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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 262 and 264

RIN 0970 – AC56

**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**

AGENCY: Office of Family Assistance (OFA), Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Administration for Children and Families (ACF) proposes to amend the Temporary Assistance for Needy Families (TANF) regulations to require states, subject to penalty, to maintain policies and practices that prevent TANF funded assistance from being used in any electronic benefit transfer transaction in specified locations. This responds to provisions in the Middle Class Tax Relief and Job Creation Act of 2012 requiring states receiving TANF grants to maintain policies and practices as necessary to prevent assistance provided under the program from being used in any electronic benefit transfer transaction in any liquor store; any casino, gambling casino, or gaming establishment; or any retail establishment that provides adult-oriented

entertainment in which performers disrobe or perform in an unclothed state for entertainment.

DATES: In order to be considered, comments on this proposed rule must be received on or before [INSERT DATE 90 days from publication in the Federal Register].

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. (We strongly recommend this method of submitting comments). Follow the instructions for submitting comments.
- Mail: Office of Family Assistance, Administration for Children and Families, 5th Floor East, 370 L'Enfant Promenade, SW., Washington, DC 20024, Attention: Robert Shelbourne
- Hand Delivery / Courier: OFA/ACF, 5th Floor East, 901 D Street, SW., Washington, DC 20251

FOR FURTHER INFORMATION CONTACT: Robert Shelbourne, Office of Family Assistance, 202-401-5150 (not a toll-free call). Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1-800-877-8339 between 8 a.m. and 7 p.m. Eastern Time.

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I. Public Inspection of Comments

All comments received, including any personal information provided, will be made available for public inspection Monday through Friday 8:30 a.m. to 5 p.m. at 370 L'Enfant Promenade, SW., Washington, DC.

II. Statutory Authority

This proposed regulation is being issued under the authority granted to the Secretary of Health and Human Services (HHS) by the Middle Class Tax Relief and Job Creation Act of 2012 (P.L. 112-96), Section 408 of the Social Security Act (42 U.S.C. 608), Section 409 of the Social Security Act (42 U.S.C. 609), and Section 1102 of the Social Security Act (42 U.S.C. 1302), which authorizes the Secretary to make and publish such rules and regulations, not inconsistent with

the Act, as may be necessary to the efficient administration of functions under the Act.

The statute at 42 U.S.C. 617 limits the authority of the Federal government to regulate state conduct or enforce the TANF provisions of the Social Security Act, except as expressly provided. We have interpreted this provision to allow us to regulate where Congress has charged HHS with enforcing certain TANF provisions by assessing penalties. Because the legislation includes a TANF penalty, HHS has the authority to regulate in this instance.

III. Background

Authorized by title IV-A of the Social Security Act, TANF is a block grant that provides states, territories and tribes federal funds to design and operate a program to accomplish the purposes of TANF. The purposes are: (1) assisting needy families so that children can be cared for in their own homes or homes of relatives; (2) reducing the dependency of needy parents by promoting job preparation, work and marriage; (3) preventing out-of-wedlock pregnancies; and (4) encouraging the formation and maintenance of two-parent families.

In addition to federal TANF block grant funds, each state must spend a certain minimum amount of non-federal funds to help eligible families in ways that further a TANF purpose. This is referred to as maintenance-of-effort (MOE).

In general, federal TANF and state MOE funds may be expended on benefits and services targeted to needy families, and activities that aim to prevent and reduce out-of-wedlock pregnancies or encourage the formation and maintenance

of two-parent families, as well as administrative expenses. Regulations under 45 CFR 260.31 define “assistance,” and regulations under 45 CFR 263.2 specify what kind of state expenditures count toward meeting a state’s MOE requirement. In particular, federal TANF and state MOE funds may be expended on “assistance,” which includes cash payments, vouchers, and other forms of benefits designed to meet a family’s ongoing basic needs (i.e., food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses). Assistance also includes supportive services such as transportation and child care provided to families who are not employed (see 45 CFR 260.31(a)). TANF funds also can be used for a wide range of benefits and services that do not fall within the definition of assistance; such expenditures are considered “nonassistance.”

Based on the most recent information provided to us by states, there are currently four means that states use to provide assistance payments to eligible low-income families with children: paper checks, Electronic Funds Transfers (EFT), Electronic Benefit Transfer (EBT) cards, and Electronic Payment Cards (EPC). Most states have replaced paper checks with one or more of the other three delivery methods in order to provide benefits in a timelier manner, reduce theft and fraud, and eliminate the need to pay check-cashing fees. For example, states are automatically transferring assistance payments directly into a recipient’s own private bank account through EFT; however, this option is not available if a recipient does not have access to or qualify for a checking account. Most states load the amount of assistance on EBT cards or EPCs, both of which

allow recipients to use a debit-like card to access their benefits through automated teller machines (ATMs) and point-of-sale (POS) devices. EPCs differ from government EBT cards in that they are network-branded (Visa or MasterCard) prepaid cards that recipients may use virtually anywhere the brand's logo is displayed. On the other hand, EBT cards may be used in fewer locations, as retailers and ATMs must be authorized to accept EBT cards.

