May 23, 2013

Ms. Debra R. Whitford, Director  
Supplemental Food Programs Division  
Food and Nutrition Service  
United States Department of Agriculture  
3101 Park Center Drive  
Room 520  
Alexandria, VA 22302


**ACTION:** Proposed Rule

Dear Ms. Whitford:

The Electronic Funds Transfer Association on behalf of its eGovernment Payments Council, is submitting the following comments in response to the above-captioned Proposed Rule published February 28, 2013 in the Federal Register.

EFTA is a non-profit professional association that through education and outreach promotes the adoption of electronic payments and commerce. EFTA was an early and strong proponent of using electronic benefits technology for the WIC program. Its eGPC members were early supporters of the Montgomery County, Ohio WIC EBT pilot as well as Wyoming’s pioneering WIC pilot and its involvement in the Health Passport Project.

In 1998 eGPC, which dates to the origin of WIC EBT in the late 1980s, launched its EBT—the Next Generation conference specifically to showcase the applications and technology used in WIC EBT and similar programs.

We have worked with FNS for nearly 30 years on a variety of programs, including WIC. We applaud FNS for its proposed rules aimed at complying with the Child Nutrition Act and codifying the operational and financial practices that will be necessary to meet Congress’ WIC EBT mandate. However, the Council has some concerns about the Proposed Rule as currently written. They are as follows:

1. **Ongoing Costs**

**246.12 Food Delivery Systems, xxix EBT operational maintenance and operational costs.** “The State agency shall not pay ongoing maintenance, processing fees or operational costs for vendor systems and equipment used to support WIC EBT after the State agency has implemented WIC EBT statewide, unless the State agency determines that the vendor is needed for participant access.”

The eGPC recommends that “vendor systems and equipment” be further defined. For example, if the State agency determines a vendor is necessary for participant access, exactly what costs would be allowed? For example, would costs such as integration or EBT-only equipment be allowed? We request a
strengthening of the language by stating the exact allowable costs and the terms and conditions under which FNS would fund ongoing operations costs for a particular WIC vendor.

2. EBT Cost Impositions on Vendors

Excerpt from the preamble 13552, II. 4. EBT Cost Impositions on Vendors states:

Further, the new provision provides State agencies that have implemented EBT statewide, discretion as to whether it will incur the cost of ongoing maintenance of EBT multi-function system and equipment. FNS proposed at 246.12(aa)(4) to disallow all cost for maintenance fees, including the maintenance costs for stand-alone WIC-only equipment, for those State agencies that have implemented EBT statewide. FNS considers this a necessary step for the viability and affordability of WIC EBT in the future.

Under Statewide Implementation Cost Impositions, the Proposed Rule states:

The HHFKA specifies that State agencies may not be required to pay maintenance costs essential to, and directly attributable to, an EBT system whether the equipment is multi-functional or used solely for the WIC Program: all such costs would be considered unallowable costs.

The Rule, as proposed, would preclude an EBT State agency from incurring maintenance costs essential to, and directly attributable to, a statewide EBT system whether the equipment is multi-functional or used solely for the WIC Program: all such costs would be considered unallowable costs. We believe that this position would have a chilling effect on the nationwide expansion of WIC EBT, rather than helping to meet Congress' goal of nationwide WIC EBT by 2020. We ask, therefore, that FNS clearly provide states with the latitude of determining whether cause exists to pay these expenses in order to maintain adequate access to the program.

3. Cost Sharing

§ 246.12 (aa) (2) Cost Sharing – Section states: “If WIC program equipment is not solely dedicated to transacting EBT for the WIC program, State agencies shall establish cost sharing criteria with their authorized WIC vendors for costs associated with such equipment.”

While Section 4 of the Introduction, EBT Cost Impositions on Vendors, discusses the intent of FNS in regards to cost sharing, the regulation as written does not mirror this intent. The regulation could be construed to apply only to EBT-only POS equipment provided by the State agency, as it refers to WIC program equipment.

