

May 5, 2014

Mr. Robert Shelbourne, Office of Family Assistance  
Administration for Children and Families  
901 D Street SW, 5th Floor  
Washington, DC 20447

Re: 45 CFR Parts 262 and 264 Temporary Assistance for Needy Families (TANF)  
Program, State Reporting On Policies and Practices to Prevent Use of TANF Funds in  
Electronic Benefit Transfer Transactions in Specified Locations

Dear Mr. Shelbourne:

The Electronic Funds Transfer Association (EFTA) is submitting the following comments  
in response to the above-captioned Request.

EFTA, the history of which spans more than 35 years, is a non-profit professional  
association that through education, outreach and advocacy promotes the adoption of  
electronic payments and commerce. EFTA was an early and strong proponent of using  
electronic benefits technology in the TANF program. EFTA worked with DHHS in the  
early 1990s to assure a smooth conversion of TANF benefits to EBT.

In 2012 EFTA worked with the Administration for Children & Families (ACF) on the  
original response to the Middle Class Tax Relief and Job Creation Act requirements  
regarding the TANF program. In April of that year we met with ACF staff to discuss how  
states could best comply with the law. Subsequently Mark Greenberg, Acting Assistant  
Secretary, was kind enough to participate in a webinar on the law that we provided for  
our state members.

As you may know, EFTA represents a significant number of the state agencies  
responsible for the delivery of TANF benefits via EBT. On two occasions EFTA  
surveyed those members on their response and compliance with the law. We shared  
those survey data with ACF in the form of a white paper and in our June 2012 comment  
[letter](#).

Below are our comments regarding the NPRM published February 6, 2014. While we  
are pleased to see the process moving forward and the guidance given to state  
agencies, we have a number of serious concerns regarding the NPRM. These are listed  
as follows:

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**BIN blocking at the Point of Sale** BIN blocking is a process whereby the payment system recognizes a payment card's (in this case an EBT card) bank identification number and makes a decision to approve or reject that transaction based on pre-set criteria. In this case, the criteria would be the use of that (EBT) card in a location prohibited by Section 4004 of P.L. 112-96.

Today, the payment processors that enable merchants across the U.S. to accept electronic cards for payment are not able to systematically block BINs at the point of sale for EBT transactions. While we are glad to see that HHS only listed BIN blocking as an *optional* approach by which a state could comply with the law, we are concerned that its inclusion could be viewed by some states as an endorsement of what is, in reality, an impractical approach for solving the problem.

...For example, a TANF agency *may* [italics added] choose to implement electronic or automated prevention measures; this may involve the reprogramming of ATMs and POS terminals so that they deny TANF EBT or EPC transactions at specified locations. (*Federal Register/Vol. 79, No. 25/Thursday, February 6, 2014, page 7132*).

We have found in conversations with various state agencies and our own EFTA members that confusion exists about the BIN blocking subject because BIN blocking is a tool that is used to decline ATM transactions. However, we will reiterate that BIN blocking at the point of sale is not systematically possible today, either by state agencies or payment processors.

We are concerned that if states are submitting this concept to HHS as a fundamental piece of how they are meeting the requirements of P.L. 112-96, Sec. 4004, that the regulation could eventually require states to block EBT BINs at the point of sale. We fear that some states may include BIN blocking as part of their compliance plan without realizing the impracticality of their commitment.

Therefore, we suggest removing the references to BIN blocking from the regulation. As an alternative, the regulation could be amended to allow a state TANF agency to direct a payment processor to remove TANF EBT from the list of payment options currently provided to that processor's merchant customer for those merchant customers that are in restricted locations.

We also suggest that the regulation be amended to note the difficulty and probable lack of success by states in using this systemic approach to meet their statutory obligations under the law.

**Statutory Definition of Electronic Benefits Transfer with Respect to Internet Transactions**

Page 7130 and 7131 of the Federal Register indicates that HHS will use the statutory definition of electronic benefits transfer in administration of the proposed rule. However, HHS admits here that the statutory language is broad. Admittedly, this acknowledgement is in the context of TANF funds deposited directly into a TANF beneficiary's private bank account.

However, we are concerned with the reference to EBT as the use of an EBT card "at an automated teller machine, point-of-sales terminal, or access to an *online* [italics added] system for the withdrawal of funds or the processing of a payment for merchandise or service."

The reference here to an *online* system is vague and problematic. It is not clear if the statutory language refers to *online* as payment made in near real time, such as the use of debit cards for purchases at a merchant location, or the use of debit cards to purchase goods and services over the Internet. We believe most consumers think of online transactions as the latter.

While some work has been done on EBT purchase transactions over the Internet, this is still a nascent technology. In addition, while 100 percent success of systematically restricting benefit usage at the point of sale may be virtually impossible to achieve, it definitely would be impossible to achieve over the Internet with a systemic solution.

We recommend clarifying two issues: first, whether you will apply the rule to Internet purchases; and second, if the rule is to be applied to Internet purchases, acknowledgment of the difficulty in doing so and the better predictive results using non-systemic solutions (e.g. training and education of cardholders).

While the proposed rule is mindful of the difficulty enforcing the law on Internet transactions, it is worth noting that at this point, although work is ongoing, there exists no approved method to use traditional, closed loop EBT cards over the Internet.