On February 22, 2012, President Obama signed P.L. 112-96, which among its provisions, requires states to maintain policies and practices to prevent TANF funds from being used in any electronic benefit transfer transaction in any liquor store; any casino, gambling casino, or gambling establishment; or any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

The legislation at Section 4004(b) also imposes a new reporting requirement as well as a new penalty. Each state is required to report to the Department of Health and Human Services (HHS) by February 22, 2014, its implementation of policies and practices related to restricting recipient from using their TANF assistance in EBT transactions at the locations specified in the previous paragraph. HHS will reduce a state's block grant if the state fails to comply with this reporting requirement or if, based on the information that the state reports, HHS finds that the state has not implemented and maintained the required policies and practices.

Finally, states are required to include in their state plans a statement outlining how they intend to implement policies and procedures to prevent access to

assistance through electronic fund transactions at casinos, liquor stores, and establishments providing adult-oriented entertainment. The state plan also must include an explanation of how the state plans to ensure that (1) recipients of the assistance have adequate access to their cash assistance, and (2) recipients of assistance have access to using or withdrawing assistance with minimal fees or charges, including an opportunity to access assistance with no fee or charges, and are provided information on applicable fees and surcharges that apply to electronic fund transactions involving the assistance, and that such information is made publicly available.

Before enactment of P.L. 112-96, there were no federal requirements to restrict a recipient's use of TANF assistance provided on electronic benefit cards, nor were there any provisions in the TANF statute or regulations precluding a state from implementing policies that prevent a recipient from using his or her benefit card at particular locations. Indeed, various states have taken measures to restrict access to EBT benefits at ATMs located in different types of establishments, such as casinos, adult entertainment establishments, liquor stores, bail bonds businesses, bingo halls, cruise ships, gun/ammunition stores, psychic readers, massage parlors, and tattoo and piercing shops. These actions have been required through state executive orders, state legislation, and state agency policy directives.

On April 25, 2012, HHS published in the Federal Register a Request for Public Comment (RFPC), which invited states and other interested persons to provide information that could help to inform the rulemaking process. State

TANF agencies, others involved in implementation, and any stakeholders were invited to comment on: current methods of assistance delivery and ability to identify transaction locations; mechanisms to ensure that recipients have adequate access to their cash assistance, including withdrawals with minimal fees and opportunities to access assistance with no fee; incidence of the use of TANF EBT transactions in restricted locations; issues and challenges states could face in implementing the requirements of P.L. 112-96 — e.g., technical issues, costs, and access implications — and mechanisms for addressing problems identified; experience with implementing EBT transaction restrictions (if applicable), e.g., nature of restriction, specific method and procedures used, challenges to implementation and responses, costs, if and how approach is effective, and any concerns raised by businesses, electronic benefit vendors, and/or TANF recipients.

As stated in the RFPC, while we do not intend to provide responses to specific comments, in the next section we do indicate where comments informed the proposed rule. In general, we received input from 45 commenters. A majority were state or local TANF agencies, most with experience in implementing TANF EBT restrictions or in the process of considering approaches to doing so. Other commenters included welfare advocacy/research organizations, electronic benefit industry organizations/companies, and one member of the general public.

Responses to the RFPC provided information on matters such as the processes involved with tracking EBT transactions, the information available in

transaction records, the challenges associated with identifying types of locations where transactions have occurred, and potential options for preventing TANF EBT transactions at specified locations. Some states that have already implemented EBT prohibitions described their experiences, provided examples of definitions of the types of businesses subject to restrictions, identified challenges and costs associated with implementation, and described concerns of businesses, vendors, and recipients. This information helped us assess the feasibility and effectiveness of various approaches to identifying locations subject to restrictions, preventing the use of TANF assistance via EBT transactions at those locations, and monitoring and enforcing compliance. For example, options for preventing the use of TANF via EBT transactions in the specified locations included centralized electronic blocking by a state or its EBT vendor, placing the responsibility on business owners to block access at their establishments, and relying on TANF recipients to monitor their EBT use and imposing penalties on those who do not comply with restrictions. We provide further detail on the options identified in the comments later in this preamble in discussing potential approaches that HHS would accept as complying with the new statutory requirements.

Additionally, commenters raised other concerns that they encouraged HHS to consider when drafting regulations. For example, commenters frequently highlighted that prohibiting EBT access at all of the locations cited in the statute would have a detrimental effect on TANF recipients access to cash assistance, particularly in rural areas, inner city neighborhoods, and Indian reservations.

Commenters expressed that many clients do not have access to transportation, or the funds for transportation if ATMs in their neighborhoods are restricted and they are forced to travel further to obtain benefits. Another concern expressed in a number of comments related to the inability of states or their contractors/vendors to prevent TANF assistance that has been deposited directly in a recipient's personal banking account from being used or accessed in the locations identified in the legislation.

Several states provided comments that included data about the incidence of the use of TANF EBT transactions in liquor stores, gaming establishments, and adult entertainment venues (and any other types of establishments on which the state chooses to place restrictions). States that have conducted such an analysis consistently informed us that they found the numbers engaged in possible misuse are very low. While we understand that the extent of misuse of benefits may be low, any inappropriate expenditure of public funds raises concerns.

Eight states reported that they had measured the extent that TANF benefits were used in prohibited locations. While findings varied slightly among states based on which locations are included in the assessment, it was always less than one percent:

- California, which prohibits TANF EBT access at the greatest number of location types (12), found that less than one half of one percent of the total number of cash transactions were performed at these locations prior to implementing its prohibition.

