical disability or a geographic barrier.

The Act does not define the term "hardship." The legislative history mentions geographical, physical, mental, educational, and language barriers, but does not define these terms. Treasury and the benefit agencies believe that, for the reasons discussed more fully below, three of the five categories mentioned—mental, educational, and language—do not pose a barrier to the use of EFT. These factors can affect an individual's ability to use any method of payment, whether check or EFT, and, therefore, there is no need to provide waivers for these categories. In fact, for many individuals, the safety and reliability associated with EFT outweigh the difficulty associated with a new method of payment.

With regard specifically to mental disabilities, Treasury notes that, as mentioned above in the discussion on "authorized payment agent," some agencies have already provided in their regulations for recipients who are mentally incapable of managing their payments. Under these regulations, an individual or entity may be appointed or otherwise selected to act on behalf of an individual entitled to a Federal payment. For example, when an application for Social Security or Supplemental Security Income benefits is filed by or on behalf of an individual who is not able to manage his or her benefit payment, SSA's regulations provide for the appointment of a representative payee. This person or entity receives the payment and arranges for the funds to be used for the benefit of the individual. The method by

⁹The VA and the RRB report similar experiences.

which payment is made to the representative payee has no effect on the actual recipient.

The proposed rule does not provide waivers based on the recipient's educational level, limited literacy skills, or lack of fluency in English. The experience of Treasury and the benefit agencies suggests that the obstacles posed by these factors are not uniquely associated with the use of EFT. Educational and language barriers can interfere with the comfortable and successful use of any method of payment, including checks and EFT. In implementing EBT, the benefit agencies have found that educational and language barriers present a challenge in making the transition to EFT, but the transitional hurdle is short-lived and ameliorated by educational programs targeted to the specific needs of recipients. The benefit agencies and the financial industry have developed, and are continuing to develop, educational materials that assist recipients with limited education or literacy skills in making the transition to EFT. In addition, Treasury intends to conduct an extensive education campaign on receiving payment by EFT.

Finally, with respect to language, the benefit agencies and the financial industry have programs to assist recipients who do not speak English. For example, in those parts of the country where a language other than English is predominant, SSA employees assist recipients in their native language. In these areas, many ATMs and POS terminals offer the choice of on-screen instructions in the predominant language as well as English. Also, materials provided during the public education campaign will be available in selected languages other than English to accommodate non-English speaking recipients.

Treasury believes, however, that there are two instances in which recipients who have an account with a financial institution and who have previously been receiving payment by check should not be required to convert to receiving payment by EFT; namely, where a physical disability or a geographic barrier would result in a hardship to the individual.

For example, Treasury believes that a waiver should be available to a recipient with a physical disability who currently has an arrangement with a nearby grocery store to cash his or her monthly check, but would have great difficulty traveling even a short distance to a bank or ATM to get his or her payment by EFT. Similarly, Treasury believes that a waiver should be available to someone who lives in a rural area or on an Indian

reservation with limited access to transportation or banking facilities and who would have great difficulty getting to a bank or ATM to receive payment by EFT.

The proposed rule does not define physical disability or specify what constitutes a geographic barrier. In the case of physical disability, Federal law contains several definitions, including those found in the Americans with Disabilities Act, the Social Security Act, and the Veterans' Benefits Act. Treasury believes that referencing in Part 208 all applicable definitions of disability would be unwieldy and confusing, and that creating a new definition for purposes of Part 208 would create an unnecessary administrative burden for agencies and recipients. In addition, in light of the approach the proposed rule takes with regard to the waiver process, Treasury does not believe that it is necessary to define physical disability or specify what constitutes a geographic barrier.

Under proposed § 208.4(b), an individual who does not have an account with a financial institution is not required to receive payment by EFT where the use of EFT would impose a hardship on the individual due to a physical disability or a geographic barrier, or where the use of EFT would impose a financial hardship on the individual.

Waivers are provided for individuals with a physical disability or a geographic barrier for the reasons discussed above. In addition, a third waiver category—financial hardship—has been provided for individuals who do not have bank accounts, and for whom Treasury will provide an account as described in § 208.5. Although financial hardship is not mentioned in the legislative history, Treasury is aware that some individuals who do not have accounts with a financial institution cash their checks at grocery stores and other locations at little or no cost. Treasury does not believe that Congress intended such individuals to pay more to receive payment by EFT than they currently pay to receive payment by check, particularly low-income recipients whose Federal payment may be their sole source of income. Therefore, Treasury is proposing to make a waiver available for these individuals on this basis. The financial hardship waiver is not available to recipients who already have accounts with financial institutions because these individuals presumably will not incur any additional expense to receive payment by EFT.