As such, the regulation appears to contradict a statement in § 246.12 (z) (2) Minimum lane coverage, which states “…State agencies shall provide Point of Sale (POS) terminals solely used to support the WIC Program.” From a practical matter, the only time State agency provided POS equipment would be used for multiple programs is when an EBT-only POS is shared between the WIC and SNAP programs, for which there would be a cost sharing agreement between the SNAP and WIC agencies.
The rules need to be clarified to resolve the discrepancy between the two sections noted above, and if the rule does only pertain to commercial POS equipment subsidized by the WIC agency, the rule should be modified to be unambiguous so that it only pertains to commercial POS equipment which the WIC agency has subsidized to support WIC EBT transactions, although the equipment is owned by the vendor.

4. EBT Cardholder Assistance

78 CFR 13563 – 246.12 (bb).(ii).(3) – “A State agency shall provide a toll free 24 hour hotline number for EBT cardholder assistance.”

The preamble reads, in pertinent part:

To leverage additional opportunities to enhance customer service for WIC participants, § 246.12(bb)(3) of this proposed rule would also require a State agency to provide a toll-free, 24-hour hotline number for EBT cardholder assistance. Customer service can be provided via an automated system and/or live representatives and internet account access. This hotline number could provide a variety of services such as enabling participants to report a lost or stolen card through a single, toll-free phone call at any time, and request a replacement. At this time of writing, only a limited number of EBT State agencies provide this service to WIC participants, none of which are offline EBT State agencies. However, the Wyoming WIC Program had provided24-hour participant support via contracted services in their offline system environment in the past, but determined the cost to provide such a service exceeded the benefits and ultimately terminated this service in 2008.

... While FNS supports the potential for enhanced business practices and customer service that EBT may provide, we also recognize the potential affordability impact and management of resources with such proposed requirements for all EBT State agencies and, therefore, welcome and encourage reader comment.

The Proposed Rule offers no guidance on what minimum services need to be provided by a 24 hour hotline in order to be compliant with the rule. Without additional clarification, it is conceivable that this requirement could be met by providing a phone number that is answered by a recording that merely directs the cardholder to contact their local clinic during normal business hours. Additional definitions and clarifications are needed to precisely define the term “hotline” and precisely define the minimum services that constitute “EBT cardholder assistance”.

The preamble mentions that “Customer service can be provided via an automated system and/or live representatives and internet account access”. However, it is not clear if the definition of “hotline” can be met solely with “an automated system”. The preamble offers some suggestions on what services “could” be provided through the hotline, but offers no guidance on a minimum required set of services.
5. Benefit Issuance Identifier

78 FR 13561 – 246.12 (x) (2) (iv) “Benefit issuance identifier. A unique and sequential number. This number enables the identification of each benefit change (addition, subtraction or update) made to the participant account.”

We question whether this intended to be the same as the “Benefit issuance ID” field that appears in the June 2012 version of the WIC Universal MIS-EBT Interface (WUMEI).

In the data dictionary of the WUMEI, it is defined as “A unique number identifying a benefit issuance due to adding, updating or subtracting benefits.” In the context of the WUMEI, the definition in the WUMEI is more restrictive than the definition in the rule. In the WUMEI, this is a value assigned by the WIC-IS for any benefit changes initiated by the WIC-IS. The definition in the rule is broad enough to also include redemptions which are changes initiated by a vendor rather than the WIC-IS.

If the intent of the rule is to indeed ensure that all benefit transactions regardless of source are tracked with a unique number, then we suggest that a different term be used such as “Benefit transaction identifier” so as to not conflict with the nearly identical term defined in the WUMEI. If the intent is to align with the WUMEI, then the definition in the rule needs to be revised to be consistent with the definition in the WUMEI.

6. Approved EBT Food Delivery Systems

78 CFR 13563 – 246.12 (bb),(1)(i) – EBT food delivery systems: Technical standards and requirements. This section of the Proposed Rule states that:

   (1) Each State agency, contractor, and authorized vendor participating in the program shall follow and demonstrate compliance with:
   (i) Operating rules, standards and technical requirements as established by the Secretary;

The preamble states, in pertinent part:

Section 17(h)(12)(G) (ii) of the CNA requires that State agencies, contractors and authorized WIC vendors participating in the Program demonstrate compliance with established technical standards and operating rules.