- Florida's last analysis in 2010 indicated less than .01% of state cash benefits were being accessed at liquor stores and casinos.
- Indiana provided information on liquor store ATM transactions in its comments, stating that from October through December 2011 it found that fewer than 30 of the 28,000 transactions per month took place in restricted establishments with the letters "LIQ" in the name.
- New Hampshire reviewed a six-month period of EBT card transactions. During this period, there were no transactions that could be identified as happening at a New Hampshire liquor store, a casino or other type of gambling establishment, or adult-oriented entertainment business.
- New Jersey reviewed transactions occurring at casinos from April-October 2011, the total number of which represented less than 1% of the total number Family First transactions for this period. The state notes that these transactions may or may not have occurred on the gaming floor, as any transaction on casino property was included in the count.

Finally, commenters presented recommendations for HHS to consider as we draft proposed regulations. There was a general consensus that HHS should draft regulations in a manner that provides states flexibility when implementing these new requirements. Commenters generally urged that states be allowed to implement approaches that are cost effective and fit within the existing structure of state operations, yet at the same time meet the intent and requirements of the law. Some commenters also cautioned that the regulations should seek to

protect recipients who inadvertently use an EBT card at prohibited locations, and ensure that states' policies are implemented in a non-discriminatory manner.

IV. Discussion of Regulatory Provisions

Part 262 – Accountability Provisions - General

The proposed rule in part 262 adds new penalties for failure to report or adequately implement the new requirements outlined in P.L. 112-96, defines terms relevant to the new requirements, specifies when the penalty takes effect, and identifies the reporting form that ACF will use to determine whether a state warrants a penalty.

Section 262.1 What Penalties Apply to States?

Sec. 4004(b) of P.L. 112-96 at Sec. 409(a)(16) of the Social Security Act (the Act) creates a new penalty. As provided in the statute, the penalty will be imposed if, by February 22, 2014, a state fails to report to HHS its implementation of the policies and practices to prevent assistance provided under the state program funded under this part from being used in any electronic benefit transfer 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. Furthermore, HHS may impose a penalty if it determines, based on the information provided in a state report, that the state has not implemented and maintained such policies and practices. If HHS determines that the state should be subject to a penalty, it will reduce the state

family assistance grant by five percent or a lesser amount based on the degree of noncompliance. States should note that the regulations at 45 CFR 262.4 through 262.7, concerning the processes for appealing a penalty, presenting a reasonable cause justification, and submitting a corrective compliance plan, apply to the new penalty added to 45 CFR 262.1.

Accordingly, we propose to add paragraph (16)(i) to §262.1(a) to provide that a penalty of not more than five percent of the adjusted SFAG will be applied for failure to report by February 22, 2014, the state's implementation of policies and practices related to these prohibited EBT transactions and to add paragraph (16)(ii) to provide that a penalty likewise will be applied for FY 2014 and each succeeding fiscal year if the state does not demonstrate that it has implemented and maintained such policies and practices. Note that if a state submits the initial report after February 22, 2014 (or a subsequently due report after February 22 of a subsequent year), and also fails to demonstrate its implementation of policies and practices, the combined penalty will not exceed five percent of its adjusted SFAG. Conforming changes also are proposed in paragraph (c)(2) to add reference to the penalties proposed in paragraphs (a)(16)(i) and (ii).

Section 262.2 When do the TANF Penalty Provisions Apply?

We propose to amend §262.2 to add new paragraph (e) indicating that the penalty for failure to report on how the state is implementing and maintaining policies and practices to prevent assistance from being used in electronic benefit transfer transactions in specified locations will be imposed for FY 2014 and each

succeeding fiscal year. Compliance requires the submission of an initial report by February 22, 2014, and annually by February 22 of each subsequent year.

Section 262.3 How Will We Determine if a State is Subject to a Penalty?

We propose to amend §262.3 by adding a new paragraph (g) to specify we will use the information provided in an annual state report due by February 22, 2014, and annually thereafter, to determine whether to impose a penalty authorized by section 409(a)(16) of the Social Security Act. Note that this reporting requirement is distinct from the provisions of P.L. 112-96 related to additional state plan requirements (see Sec. 4004(c)).

Part 264 – Other Accountability Provisions

Subpart A - What Specific Rules Apply for Other Program Penalties?

The proposed rule in part 264 explains in further detail what HHS expects of states when implementing the new requirements of P.L. 112-96 by specifying the policies and procedures required, providing relevant definitions and addressing consequences if a state fails to meet the requirement.

Section 264.0 What Definitions Apply to this Part?

In order to clarify the types of locations where states are required to block the use of TANF assistance via electronic benefit transfer transactions and to ensure that the policies and practices are applied consistently between states, we propose to amend section 264.0(b).

We will incorporate the statutory definition of “electronic benefit transfer transaction,” which is “the use of a credit or debit card service at an automated teller machine, point-of-sales terminal, or access to an online system for the withdrawal of funds or the processing of a payment for merchandise or service.” The statutory language is broad and questions have been raised as to whether the definition includes TANF funds directly deposited into a recipient’s private bank account, and whether it is feasible for states and banks to implement such a requirement, particularly if the recipient also maintains non-TANF funds in the same account. Accordingly, we encourage commenters to address the question of whether states and banks have, or reasonably could have, the capacity to apply the EBT transaction restrictions to assistance funds deposited in private bank accounts and to monitor whether recipients use such funds in a prohibited manner.

As provided in the statute, in proposed paragraph (b), the term “liquor store” refers to any retail establishment which sells exclusively or primarily intoxicating liquor, and does not include a grocery store which sells both intoxicating liquor and groceries including staple foods.