The financial hardship waiver proposed in § 208.4(b) will, as a

practical matter, take effect upon the availability of the account described in § 208.5. Under the Act, Treasury is required to ensure that individuals who are required to have an account at a financial institution in order to receive Federal payments will have access to such an account at a reasonable cost and with the same consumer protections as other account holders at the same financial institution. Treasury is in the process of designing such an account. While Treasury is hopeful that the account will be available nationwide by January 2, 1999, and will make every effort to achieve that goal, it is possible that the account will not be available on a nationwide basis by that time. For this reason, the requirement to receive payment by EFT is automatically waived for all individuals who certify that they do not have an account with a financial institution until the earlier of January 2, 2000, or the date as of which the Secretary determines that the account referred to in § 208.5 is available.

Proposed § 208.4(c) provides that an agency is not required to make a payment by EFT where the political, financial, or communications infrastructure in a foreign country does not support payment by EFT. This waiver category responds to concerns expressed by agencies that make international payments. For example, the SSA certifies benefit payments to recipients in 132 countries around the world but, at the present time, international Direct Deposit is available only in 10 countries. Treasury also recognizes that in some countries, payment by EFT is feasible in some areas, such as large cities, but is not feasible outside these areas. In such cases, payments should be made electronically to any area within the country where the necessary infrastructure exists, unless the recipient qualifies for one of the other waivers.

Proposed § 208.4(d) proposes a waiver in those cases where a natural or other disaster makes payment by EFT not feasible. This waiver responds to concerns raised by the Federal Emergency Management Agency and other disaster assistance agencies who advised Treasury that, in areas affected by natural disasters, financial institutions may be closed or inaccessible due to electrical or telecommunications failure or structural damage.

Treasury recognizes that agencies that respond to emergencies must have the flexibility to fulfill their missions, and that providing payments to emergency victims and emergency personnel must

be done in the most efficient and expedient manner possible. Therefore, Treasury is proposing a waiver for disaster assistance agencies making payments to recipients residing in areas that are designated by the President or an authorized agency administrator as a disaster area. The waiver period would last for 120 days from the date the disaster is declared. The disaster assistance agencies indicated that most emergency response phases do not last longer than 120 days and that, after that time, the financial and communications infrastructure typically is restored so that recipients can receive their payments electronically. If the emergency response time exceeds 120 days, the agency is expected to notify Treasury in writing of the need to extend the waiver period. The notification should include a justification for the extension and state the length of the extension period required.

Proposed § 208.4(e) provides a waiver for payments made in response to contingency operations conducted by the Department of Defense. A contingency operation is defined in 10 U.S.C. 101(a)(13) as a military operation that either is designated by the Secretary of Defense as an operation in which armed forces undertake military actions against an enemy or results in a call or order to, or retention on, active duty of members of the armed forces during a war or national emergency declared by the President or Congress.

Proposed § 208.4(f) provides a waiver from the mandatory EFT requirement where payment by EFT may pose a threat to national security, jeopardize the life or physical safety of an individual, or compromise a law enforcement action. Agencies engaged in law enforcement and national security, as well as the military, advised Treasury that in many cases payment by EFT is not feasible or could endanger employees or other individuals. For example, the physical safety of undercover agents or participants in a witness protection program could be jeopardized by the audit trail left by an electronic payment. Under the proposed rule, a waiver also would be available for military or other sensitive operations where the provision of bank routing information to third parties might compromise the security of the operation, thereby jeopardizing national security.

Under proposed § 208.4(g), an agency would not be required to make a payment by EFT if the cost of using EFT for making a non-recurring payment is greater than the cost of making that payment by check. Treasury considers

non-recurring to mean a frequency of not more than once in a 12-month period to the particular recipient. In comments and in discussions with Treasury, agencies frequently identified non-recurring payments as a payment class in which a check might be more cost-effective than an EFT given the administrative cost of enrolling a recipient for an ACH payment. Since one of the principal purposes of the Act was to reduce the Government's cost, Treasury believes this is an appropriate waiver category.