As noted, FNS feels strongly that in order to implement WIC EBT nationwide, a common set of technical standards and operating rules must be followed to facilitate EBT expansion efficiently and consistently from state to state. To respond to this need, the EBT Operating Rules and TIG were created that address, respectively, the “what” and “how” of EBT implementations.

FNS, State agencies, and industry stakeholders collaboratively developed the EBT Operating Rules and TIG to help guide State agencies and industry in implementing WIC EBT systems. This collaborative effort has enabled the Operating Rules and TIG to be accepted and implemented among EBT State agencies, their authorized vendors, processors and other stakeholders. The
Operating Rules establish national practices consistent with FNS and state policies that affect the WIC EBT payment process, and follow the card payment models in use by the credit, debit and EBT.

eGPC understands that Section 17(h)(12)(G) (ii) of the CNA requires that State agencies, contractors and authorized WIC vendors must demonstrate compliance with established technical standards and operating rules. We further accept and endorse FNS’ desire for commonality in WIC EBT implementations to facilitate EBT expansion efficiently. However, we have several concerns regarding the proposed rule’s language making “demonstrated compliance” with current and future rules a regulatory requirement.

We believe it is too soon to employ the rigidity of a regulatory mandate.

As acknowledged in the Preamble efforts continue “to further refine and expand technical standards and operating rules applicable to WIC EBT.” We agree. And we endorsed FNS’ previous policy of promoting commonality through administrative guidance, and vendor and processor contracts, all of which fall under the authority of the Secretary. This approach provides the flexibility needed and would comply with the language in Section 17(h)(12)(G) (ii) of the CNA.

With so few implementations of WIC EBT to date we believe that needed changes in the rules will grow in number as more states move toward adoption of EBT. For instance, we are aware of cases in which the Proposed Rule would inhibit, if not preclude, adoption of WIC EBT.

In Alaska, for example, the WIC program provides food delivery to remote clients – in villages with no stores, no road access, and harsh winters with limited resupply – via a contract with a “Mail Order Vendor (MOV).” As it plans for EBT the WIC program is considering adopting the approach employed in the State’s SNAP EBT system. The Alaska SNAP program has faced a similar challenge since the inception of EBT, delivering food to remote households, and integrating that delivery with EBT. To overcome this challenge SNAP in Alaska has for many years operated a similar program called Long Distance Purchasing (LDP). The program operates like this:

1. The cardholder calls a FNS-authorized retailer and requests that an “Alaska Long Distance Purchasing Agreement” be mailed to the cardholder to utilize the LDP program.
2. The client completes their portion of the agreement and returns back to the retailer with their food order
3. The agreement is then kept on file with the retailer and the contractor to allow for future purchases to be conducted without card present for this specific retailer
4. For ongoing/future orders the retailer takes the grocery order over the phone or by using the retailer’s website
5. The LDP retailer obtains an authorization number from the state’s SNAP contractor

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1 A LDP Agreement is required for “each” different retailer that the client wishes to obtain food from. Not all Alaska retailers participate in the LDP program so it is important that the client ask that question of the retailer first.
6. This authorization number allows a hold to be placed on the funds and once the contractor receives the manual voucher from the retailer the LDP transaction is processed by removing the funds from the clients account and crediting the retailers account.

7. The food is dropped shipped to the client at the time of purchase.

LDP is similar in many ways to a commercial “card not present” transaction any consumer might initiate shopping over the phone from a catalog or website using a credit card. The current WIC Rules do not permit “card not present” transactions. Without a change, Alaska WIC would have no means of delivering WIC EBT services to these remote populations. The state EBT director has declared that without LDP there would have been no EBT in Alaska.

But this is just one example of a state whose food delivery needs do not fit neatly within the Proposed Rule, and whose most vulnerable population would be harmed if the Rule is enacted as proposed and results in the unintended consequence of locking out a technological solution that could meet their unique needs.