The statute provides exclusions to the phrase “casino, gambling casino, or gaming establishment,” but does not provide a further definition. We propose to interpret the statutory reference to “casino, gambling casino, or gaming establishment” to mean an establishment with a primary purpose of accommodating the wagering of money. Under the statutory definition provided in proposed paragraph (b), this would not include a grocery store which also

offers, or is located within the same building or complex as casino, gambling or gaming activities or other establishments where such activities are incidental to the principal purpose of the business.

The statute is silent of the definition of “retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state to entertainment.” To clarify the intended locations to which restrictions apply, we add to proposed paragraph (b) that this term means “such an establishment that prohibits the entrance of minors under the age specified by state law.” Therefore, a theater or cinema whose primary purpose is not to provide adult-oriented entertainment, but may, for instance, occasionally feature an unrated or X-rated movie, would be excluded from this definition because minors are generally allowed to enter such an establishment (though not permitted to attend the unrated or X-rated film).

Section 264.60 What Policies and Procedures Must a State Implement to Prevent Assistance Use in Electronic Benefit Transfer Transaction in Locations Prohibited by the Social Security Act?

We propose to add a new section 264.60 under subpart A. Under the proposed paragraph, states are required to implement policies and procedures to prevent assistance (defined at §260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any: (a) liquor store, (b) casino, gambling casino or gaming establishment, (c) retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment. As states

consider the appropriate policies and practices that they will implement to comply with the new requirements of P.L. 112-96, we advise them to be mindful of the goals of the legislation. The new requirements not only aim to ensure that cash assistance is used in a manner consistent with the purposes of TANF, but also serve to promote the integrity of the program and the responsible stewardship of public funds. When HHS reviews state reports that outline their policies and procedures, we will accept any reasonable approaches that further these goals and comply with the statutory and regulatory requirements. We note that a state has flexibility in determining appropriate policies and practices to prevent the use of TANF assistance in electronic benefit transfer transactions at specified locations. At the same time, states' policies and practices must prevent the use of TANF funds at the specified locations, while ensuring reasonable access to cash assistance, as directed by Congress. Below, we outline examples of approaches that HHS would accept as complying with statutory and regulatory requirements; at the same time, states have the option to elect other methods to achieve the goals of the legislation.

Identifying Locations: When reporting policies and practices to prevent the use of TANF assistance at any liquor store; casino, gambling casino or gaming establishment; and retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment, states must describe an initial and on-going process for identifying the establishments in their states that are subject to the requirements.

Comments responding to the RFPC reflected a number of challenges associated

with identifying the locations where access to TANF assistance via EBT transaction should be prevented; these predominately related to inaccurate or limited information in transaction data, e.g., wrong addresses, missing data elements. Comments explained that retailers do not always send accurate ATM location information to the third party processors and/or third party processors do not consistently populate ATM data fields accurately. Furthermore, commenters stated that ATM location information can change each time an ATM is moved or there is a change in ownership, which also makes it difficult to ensure that ATMs have the restrictions applied. The Government Accountability Office's recent report on TANF Electronic Benefit Cards (GAO-12-535, July, 2012) confirms this in describing California's experience identifying locations where EBT access would be blocked. State officials said that the EBT transaction data sometimes contain addresses that are misspelled or refer to the address of a retailer's corporate offices rather than the locations where the transactions actually took place. GAO also found that address information was complete for only 30 percent of transactions in Texas, but also estimate that about 70.4 percent of those addresses could be simply standardized. Furthermore, while ATM transactions contain merchant category codes (MCCs), this information has limitations because some ATMs have an MCC that identifies it as a financial institution rather than referring to the type of establishment where the ATM is located. GAO concludes that "preventing unauthorized transactions can be time-intensive and is impaired by flaws in available transaction data and other challenges. Addressing the limitations we found in the transaction data that

impede the identification and monitoring of certain locations could require significant resources.” HHS understands these challenges, and we encourage states to explore an array of approaches aimed at identifying locations subject to restrictions. We would anticipate that a state’s methodology would involve multiple actions to identify the relevant establishments, such as reviewing transaction records, conducting Internet searches (e.g., searches of specific keywords associated with the types of establishments identified in the statute), and other forms of searches a state determines to be appropriate and feasible (e.g., visiting establishments). When possible, we recommend that TANF agencies collaborate with state licensing agencies, such as a state’s gaming commission, for whatever information licensing agencies can provide in efforts to develop a list of locations that are subject to these requirements. When seeking to identify liquor stores, a TANF agency may contact the state liquor authority to obtain a list of all establishments with a liquor license; the TANF agency can then notify all the merchants that they must follow procedures to prevent TANF assistance from being used or accessed at their place of business unless they notify the state agency that they do not fall within the definition of “liquor store.” Finally, states will need to develop on-going procedures for identifying new establishments to which the state’s requirements apply.

Commenters noted that while gaming authorities may have a list of all affected gaming establishments, and liquor authorities may have a listing that includes all liquor stores (though the list is likely to be broader than just liquor stores), there may be no entity in the state charged with regulating adult

entertainment, and accordingly, there may be no readily available list of such establishments. If that is the case, then a state may choose to conduct internet searches using key words as the principal way of identifying such establishments, but if the state relies on such a methodology, it will be appropriate to provide notice to identified entities so that they can inform states of any misclassification.