Agencies also questioned the wisdom of requiring small dollar payments to be made by EFT. Proposed § 208.4(g) should not be read as a waiver for all small dollar payments. The cost associated with making a \$100 payment is proportionately higher than the cost of making a \$10,000 payment, regardless of the payment method used. Thus, a factor in addition to the dollar amount of an individual payment is whether it is a small dollar single payment or a small dollar recurring payment.

Proposed § 208.4(h) provides that agencies are not required to make payments by EFT when public necessity suggests that payment by methods other than EFT is in the best interest of the Government. An agency may determine that a need for goods and services is of such unusual and compelling urgency that the Government would be seriously injured if payment were required to be made by EFT. Alternatively, an agency may determine that, where there is only one source for goods or services, payment by a method other than EFT would prevent serious injury to the Government. Unusual and compelling urgency means that there is a need to act without delay to protect a legitimate Government interest. Serious injury means that the Government faces an imminent loss of money or property, or the disruption of a Federal program or activity.

Treasury received a number of comments from agencies expressing concern that the Act would interfere with their efforts to obtain goods or services deemed essential to the agencies' missions in a timely fashion. For example, in some cases, an agency may have only one supplier of an essential material or service, and that supplier may not be able to accept payment by EFT. While the Act clearly requires vendors to accept payment by EFT, Treasury recognizes that, in limited cases, agencies require flexibility in dealing with vendors who are unable to receive EFT payments.

Agencies and other commenters asked Treasury to consider making a waiver available for vendor payments where,

because of system limitations or cost, remittance data is not available to the vendor. As noted above, remittance data is information that identifies the payment. This data permits the vendor to reconcile funds received against outstanding invoices.

A number of commenters stressed the importance of passing remittance data on to the vendor, stating that the lack of remittance data is the primary reason why vendors are reluctant to receive payment by EFT. Several commenters noted that many financial institutions lack the capability to provide remittance data to their depositors which requires the translation of data from machine readable to human readable form. It is estimated that of the approximately 11,000 financial institutions which can accept an electronic payment, fewer than a thousand are capable of translating remittance data into a human readable form. In addition, financial institutions sometimes charge their customers for remittance data, which also reduces the incentive for smaller vendors to accept payment by EFT.

Treasury is working with agencies, the financial industry, and vendors to solve the remittance data problem. For example, several pilots are underway to test the feasibility of making remittance data available through a variety of methods, including on an agency's web site. The proposed rule does not contain a waiver for vendor payments because Treasury expects that, as a result of these efforts, the problem of making remittance data readily available will be solved by January 1999. However, Treasury will monitor developments closely and will reconsider the need for a waiver at that time.

Finally, several agencies noted that the Federal Acquisition Regulation ("FAR") interim rule on Payment by Electronic Funds Transfer, published on August 29, 1996,¹⁰ exempts certain classes of contracts from the Act. Treasury is working with the appropriate agencies to reconcile any differences between the two rules.

E. Section 208.5—Access to Account Provided by Treasury

Proposed § 208.5 provides that where an individual certifies that he or she does not have an account at a financial institution, or where an individual fails to respond to a request for information pursuant to § 208.8, Treasury will, pursuant to the Act's mandate, provide the individual with access to an account at a Federally-insured financial institution selected by Treasury. (All such individuals will, of course, retain

¹⁰ 61 FR 45776.

the right to establish their own account relationships at institutions of their choice.)

This section addresses the problem of delivering Federal payments by EFT to individuals who do not have an account at a financial institution. In order to use Direct Deposit, a recipient must have an account at a financial institution.¹¹ It is estimated that approximately 10 million individuals who receive Federal payments do not have an account at a bank, savings association, savings bank, or credit union, and, therefore, cannot receive payment by Direct Deposit.

One of Treasury's domestic policy objectives is to encourage individuals who do not have an account at a financial institution to move into the financial services mainstream. Since the Act was passed, Treasury has been working with agencies and the financial industry on educational efforts designed to encourage individuals to open an account at a financial institution so that they can receive their Federal payments by Direct Deposit. In addition, Treasury and the financial industry are participating jointly in the marketing of Direct Deposit Too, which is a model for a simple, low-cost, electronically accessible deposit account. Treasury hopes that many recipients without accounts will open accounts as a result of these public and private sector educational and marketing efforts. However, Treasury recognizes that a certain percentage of individuals who are required to receive payment by EFT, i.e., individuals who are not eligible for a waiver, likely will not have accounts by the January 1999 deadline, and the Act specifically requires that Treasury regulations ensure access to an account by individuals who are required to have an account because of the EFT mandate.¹²