With seventy-eight (78) state agencies yet to implement, there are likely hundreds of challenges large and small yet to be faced. And the incredible growth of Web and mobile payments further suggest that the rule set needs to further evolve before it warrants regulatory status.

This is why agencies as diverse as USDA, the Department of Treasury and the Federal Reserve System over the past 20 years have avoided the temptation of codifying specific technology solutions into regulation. We note that SNAP EBT achieved much of its commonality without regulatory mandate of a rule set not nearly as detailed and highly prescriptive as the current WIC EBT rule set.

We believe this action is inconsistent with the prudent rules of the regulatory process.

Regulations have the force of law and thus a formal process for their enactment. The WIC Rule Set has not complied with this process. In spite of FNS’ well-intentioned efforts, the process has not truly been a collaborative effort of all stakeholders.

Further, the language of the Proposed Rule implies that FNS is seeking to incorporate by reference its previous guidance to states, rather than allowing them to pass through the formal regulatory Rules Making process in an open and transparent way. We point to FNS’ statement that “…FNS has taken on the WIC EBT document maintenance responsibility, at least initially, because some state agencies have expressed a concern that they would have insufficient input into the Operating Rules and TIG if they are maintained by an industry organization.”

The organization alluded to here is the eGPC and its State Forum, as well as NACHA—the Electronic Payments Association, which maintains the Quest® operating rules for EBT transactions. eGPC believes this statement cited above reflects a lack of openness, transparency and collaborative spirit that has historically existed up to this point in the development of EBT. Moreover we believe it demonstrates an unwarranted suspicion of FNS’ private-sector partners throughout this process. We note that the Council and its members have a long record of working hand in hand with FNS on the development of operating rules, standards, and technological issues within the SNAP program. We regret that the WIC program does not recognize this record, or value the contributions of this group and its members to EBT. With due respect, we ask FNS to remove this reference that implies that FNS’ private sector partners
would somehow prevent state agencies from being part of the dialog in the development of operating rules for WIC EBT.

With respect to initiatives like the TIG, universal interface, and other operating rules, many among the states and industry did not have the time to participate in the periodic teleconferences and the cumbersome web-based documentation process. Others, being so new to WIC EBT, were likely unaware of the process, particularly among regional chains that do not operate in the few states in which it has been adopted.

Further, SNAP agencies have not been party to the process either, yet are essential stakeholders in states where WIC is exploring partnerships to achieve greater efficiencies and collaboration in EBT. If the current rule set—TIG, Universal Interface, National UPC Data Base—had been published as draft regulatory actions all stakeholders would have had an opportunity to comment through the federal Rules Making process on each of these initiatives.

For these reasons we ask that the operating rules, TIG and other initiatives that were not subject to the regulatory review process go through the formal Federal Rule Making process, rather than be incorporated here into regulation by reference. We also ask that the inference about this organization, which impugns the historic and transparent work our members have done in EBT—be stricken from the Draft Rule prior to publication.

7.  First and Last Use of Date

First and Last Date of Use (pg. 13561, 245.12, item (2) (ii) and (iii)). The last date of use is defined as the last date on which the benefit may be used to obtain authorized supplemental foods. This date must be a minimum of 30 days from the first date on which it may be used to obtain authorized supplemental foods except for the participant’s first month of issuance. As written the proposed rule does not address the month of February which is less than 30 days. It is necessary for FNS to clarify what its rule would be with respect to the month of February.

EFTA continues to support FNS in its effort to codify operating rules for WIC EBT. However, we believe that the modifications suggested above will help strengthen the Final Rule and ensure that the nationwide expansion of WIC EBT occurs in a way that is consistent with the intentions of Congress, and open and fair to all stakeholders.

If you have any questions about our comments, please feel free to contact me directly. Our members stand by to work with you on implementing the Final Rule. On behalf of EFTA and its eGPC, I thank you for the opportunity to comment on this important subject. We wish FNS well in its deliberations and look forward to reviewing the Draft Rule when available.

Sincerely,

[Signature]

Kurt Helwig
President & CEO