We received a number of comments explaining that states do not have the authority to block transactions that occur on sovereign tribal lands in the state. While Congress did not apply the requirements in P.L. 112-96 to tribal TANF programs, we believe it is the responsibility of the state to develop appropriate policies for preventing access to TANF cash assistance provided by state programs at any “liquor store,” “casino, gambling casino, or gaming establishment” or “retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment,” including those that are located on sovereign tribal land. We encourage states to work with tribes to try to prevent state TANF assistance use at the prohibited locations located on sovereign tribal land.

We also face the question of how to address internet transactions. We note that the statutory definition of “electronic benefit transfer transaction” refers to “access to an online system for the withdrawal of funds or the processing of a payment for merchandise or a service” in the establishments identified in the statute. It has been suggested that the statute is only intended to apply to transactions occurring in the specified establishments and not to internet

transactions. While we are mindful of the overall goals of the legislative provision, we recognize that there may be significant practical issues that states would face in any efforts to enforce restrictions on internet transactions. Accordingly, we invite comments in response to this Notice of Proposed Rulemaking on the issue of whether the restrictions should extend to internet transactions, and if so, what mechanisms might be available to states to enforce such restrictions.

Furthermore, many commenters recommended that regulations allow states the flexibility to avoid imposing a restriction at an ATM or POS terminal if such a restriction would limit the ability of recipients in a geographic area to access their cash assistance. While one of the new state plan requirements at Sec. 4004(c) of P.L. 112-96 conveys a clear emphasis that states ensure adequate access to cash assistance for recipients, we do not interpret this language as providing states the option to avoid imposing a restriction at an ATM or POS terminal located in any of the three types of specified locations. Rather, it conveys a responsibility for states to take corrective actions to increase locations where TANF recipients may access their cash assistance if they find that there is an insufficient number of access points in a geographic area. Commenters provided the following examples of factors to take into consideration when aiming to ensure reasonable access by applying exceptions to restrictions: the number of recipients who would be affected if a location to access assistance is blocked and the number of ATMs available in a community (e.g., if a community within a defined geographic area or zip code has fewer than three locations to access

cash assistance, none of those locations would be subject to any restrictions). One state TANF agency that has implemented blocking measures commented that it “maintains cash access plans for each county in the state to ensure that recipients have reasonable access to benefits. These plans are reviewed on an annual or as-need basis. The plans were reviewed prior to and after the deactivation of certain ATMs and it has been determined that sufficient cash access continues to be maintained.”

Finally, we remind states of the other state plan requirement at Sec. 4004(c) of P.L. 112-96, stating that a plan must also include an explanation of how the state plans to ensure that recipients of assistance “have access to using or withdrawing assistance with minimal fees or charges, including an opportunity to access assistance with no fee or charges, and are provided information on applicable fees and surcharges that apply to electronic fund transactions involving the assistance, and that such information is made publicly available.” Therefore, as they develop plans to ensure adequate access to cash assistance, states must be sure to consider whether there is an adequate number of locations where recipients may obtain cash assistance at a minimal cost *and* at no cost. Comments conveyed that a reasonable cash access fee is between \$0.25 and \$1.00. Furthermore, most states offer a number of free ATM withdrawals per month, which would be stipulated in a state’s contract with its EBT vendor. The Electronic Funds Transfer Association (EFTA) commented that a survey of electronic payment program directors revealed that “about 93% of [23] responding states say that their TANF beneficiaries exhaust their monthly

cash in no more than three transactions.” In July of 2011, the median of all states' maximum monthly benefit levels for a single parent family of three was \$428, ranging from \$170 in Mississippi to \$923 in Alaska. With an amount that is “less than the estimated cost of a modest two-bedroom apartment (based on HUD Fair Market Rents or FMRs) in all states, and less than *half* of the FMR in 26 states,” it is plausible that a recipient would withdraw all of his or her monthly benefits in few transactions (I. Finch & L. Schott, “TANF Benefits Fell Further in 2011 and Are Worth Much Less Than in 1996 in Most States,” Center on Budget and Policy Priorities, November 21, 2011). If a state TANF agency has data that indicate that a majority of its TANF beneficiaries withdraw all of their cash in fewer than three transactions, it may consider providing three free transactions so that most TANF beneficiaries would incur little or no cost.

Preventing Use of TANF Assistance via EBT transactions: Once a state or local TANF agency has identified the businesses that are subject to restrictions, the agency may implement one or a combination of approaches that aim to prevent a recipient from accessing or using his or her TANF assistance in EBT transactions at those locations. For example, a TANF agency may 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 in specified locations. A TANF agency would need to notify relevant merchants that they must communicate to third-party processors or ATM owners to block bank identification numbers (BINs) associated with TANF benefit cards. Alternately, if feasible, a TANF agency or its EBT vendor may choose to contact

the third-party processors who provide the network services to those devices directly and request that they block the EBT BIN at locations subject to restrictions. Regarding EPC, one commenter explained that “transaction servicers could block transactions by matching the terminal ID of the incoming transaction against a list of prohibited terminal IDs/locations provided by the State.”