Treasury considered several approaches to implementing this requirement. Several commenters suggested that Treasury require financial institutions to provide a basic account at a reasonable price to individuals without accounts. Treasury does not believe that financial institutions should be required to provide these types of account services as a result of the Act. Another approach involves the development of a model deposit account with an invitation to financial institutions to offer this account, at a specified price or at a price below some ceiling determined by Treasury, to individuals without accounts. Treasury believes that identifying institutions willing to

participate in a voluntary program and monitoring their activities would require the creation and maintenance of a regulatory infrastructure. In addition, it is possible that, in some geographic areas, no institutions would be willing to participate, resulting in gaps in coverage.

A third approach is for Treasury to engage one or more Federally-insured financial institutions to act as Treasury's financial agent for the provision of accounts to those individuals. Treasury believes that this approach will enable Treasury to perform its obligation under 31 U.S.C. 3332(i)(2) to ensure that all individuals required to receive payments electronically will have access to an account at a financial institution at a reasonable cost and with consumer protections comparable to those afforded other account holders at such institutions. In addition, a number of consumer organizations strongly urged Treasury to permit only Federally-insured financial institutions to act as agent for Treasury to hold accounts for individuals who do not have such accounts. Treasury takes seriously the concern expressed by these commenters, and specifically invites comment on this issue.

Treasury plans to obtain such account services through a competitive process that will select one or more entities to act as Treasury's agent to provide these services to recipients that do not have, or do not choose to open, accounts at financial institutions of their own choice. Any financial institution designated by Treasury as its financial agent will perform those functions that involve the disbursement of public funds, including the establishment of the recipient's account and the crediting of the Federal payment to the account. Other functions, however, may be performed by non-financial institutions working in partnership with the financial agent.¹³

The proposed regulation does not attempt to define the specific characteristics of the account that will be made available. Following the close of the comment period on this notice of proposed rulemaking, Treasury will develop proposed terms, conditions, and attributes of the account to be offered and will publish this proposal for a limited period of public comment. After evaluating comments received, Treasury will determine the specific terms, conditions, and attributes of the account to be offered and will request

that interested organizations submit bids on the cost of providing such an account within defined geographic areas. Bidders also may be requested to submit bids on different permutations of alternative account structures and geographic areas. It is anticipated that such accounts will be offered on the basis of a specified periodic service charge paid by the recipient.

Treasury believes the design of these Federally-provided accounts is critical to the successful implementation of the Act. While no final decisions have been made as to the attributes of the account, it is the preliminary view of Treasury that each recipient should have an individual account at a Federally-insured financial institution that can be directly accessed via plastic debit card at any location of that institution, including any automated teller machines or point-of-sale terminals that accept transactions by the institution's cardholders. Treasury has retained the services of a consultant to evaluate and provide advice to Treasury with respect to both the account structure and the design of the competitive selection process for the account providers. In addition, Treasury is seeking public comment on this subject.

Commenters are encouraged to provide their views on any issues that they believe are important to the successful design of this new account. In submitting views, commenters should consider that the cost of the account to be offered by bidding institutions is likely to be affected by the range of attributes required to be included in the account, as well as the institutions' expected average balance, i.e., float, for the account. In particular, Treasury requests comments on the following questions:

- Should Treasury make available a debit card-based account to individuals who are required to receive Federal payments by EFT and who do not have an account of their own with a financial institution?

- Should the cost of the account to the recipient be the most important factor for selecting the account structure and/or the account providers, or should the account structure be designed to meet other objectives even if the cost to recipients is increased as a result? If the latter, which objectives? What is an appropriate standard by which to weigh tradeoffs between increased costs and additional account features?

- Should the account be structured to provide only a basic withdrawal service at the lowest possible cost, with additional service charges for additional features, or should the account offer a range of services at a fixed monthly cost,

¹¹ See 31 CFR 210.4(a).

¹² 31 U.S.C. 3332(i)(2).

¹³ The notice of proposed rulemaking for Treasury's rule relating to electronic benefits transfer, 31 CFR Part 207, describes the disbursement of public funds and the statutory basis for the use of financial agents. 62 FR 25572.

even if greater than the cost of a basic account?