**Questionable Jurisdiction of P.L. 112—96 Over Internet Transactions**

Beyond the definition of Internet transactions we question whether it is even appropriate for ACF to regulate Internet commerce in which an EBT card is involved.

We believe that Congress' intent in P.L. 112—96 was to regulate what it considered misuse of TANF funds occurring at bricks-and-mortar merchants: liquor stores, casinos, and adult-entertainment venues.

Section 4004(b) of the law is intended to prevent TANF assistance provided by a state from being used in an EBT transaction in "(i) Any liquor store; (II) any casino, gambling casino, or gaming establishment; or (iii) any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment."

Language such as “store,” “casino,” and “establishment” used multiple times in the law, leads us to conclude that Congress’ specific intent was to prevent TANF benefits from being used a physical locations where they would be diverted to uses inconsistent with the intent of the TANF program.

The combination of the strong statement in P.L. 112-96 regarding stores, casinos and establishments, plus the absence of any reference to commercial enterprises – such as online wine or spirits sales (generally governed by state law), online gaming, 900 sex lines, or streaming video in which performers disrobe in a manner similar to what occurs in adult-entertainment establishments -- leads us to conclude that Congress expressed no intent in P.L. 112-96 to regulate the use of TANF for online commerce.

In addition we find no credible way that a state agency administering TANF could determine whether a TANF beneficiary was conducting online commerce with these types of businesses. The state agency should not be liable in the event that recipients of these benefits choose to conduct Internet commerce with these businesses.

#### **Definition of Adult Entertainment**

On page 7130 of the Federal Register HHS has added clarifying language that the rule defines adult entertainment locations as those that prohibit “the entrance of minors under the age specified by law.”

However, this new language could also apply to establishments that serve liquor by the drink. In some states these locations restrict entrance by age yet do not have performers as otherwise described in the definition.

We recommend clarifying the definition so as to exclude businesses selling liquor by the glass which should be covered in the definition of liquor store.

#### **Cross-border Sales**

P.L. 112-96 also raises the issue of cross-border sales; for example, a TANF beneficiary who receives benefits via an EBT card issued by the Commonwealth of Pennsylvania but then uses it for a prohibited purpose in the State of Delaware. In that example, would it be the responsibility of Delaware to enforce Pennsylvania’s state regulations regarding use of TANF benefits, or must Pennsylvania be responsible for enforcing its regulations within another state’s jurisdiction?

We believe that mandating cross-border enforcement of P.L. 112-96 creates a Hobbesian dilemma for states. In this case, Pennsylvania would either have to plead with Delaware to devote the resources of its taxpayers to enforce Pennsylvania’s regulations or extend its regulatory reach into the jurisdiction of its neighbors.

The cost and federalist principles involved in resolving these dilemmas are such that we would recommend that the prudent course would be for the Rule to be silent with

respect to cross-border commerce.

**Identifying Locations and Enforcement of Compliance.** Page 7131 of the Federal Register, in reference to adult entertainment businesses states, “If the state relies on such a methodology (i.e. Internet searches to locate these businesses), it will be appropriate to provide notice to identified entities so that they can inform states of any misclassification.”

However, these locations are often masked under location names that do not suggest that they provide adult entertainment. These might include names like 321 Enterprises, TIG Inc., Market Street Partners, etc. The amount of labor expense required to accurately trace these businesses is prohibitive when measured against what states have indicated in the NPRM is a relatively small problem.

Rather than such an approach, we suggest that states attempt to work through national associations of these businesses and their state affiliates. These are organizations that keep a watchful eye on state laws and federal regulations. They understand the optics of this situation and could provide assistance in helping states enforce the law by notifying member companies, preparing point-of-service placards and decals and working with their ATM providers to block state EBT BINS at those machines.

### **Plastic to Paper**

Finally, a number of the suggested compliance tactics in the Proposed Rule, such as blocking BIN numbers at the point-of-sale, and establishment of due process procedures will involve significant additional expense on the part of state agencies.

We have heard from some states that because of the cost of enforcement and the potential liabilities, they are considering ending their EBT card programs and returning to the use of paper checks for the distribution of TANF benefits.

We do not advocate returning to the days of paper checks. However, we believe that should a state adopt such a solution, it would place that state and its TANF beneficiaries beyond the regulatory purview of P.L. 112-96.

That a state would take such a drastic measure—returning to the expense of printing and mailing checks and adjudicating claims of lost benefits—testifies to the reluctance of some states to take on what they see as an unfunded mandate to enforce the final Rule.

We ask ACF to take this reluctance into account in establishing a final Rule that allows states to maintain EBT as a safe, secure and cost-effective method of distribution.

In summary, EFTA continues to believe that the most effective way to achieve the goals of Public Law 112—96 is regulation that provides flexibility for states to develop and

manage a plan that best meets their needs and the needs of their program participants.

On behalf of the state and processor members of the Electronic Funds Transfer Association and its eGovernment Payments Council, we appreciate the opportunity to comment on the Proposed Rule. We wish you well in your deliberations and look forward to reviewing the Final Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Kurt Helwig". The signature is stylized with a large initial "K" and a long, sweeping underline.

Kurt Helwig  
President & CEO