Another option that does not require electronic blocking of ATMs or POS terminals is to communicate to recipients and/or establishments that recipients are not permitted to access their TANF benefits via EBT transactions at the specified locations and enforce compliance with appropriate penalties for violations. This may involve requiring merchants to post signs next to terminals to inform TANF recipients of the restrictions, or providing a list of restricted establishments to recipients, which should be updated on a regular basis. However, if a state’s policies and practices do not electronically prevent access to cash assistance at restricted locations, the state should consider the need for procedures for monitoring compliance and taking action (e.g., warnings, penalties) when violations are identified. States are encouraged to periodically evaluate the effectiveness of these policies to prevent the use of TANF assistance via electronic benefit transfer transactions at specified locations, and adjust policies as necessary. We note that if a state chooses to implement policies and practices that do not involve steps to electronically block or prevent access of TANF assistance via EBT transfer, we encourage them to ensure that recipients are informed and reminded of the restrictions on a regular basis.

Monitoring: State reports of policies and practices should include a description of implementation activities. For example, a state agency may have in place procedures for auditing a certain percentage of recipients' transaction records to determine compliance by individuals and businesses; TANF agency staff or EBT/EPC vendors may review monthly ATM activity reports, matching them against a list of terminal IDs or addresses of restricted locations, to determine whether the owners and processors complied with the request to reprogram ATMs. A state agency may also conduct random site visits to establishments that are subject to the requirements.

Enforcement of Compliance: In order to fulfill the goals of the legislation, a state should have mechanisms in place to maintain a state's policies to prevent TANF assistance from being used or accessed in restricted locations. For example, a state may choose to impose penalties on the parties responsible for ensuring that ATMs and POS terminals are reprogrammed (e.g., merchants, ATM owners or third-party processors) if they do not block transactions with state EBT or EPC cards from being processed at relevant ATMs and POS terminals. Or if a state chooses to implement measures that do not involve steps to electronically block EBT access, then the state may choose to impose penalties on merchants who do not post signs informing TANF recipients that they cannot use their EBT cards or EPC to purchase goods at that establishment or access funds at an ATM located on the premises. If authorized by state law, the state could impose financial penalties in relation to entities that are subject to state licensing requirements. If a TANF agency develops policies under which it

imposes a sanction or penalty on a recipient who is found to have used his or her EBT or EPC card at a prohibited location, such action would be subject to applicable appeals procedures needed to meet due process requirements.

Once a state has implemented policies and practices to comply with these new requirements, in addition to the four areas described above (i.e., identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance), we encourage states to share any information they develop concerning the effectiveness of policies and enforcement practices (e.g., data related to the incidence of the use of TANF assistance via EBT transactions in restricted locations), whether the state was able to achieve desired outcomes, and any potential plans to modify policies in order to address challenges or improve effectiveness. This information may be useful to other states as they consider adjustments to their procedures over time.

Section 264.61 What Happens if a State Fails to Report or Implement and Maintain Policies and Practices Required in Section 264.60 of this Subpart

We propose to add a new section 264.61 to address the penalty associated with the new requirements. Under paragraph (a), HHS will impose a penalty of not more than five percent of a state's adjusted SFAG for failure to submit by February 22, 2014 a report demonstrating the state's implementation of policies and practices to prevent EBT use in the locations specified in P.L. 112-96. Under paragraph (b), HHS will impose a penalty of not more than five percent of a state's adjusted SFAG each fiscal year succeeding FY 2014 in which the state

does not demonstrate it has implemented and maintained the required policies and practices. In order to meet this requirement, states' reports must fully explain the policies and practices that are being implemented and maintained; reports should address each of the following four areas: identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance. Note that if a state submits a report after February 22 and also fails to demonstrate its implementation of policies and practices, the combined penalty will not exceed five percent of its adjusted SFAG.

All penalties will be imposed in accordance with 45 CFR Part 262, which provides states with procedures for appealing a penalty, and submitting a reasonable cause justification or corrective compliance. Furthermore, Sec. 409(a)(16)(C) of the Act, as amended by Sec. 4004(b) of P.L. 112-96 provides HHS the discretion to reduce the penalty amount based on the degree of noncompliance of the state.

Sec. 409(a)(16)(C) of the Act, as amended by Sec. 4004(b) of P.L. 112-96, also specifies that "Fraudulent activity by any individual in an attempt to circumvent the policies and practices required by Sec. 408(a)(12) shall not trigger a state penalty under subparagraph (A);" as such, HHS will not base any penalty on such information.

V. Paperwork Reduction Act

This proposed rule establishes new information collection requirements in § 262.3(g). As required by the Paperwork Reduction Act of 1995, codified at 44 U.S.C. 3507, the Administration for Children and Families will submit a copy of these sections to the Office of Management and Budget (OMB) for review and they will not be effective until they have been approved and assigned a clearance number.

Requirement	Number of Respondents	Yearly Submittals	Average burden per respondent (hours)	Total burden hours
Annual reporting on policies and practices to prevent TANF assistance from being used in electronic benefit transfer transactions in liquor stores; casinos, gambling casinos, or gaming establishments; or any retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.	54	1	40	2,160

We estimate the costs of implementing these proposed requirements would be approximately \$108,000 annually. We calculated this estimate by multiplying 2,160 hours by \$50 (average cost per hour).

With respect to these provisions, the Administration for Children and Families will consider comment by the public on this collection of information in the following areas:

- Evaluating whether the proposed collection is necessary for the proper performance of the functions of ACF, including whether the information will have practical utility;
- Evaluating the accuracy of ACF's estimate of the proposed collection of information, including the validity of the methodology and the assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, *e.g.*, permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information contained in this proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. This does

not affect the deadline for the public to comment to the Department on the regulations. Written comments to OMB for the proposed collection of information should be sent directly to the following: Office of Management and Budget, either by fax to 202-395-6974 or by email to OIRA at submission@omb.eop.gov. Please mark faxes and e-mails to the attention of the desk officer for ACF.