- How many withdrawals should be included in the base price of the account? Should the account terms address the charges imposed by automated teller machine owners other than the account provider?

- Should the account structure provide for additional electronic or nonelectronic deposits within the basic monthly service charge? If so, what number of deposits?

- Should the account provide for some number of third-party payments, such as payments for rent or utility bills? If so, how many third party payments should be provided for and should they be priced in the basic monthly service charge?

- Should the account include a savings feature? How would such a feature operate? Would additional free withdrawals or the capability to accept deposits other than the Federal payment act to foster savings by the recipient?

- How important is a broad geographic reach to meeting the access objectives that most recipients will want? How should Treasury best meet access needs in underserved areas?

Treasury has been urged to adopt restrictions for the account that it furnishes that would preclude arrangements between the financial institution at which the account is maintained and third parties, such as check cashers and money transmitters, under which recipients might be provided with additional means of accessing the account. Those favoring such restrictions argue that recipients should be protected against excessive charges that might be imposed for such services. These arguments raise important concerns, particularly with respect to low-income recipients who have in the past paid high fees to cash government checks. In light of these concerns, Treasury requests comment on some additional questions relating to the account it will design and make available to recipients who do not have bank accounts:

- Should access to the account be provided at outlets in addition to those normally offered by the financial institution providing the account? For example, should arrangements be permitted under which third parties may offer other means by which a recipient may, in effect, withdraw funds from the account. If yes, should there be any restrictions on where additional access may be provided or under what terms it can be offered?

- If additional access is offered through arrangements with third parties, should the cost of this additional access

be included in the pricing proposal in the competitive bid process?

- Which account design would provide the appropriate opportunity for non-financial institutions to participate in the delivery of services to Federal payment recipients?

Treasury will make every effort to ensure that the account referred to in § 208.5 will be available throughout the country by January 2, 1999. Moreover, Treasury has been working with a number of States to link the delivery of Federal payments to State EBT programs. Where such linkage occurs, recipients who receive a Federal payment, such as Supplemental Security Income, as well as benefits under a State-administered program, for example, Food Stamps, will be offered an option of accessing both benefits by means of a single card. However, as discussed above in connection with proposed § 208.4(b), in the event that the account described in § 208.5 is not available, the requirement to receive a Federal payment by EFT will be waived for individuals who certify that they do not have an account with a financial institution until the earlier of January 2, 2000, or the date as of which the Secretary determines that the account is available.

F. Section 208.6—Account Requirements

Proposed § 208.6 addresses account requirements for Federal payments made by EFT. The proposal sets forth a general rule for all Federal payments, and then provides two exceptions from the general rule for situations that involve an authorized payment agent or an investment account established through a registered securities broker or dealer.

Under § 208.6(a), all Federal payments made by EFT must be deposited into an account in the name of the recipient at a financial institution, unless one of the exceptions described in subsection (b) applies. The requirement to deposit the payment into an account in the name of the recipient¹⁴ is consistent with Treasury's regulations governing use of the ACH¹⁵ and thus provides continuity with existing arrangements for the Direct Deposit of Federal payments.

Proposed § 208.6(b)(1) addresses cases in which an authorized payment agent has been selected or designated. In such cases, the account may be titled in any

manner that satisfies the regulations of the appropriate agency. See the discussion of "authorized payment agent" in the section-by-section analysis of § 208.2(b) above.

Proposed § 208.6(b)(2) permits a Federal payment to be deposited into an account in the name of a broker or dealer registered under the Securities Exchange Act of 1934 with whom the recipient has an account. Treasury is aware that many brokers and dealers offer services that combine investment and transaction features. In these services, funds deposited into an account at a financial institution—which may be in the name of the securities broker or the name of the customer—are swept out of such an account on a regular basis and into an investment vehicle owned by the recipient. When the customer uses the funds for transaction purposes, whether by credit or debit card or check, the funds needed to cover the transaction are transferred out of the investment vehicle.

Such services offer cash management features, and Treasury sees no reason to discourage recipients of Federal payments from using these services, provided certain protections are available, namely, that the broker or dealer is registered under the Securities Exchange Act of 1934 and that the recipient's funds are protected by deposit insurance during the time the funds are on deposit at the financial institution.

The registration requirement ensures that the broker or dealer is subject to certain basic requirements such as membership in the appropriate self-regulatory organization, membership in the Securities Investor Protection Corporation, recordkeeping and reporting requirements, and net capital requirements. In addition, such brokers and dealers are subject to inspections by the Securities and Exchange Commission and the self-regulatory organizations. The requirement that the account and associated records be structured so that the recipient's interest is protected under applicable Federal or state deposit insurance regulations ensures that the recipient's interest in a master account is individually insured to the same extent it would be if the account were in the name of the recipient alone.

Other than payments made to an authorized payment agent or an investment account, Federal payments made by EFT must be deposited to an account at a financial institution. The proposed rule is silent on the role that non-financial institutions may play in the delivery of Federal payments to

¹⁴ Section 208.6 would not prohibit the use of a joint account between the recipient and a spouse or other member of the recipient's family so long as the recipient has the right to withdraw funds from the account.

¹⁵ 31 CFR 210.4.

recipients with bank accounts and the relationship between non-financial institutions and such recipients. Treasury anticipates that non-financial institutions will continue to have the opportunity to partner with financial institutions and to market products and services to recipients. Treasury's research and the comments received on the interim rule indicate that non-financial institutions have performed such functions in the past and are developing new products and services that will allow them to serve recipients who receive their Federal payments by EFT. Treasury specifically invites comments on this opportunity for market innovations.

The use of such products and services would be purely voluntary on the part of recipients who would continue to be able to access their payments directly at a financial institution of their choice if they chose not to use the services of a non-financial institution. These relationships are distinguished from the account that Treasury proposes to provide for individuals who do not have an account with a financial institution. See § 208.5.

Treasury has been urged to interpret the Act as requiring regulation of the fees charged by financial institutions and the imposition of certain consumer protections on the services they offer. Consumer organizations urged Treasury to limit the fees that authorized payment agents may charge for their services, and suggested that reasonable costs for recipients without bank accounts should range from no cost to low cost. Some commenters suggested that Treasury either subsidize or regulate account fees. Other commenters stated that efforts to reduce costs for the Government should not place an undue financial burden on the private sector. These commenters opposed Treasury's defining "reasonable cost" or establishing limits on fees, and expressed concern that their costs would exceed any ceiling on fees set by Treasury. They considered "reasonable cost" to include all costs plus a reasonable profit and argued that to regulate otherwise would discourage the private sector from developing systems to address problems posed by the electronic payment mandate.

Section 3332(i)(2) provides:

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

(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.

This provision could possibly be interpreted in two ways. The requirement that Treasury ensure access to an account could be read very broadly to refer to all individual recipients who receive their Federal payments by EFT, whether or not they already have an account. Such a broad interpretation potentially would place Treasury in the position of determining the reasonableness of prices charged by thousands of financial institutions, for a wide variety of account services, to individuals who have account relationships at institutions they have chosen voluntarily.

Section 3332(i)(2) also could be read more narrowly as referring to those individuals who, as of January 2, 1999, have not voluntarily selected or opened an account at a financial institution and who will need access to such an account in order to receive a Federal payment by EFT.

Treasury believes the latter interpretation is the better one, i.e., that § 3332(i)(2) should be read to require Treasury to provide "unbanked" individuals with access to a reasonably-priced account at a financial institution. Treasury does not believe that there should be widespread regulation of the prices of deposit services voluntarily obtained by recipients in a competitive marketplace. Gathering information about the prices charged for accounts by financial institutions throughout the United States and evaluating those prices to determine their reasonableness would impose a heavy administrative burden both on the industry and on Treasury. In addition, widespread price regulation would interfere with the functioning of the market for account services. Accordingly, the reasonable cost and consumer protection standards will be applied as specified in § 208.5 to any account provided by Treasury to individuals who do not otherwise have access to an account.

G. Section 208.7—Agency Responsibilities

Section 208.3 of the proposed rule sets forth the general rule that, effective January 2, 1999, all Federal payments for which a waiver is not available must be made by EFT. Proposed § 208.7 describes the agencies' operational responsibilities in carrying out this mandate.

First, under proposed § 208.7(a), an agency must collect from each recipient who is required to receive payment by EFT and who has an account with a financial institution the information required to make the payment. This

information can be collected electronically through the ACH system by use of an Automated Enrollment Entry (ENR). The ENR is a new ACH entry that was specifically designed to meet the needs of agencies as a replacement for the paper form that has been used for enrollment in the Direct Deposit program. The phrase, "who is required to receive payment by electronic funds transfer," is an acknowledgment that waivers will apply in some cases.