VI. Regulatory Flexibility Analysis

The Secretary certifies under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this proposed regulation will not result in a significant impact on a substantial number of small entities. We note that any impact on businesses emanates from statutory mandate and the policies that states adopt in implementing the statutory requirement. HHS sought information related to concerns of businesses resulting from restrictions on TANF EBT access when we released a Request for Public Comment on April 25, 2012. A limited number of commenters addressed this issue, and most conveyed that they are not aware of any concerns at this time. In fact, the Western Center on Law and Poverty stated that in California, which prohibits TANF EBT access to 12 location types, many banned businesses expressed support for the policy. One commenter, the Electronic Funds Transfer Association (EFTA), did however summarize concerns of EBT vendors, such as Xerox and J.P. Morgan. EFTA stated that EBT vendors have expressed concerns over the expense of implementing the new requirements and notes that any system modifications that

may be required would be extra-contractual for the processors and their states;

despite the financial opportunity this presents, EBT vendors say that such modifications are not cost beneficial for either them or the states.

In order to address these concerns, HHS has drafted the proposed regulations in a manner that minimizes the impact on businesses, including small businesses, by providing states flexibility when implementing policies and practices that comply with the new requirements. In particular, states have the flexibility to implement approaches that do not place significant burden or impose large costs on its EBT vendor, small businesses, or any one particular party. Therefore any costs resulting from policies under which states require action by small entities, including small businesses, are the result of choices states make when implementing the statutory requirements.

The primary impact of this proposed regulation is on state governments. State governments are not considered small entities under the Act.

VII. Regulatory Impact Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if the regulation is necessary, to select the regulatory approaches that maximize net benefits (including potential

economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. These proposed rules meet the criteria for a significant regulatory action under E.O. 12866. Therefore, the Office of Management and Budget has reviewed this rule.

Need for the Regulation

These regulations incorporate statutory changes to the TANF program enacted in the Middle Class Tax Relief and Job Creation Act of 2012. These proposed regulations are limited to the penalty provisions of Section 4004 of P.L. 112-96. Because states have a range of systems for disbursement of assistance, and a number of questions have arisen regarding the applicability and requirements of the statutory language, the proposed regulations are being released in order to clarify for states the information they should submit in order to avoid a penalty.

ACF does not believe there would be a significant economic impact from this proposed regulatory action. The regulatory requirement is to implement, maintain, and report on policies and practices that prevent the use or withdrawal of TANF assistance in any electronic benefit transfer transactions in the three specified locations. The costs associated with implementation, and the parties that bear these costs, largely depend on the policies and practices a state chooses to in order to comply with the statutory requirements. For example, if a

state chooses to take on a centralized oversight role, it will face additional resources at the agency-level; at the same time, if it chooses to place the responsibility to prevent assistance from being used in restricted locations via EBT transactions on its EBT service provider, additional contract costs will need to be negotiated. Or if a state chooses to direct ATM and business owners to take the necessary steps to reprogram ATM and POS terminals within the restricted establishments, then costs are passed on to these parties.

At the same time, states have flexibility in policies and practices they choose to implement in order to comply with the statutory requirements that prevent assistance (defined at §260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any liquor store; casino, gambling casino or gaming establishment; and retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment. States may develop approaches that are cost effective and fit within the existing structure of state operations, yet at the same time meet the requirements of the law.

Nevertheless, regardless of the approach a state may take when implementing policies in order to comply with the statute and regulations, there will be, at a minimum, administrative costs for the state agency responsible for administering the TANF benefits. We believe that states will spend funds on the following types of costs to implement the changes in order to complete the annual progress report to ACF:

- Costs for identifying the prohibited locations;
- Costs to modify existing tracking of recipient use of electronic benefits and/or electronic banking;
- Costs to monitor recipient use of electronic benefit transfers;
- Costs to investigate and follow up on violations of electronic benefit transfers;
- Cost of processing and responding to appeals.

With regards to the reporting requirement, based on our estimate described under the Paperwork Reduction Act section of this preamble, the total costs for all states to comply with this requirement would fall well below the \$100 million threshold.

The statutory requirements and proposed regulations also provide potential benefits that coincide with goal of financial responsibility. For example, the policies and practices that state implement may result in reductions in inappropriate expenditures of government funds, and provide opportunities to educate recipients on budgeting (emphasizing to recipients that they should ensure assistance is spent only on basic needs) and ways to minimize access fees.

VIII. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any federal mandate that may result in the expenditure by

state, tribal and local governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. ACF has determined that this proposed rule would not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of more than \$100 million in any one year.

IX. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

X. Assessment of Federal Regulation and Policies on Families

Section 654 of The Treasury and General Government Appropriations Act of 1999 (P. L.105-277) requires federal agencies to determine whether a proposed policy or regulation may negatively affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law.

This regulation will not have an impact on family well-being as defined in the legislation.

XI. Executive Order 13132

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and

funding requirements of section 6 of the Executive Order. We do not believe the regulation has Federalism implications as defined in the Executive Order.

However, consistent with Executive Order 13132, the Department specifically solicits and welcomes comments from state and local government officials on this proposed rule.

List of Subjects in 45 CFR Parts 262 and 264

Administrative practice and procedures, Day care, Employment, Grant programs-social programs, Loan programs-social programs, Manpower training programs, Penalties, Public assistance programs, Reporting and recordkeeping requirements, Vocational education.