Under this section, agencies are required to collect the information needed to make a payment through the ACH network, namely, the recipient's account number and the financial institution's name and routing number. Treasury encourages agencies to collect this information at the earliest possible opportunity in their dealings with potential recipients of Federal payments. For vendor payments, agencies are encouraged to collect this information as a condition of awarding a contract, issuing a purchase order, or formalizing an agreement to obtain goods or services. Collection of this information as a condition of award ensures that the agency is doing business only with vendors who are willing and able to accept an EFT payment and consequently ensures that all vendor payments, unless waived under § 208.4, will be made by EFT.

In order to ensure compliance by January 2, 1999, agencies must take action as early as possible in 1998 to inform recipients who still receive checks of the requirement to convert to EFT. Collection of the required information should begin no later than July 1, 1998, and recipients should be encouraged to convert to EFT as soon as possible.

Under proposed § 208.7(b), agencies are directed to obtain from individuals who do not have an account at a financial institution a written certification that the individual does not have an account with a financial institution unless the individual has determined that he or she needs a hardship waiver. Treasury will provide individuals who certify that they do not have an account with access to an account in accordance with § 208.5.

Proposed § 208.7(c) directs agencies to obtain from any individual who applies for a waiver under § 208.4 (a) or (b) a written certification that receiving payment by EFT would impose a hardship. As indicated above, agencies may rely upon the individual's assertion that a hardship exists; Treasury does not expect agencies to go beyond the certification to evaluate the individual's circumstances.

H. Section 208.8—Recipient Responsibilities

Proposed § 208.8(a) implements 31 U.S.C. 3332(g), which requires recipients of Federal payments who are required to receive payment by EFT to designate a financial institution or an authorized payment agent to which payment will be made and provide the agency that makes or authorizes the payment with the information needed in order to deliver the payment by EFT. Under the Privacy Act (5 U.S.C. 552a), such information is considered confidential with respect to individuals, and may not be disclosed by the agency except as authorized by law.

Proposed § 208.8(b) provides that an individual who is required to receive payment by EFT and who does not have an account at a financial institution must certify in writing to the agency making the payment that he or she does not have an account. Such an individual will be provided with access to an account provided by Treasury unless he or she is eligible for a waiver. See the discussion of § 208.5 above.

Proposed § 208.8(c) requires all individuals who apply for a waiver under § 208.4 (a) or (b) to certify in writing that receiving payment by EFT would impose a hardship. As discussed above in the section-by-section analysis of § 208.4, an individual's certification would be based on the individual's own evaluation of his or her circumstances.

I. Section 208.9—Compliance

Section 208.9 of the proposed rule provides for Treasury to monitor agencies' compliance with the EFT mandate. It further provides that agencies that fail to make payment by EFT as required under this part may be assessed a charge in accordance with 31 U.S.C. 3335.

Treasury expects agencies to be in compliance with the Act and this part by January 2, 1999, and will begin to monitor compliance as of that date. In order to avoid placing an unnecessary administrative burden on agencies, Treasury does not intend to impose an ongoing reporting requirement on agencies that are in compliance with the EFT mandate. Agencies found to be in noncompliance, however, may be required to submit information on the methods by which they make payments. Further, such agencies may be assessed a charge equal to an amount determined by the Secretary to be the cost to the general fund of the Treasury caused by such noncompliance.

J. Section 208.10—Reservation of Rights

Proposed § 208.10 specifically authorizes the Secretary to waive any

provision of the rule. This provision has been included in the event that circumstances make such a waiver necessary or appropriate. Under this provision, the Secretary could grant a waiver not specifically provided for in this part without having to amend the rule.

IV. Special Analysis

Although it has been determined that this proposed regulation is a significant regulatory action for purposes of section 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 proposed regulation, if adopted, will not have a significant economic impact on a substantial number of small entities. Treasury has included eight categories of waivers in the proposed rule. The first two categories are designed specifically to alleviate hardships that might be imposed on individuals, including sole proprietors, as a result of the mandatory conversion from check to EFT. Further, the proposed rule does not prohibit small entities from participating in the delivery of services to recipients who receive their Federal payments by EFT. 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. Treasury welcomes, however, all comments and specifically any comments related to the impact of the proposed rule on small entities.