(Catalog of Federal Domestic Assistance Program Number 93.558 Temporary Assistance for Needy Families)

Dated: January 13, 2014

Mark Greenberg,

Acting Assistant Secretary for
Children and Families

Approved: January 15, 2014

Kathleen Sebelius,

Secretary

For the reasons set forth in the preamble, we propose to amend Parts 262 and 264 of 45 CFR as follows:

PART 262 – ACCOUNTABILITY PROVISIONS- GENERAL

1. The authority citation for 45 CFR part 262 is revised to read as follows:

Authority: 31 U.S.C. 7501 *et seq.*; 42 U.S.C. 606, 609 and 610; Pub.L. 109-171; Pub. L. 112-96.

2. Amend §262.1 by adding paragraph (a)(16) and revising paragraph (c)(2) to read as follows:

§ 262.1 What penalties apply to states?

(a) * * *

* * * * *

(16)(i) A penalty of not more than five percent of the adjusted SFAG (in accordance with §264.61(a)), for failure to report by February 22, 2014 on the state's implementation and maintenance of policies and practices required in §264.60 of this chapter.

(ii) A penalty of not more than five percent of the adjusted SFAG (in accordance with §264.61(b)), for FY 2014 and each succeeding fiscal year in which the state does not demonstrate that it has implemented and maintained policies and practices required in §264.60 of this chapter.

* * * * *

(c) * * *

(2) We will take the penalties specified in paragraphs (a)(3), (a)(4), (a)(5), (a)(6), (a)(8), (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), and (a)(16) of this section by reducing the SFAG payable for the fiscal year that immediately follows our final decision.

3. Amend §262.2 by adding paragraph (e) to read as follows:

§262.2 When do the TANF penalty provisions apply?

* * * * *

(e) In accordance with §264.61(a) and (b), the penalty specified in §262.1(a)(16) will be imposed for FY 2014 and each succeeding fiscal year.

4. Amend §262.3 by adding paragraph (g) as follows:

§262.3 How will we determine if a State is subject to a penalty?

* * * * *

(g) To determine if a State is subject to a penalty under §262.1(a)(16), we will use the information provided in annual state reports due by February 22, 2014, and annually thereafter in accordance with section 409(a)(16) of the Social Security Act. State reports must address the policies and practices that are being implemented and maintained with

respect to each of the following: identifying locations; methods to prevent use of TANF assistance via EBT transactions in restricted locations; monitoring; and enforcement of compliance.

PART 264 – OTHER ACCOUNTABILITY PROVISIONS

5. The authority citation for 45 CFR part 264 is revised to read as follows:

Authority: 31 U.S.C. 7501 *et seq.*; 42 U.S.C. 608, 609, 654, 1302, 1308, and 1337.

6. Amend §264.0(b) to add definitions of Casino, gambling casino, or gaming establishment; Electronic benefit transfer transaction; Liquor Store; and Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment in alphabetical order to read as follows:

§264.0 What definitions apply to this part?

(b) ***

Casino, gambling casino, or gaming establishment means an establishment with a primary purpose of accommodating the wagering of money. It does not include:

(i) A grocery store which sells groceries including staple foods and which also offers, or is located within the same building or complex as, casino, gambling, or gaming activities; or

(ii) Any other establishment that offers casino, gambling, or gaming activities incidental to the principal purpose of the business.

Electronic benefit transfer transaction means the use of a credit or debit card service, automated teller machine, point-of-sales terminal, or access to an online system for the withdrawal of funds or the processing of a payment for merchandise or a service.

Liquor Store means any retail establishment which sells exclusively or primarily intoxicating liquor. Such term does not include a grocery store which sells both intoxicating liquor and groceries including staple foods (within the meaning of section 3(r) of the Food and Nutrition Act of 2008 (7 U.S.C. 2012(r))).

Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment means such an establishment that prohibits the entrance of minors under the age specified by state law.

7. Add §264.60 and §264.61 to subpart A to read as follows:

§264.60 What policies and practices must a state implement to prevent assistance use in electronic benefit transfer transactions in locations prohibited by the Social Security Act?

Pursuant to section 408(a)(12) of the Act, states are required to implement policies and procedures to prevent assistance (defined at §260.31(a)) provided with federal TANF or state TANF MOE funds from being used in any electronic benefit transfer transaction in any:

(a) Liquor store

(b) Casino, gambling casino or gaming establishment

(c) Retail establishment which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

§264.61 What happens if a state fails to report or implement and maintain policies and practices required in §264.60 of this subpart?

(a) Pursuant to section 409(a)(16) of the Act and in accordance with 45 CFR part 262, a penalty of not more than five percent of the adjusted SFAG will be imposed for failure to report by February 22, 2014 and each succeeding fiscal year on the state's implementation of policies and practices required in §264.60. The penalty will be imposed in the succeeding fiscal year subject to §262.4(g) of this chapter.

(b) Pursuant to section 409(a)(16) of the Act and in accordance with 45 CFR part 262, a penalty of not more than five percent of the adjusted SFAG will be imposed for FY 2014 and each succeeding fiscal year in which the state fails to demonstrate the state's implementation of policies

and practices required in §264.60. The penalty will be imposed in the succeeding fiscal year subject to §262.4(g) of this chapter.

[FR Doc. 2014-02488 Filed 02/04/2014 at 11:15 am; Publication Date: 02/06/2014]