The Paperwork Reduction Act of 1995 requires that collections of information prescribed in the proposed rules be submitted to the OMB for review and approval. Under this 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. Comments on the collection of information may be submitted to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Office for the 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, Maryland 20785.

The collection of information in this proposed 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. Section 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 are specifically requested on:

1. Whether the proposed collection of information is necessary for the proper performance of functions of the Service, including whether the information will have practical utility;
2. The accuracy of the estimated burden associated with the proposed collection of information;
3. How the quality, utility, and clarity of the information to be collected may be enhanced; and
4. How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques and other forms of information technology.

List of Subjects in 31 CFR Part 208

Accounting, Banks, Banking, Electronic Funds Transfer.

Authority and Issuance

For the reasons set out in the preamble, Part 208 of Title 31 is proposed to be 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 Access to account provided by Treasury.
 - 208.6 Account requirements.
 - 208.7 Agency responsibilities.
 - 208.8 Recipient responsibilities.

208.9 Compliance.

208.10 Reservation of rights.

Authority: 5 U.S.C. 301; 31 U.S.C. 321, 3301, 3302, 3321, 3325, 3327, 3328, 3332, 3335, and 6503.

§ 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) *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.

(d) *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.

(e) *Financial institution* means:

(1) An entity described in section 19(b)(1)(A), excluding subparagraphs (v) and (vii), of the Federal Reserve Act (12 U.S.C. 461(b)(1)(A)). Under section 19(b)(1)(A) of the Federal Reserve Act and for purposes of this part only, the term "depository institution" means:

(i) 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);

(ii) 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);

(iii) 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);

(iv) 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 pursuant to section 201 of such Act (12 U.S.C. 1781);

(v) 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

(2) 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).

(f) *Individual* means a natural person.

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

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

(i) *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 who became eligible for a Federal payment before July 26, 1996, and who has an account with a financial institution, certifies that payment by electronic funds transfer would impose a hardship on him or her due to a physical disability or geographic barrier;

(b) Where an individual certifies that he or she does not have an account with a financial institution and that payment by electronic funds transfer under § 208.5 would impose a hardship due to a physical disability or geographic 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 certify that they do not have an account with a financial institution until the earlier of January 2, 2000, or the date as of which the Secretary determines that the account referred to in § 208.5 is available;

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

(d) 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;

(e) Where either:

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

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

(f) 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;

(g) Where 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. For purposes of this rule, "non-recurring" means the agency does not expect to make more than one payment to the same recipient within a one-year period; and

(h) 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 Access to account provided by Treasury.

Where the requirement to pay by electronic funds transfer is not waived under § 208.4 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, Treasury shall provide the individual with access to an account at a Federally-insured financial institution selected by Treasury. Such account will be provided at reasonable cost to the individual and with the same consumer protections as other accounts at the same financial institution.

§ 208.6 Account requirements.

(a) All Federal payments made by electronic funds transfer shall be deposited into an account at a financial institution. 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 under the Securities Exchange Act of 1934, such payment may be deposited into an account in the

name of the broker or dealer, provided the account and all associated records are structured so that the recipient's interest is protected under applicable Federal or state deposit insurance regulations.

§ 208.7 Agency responsibilities.

An agency shall:

(a) Obtain from each recipient who is required to receive payment by electronic funds transfer and who has an account with a financial institution, the information required to make such payment;

(b) Obtain from each individual who is required to receive payment by electronic funds transfer and who indicates that he or she does not have an account with a financial institution, a written certification that the individual does not have an account with a financial institution; and

(c) Obtain from each individual who applies for a waiver under § 208.4(a) or (b) a written certification that receiving payment by electronic funds transfer would impose a hardship.

§ 208.8 Recipient responsibilities.

(a) 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.

(b) Each individual who is required to receive payment by electronic funds transfer and who does not have an account with a financial institution must certify in writing, within the time frame specified by the agency making the payment, that he or she does not have an account with a financial institution. Such individual will be provided an account as indicated in § 208.5.

(c) Each individual who qualifies for, and wishes to apply for, a waiver under § 208.4(a) or (b) must certify in writing, within the time frame specified by the agency making the payment, that receiving payment by electronic funds transfer would impose a hardship.

§ 208.9 Compliance.

(a) Treasury will monitor agencies' compliance with this part. Treasury may require agencies to provide information about the methods by which they make payments.

(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 the regulations in this part in any case or class of cases.

Dated: September 11, 1997.

Russell D. Morris,
Commissioner.

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