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Webinar Transcription
NPRM TANF EBT Webinar
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Speakers: Earl Johnson, Director, Office of Family Assistance; Maria Sciannameo, Program Specialist, Administration for Children and Families, Office of Family Assistance; and Susan Golonka, Deputy Director, Administration for Children and Families, Office of Family Assistance

Content: The Notice of Proposed Rulemaking (NPRM), 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, was published in the Federal Register on February 6, 2014. OFA hosted a Webinar, The Notice of Proposed Rulemaking (NPRM), Temporary Assistance for Needy Families (TANF) Program, State Reporting on Policies and Practices to Prevent Use of TANF Funds in Electronic Benefit Transfer Transactions to provide participants with a summary of the NPRM and the comment process.

[Operator] Please stand by. Good day everyone, and welcome to the Notice of Proposed Rulemaking, Temporary Assistance for Needy Families Programs, State Reporting on Policies and Practices to Prevent Use of TANF Funds in Electronic Benefit Transfer Transactions conference call. Today's call is being recorded.

And at this time, I'd like to turn the conference over to Earl Johnson. Please go ahead.

Welcome

[Earl Johnson] Good day. As you are all aware, well aware, the NPRM related to the EBT requirements was published in the Federal Register on February 6, 2014. We're really excited about this. We appreciate your patience while we got the information we needed before drafting the proposed rules, and as we considered and debated a number of issues. We appreciate those who responded to our requests for public comments as [we] found the information to incredibly helpful. We encourage you to submit comments on the NPRM, which are due May 7, 2014. We're looking forward to that feedback. The Federal Register Notice provides instructions on how to submit comments. If you have any questions about this process, you can contact the Federal staff in your state's region or here in Central Office. That contact information will be provided at the end of the webinar. We can assure you that we consider all comments we receive, and we will outline our thoughts and decision processes of the Preamble of the Final Rule.

Please keep in mind that states' reports on their EBT policies and practices are still due February 22, 2014 — just over a week away. The NPRM outlines proposed rules, so states have to demonstrate that they have implemented policies and practices based upon a reasonable interpretation of the statute. We will remind you of this a number of times during this webinar. We are here to help you guys. We've been willing to engage with states over the last two years and have published guidance as necessary, and that certainly will not stop. We plan on sharing what we have -- what we are learning as we receive reports, and we are available to answer any questions states have.

I want to thank you guys for your patience once again, and with that I'm going to turn this over to our main presenter, Maria Sciannameo.

Overview

[Maria Sciannameo] Hi. This is Maria Sciannameo. Before we get into the webinar itself, the content, I want to provide you a brief overview of what we'll be discussing today. We're going to go over the Notice of Proposed Rulemaking, of course, and just present it to you — go over some logistics about submitting comments, some important dates. We'll provide a summary of the legislation and requirements, and then go over the contents of the NPRM — specifically, the proposed definitions, proposed acceptable policies and practices to be in compliance, proposed elements of a complete report, and the penalty, and then we'll talk about some next steps.

With respect to taking questions at the end, we will answer questions concerning the process of submitting reports and amendments by February 22nd, so please know that questions or comments related to the NPRM itself need to be put in writing and submitted as comments. If something is not clear in the reading of the NPRM, then we want to know it, in writing, via the comment process. Again, as Earl mentioned, those comments are due May 7, 2014.

One thing before we really begin and we want you to keep in mind that the proposed rules are not in effect. The states must submit reports on the policies and practice they have implemented based on their reasonable interpretation of the statute by February 22, 2014.

We apologize for any confusion that might have resulted from some Q&As that we posted on our website. One of the Q&As we said before February 22, 2014; we should have written by February 22, 2014.

You can submit reports to the website that's listed up there. And please review those Q&As and any other guidance such as the program instruction that we posted on our website. Contact Federal staff for additional guidance you may need. There will be penalties if you do not report on time, or if the information in your report does not indicate that you have implemented the required policies and practices, or if the information in the report does not reflect a reasonable interpretation of the statutory language. And we did receive a lot of reports over the past week, so that is a good sign.

So, as Earl noted, the NPRM was published in the Federal Register on February 6. It's available at the Federal Register's website, OFA's website, and at Regulations.gov by searching that Doc ID number. Comments are due by May 7, 2014, and the Federal Register Notice has instructions on how to submit comments. If you have any questions about how to do that, please contact us, and we'll be happy to help.

So a summary of the statute — I sincerely hope that you are well aware of this: The Middle Class Tax Relief and Job Creation Act was enacted on February 22, 2012 — two years ago just about. It requires 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 gambling establishment; or at any retail establishment that provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state for entertainment.

So the legislation imposed a reporting requirement. As we've talked about, each state is required to report to us by February 22, 2014, and annually thereafter, on its implementation and maintenance of policies and practices. There's a penalty associated where we're required to reduce a state's block grant by up to 5 percent if a state fails to comply with the reporting requirement, which means to submit the report on time or, if based on the information in the report, we find that you have not implemented and maintained the required policies and practices.

Our authority to issue regulations for these requirements derives from the fact that we are required to impose a penalty for a state's failure to submit the report, but you'll see that our proposed regulations really focus on the reporting requirement.

Definitions

All right, getting more into the content of the NPRM, we've added definitions to 45 CFR 264.0. The first definition is for electronic benefit transfer transaction. The definition in the NPRM basically mirrors the statutory definition, 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." In our discussion of this definition, we do know that it is quite broad; it certainly includes electronic benefit transfer cards, as well as the electronic payment cards. Those are the co-branded cards that can be used at many locations, you know, that have the MasterCard or Visa logo.

With respect to whether the definition includes direct deposits, we actually did not develop a proposed approach because we felt that we needed more information on whether it's feasible for states and banks to implement such a requirement, particularly if the recipient also maintains non-TANF funds in the same account. We encourage comments to address the question whether states and banks have, or reasonably could have, the capacity to apply the EBT transaction restrictions to assistance funds deposited into private bank accounts, as well as the ability to monitor whether recipients use those funds in a prohibited manner. And you'll see that this one of the two areas where we are really looking for comments and feedback. I'll talk more about the other one in a little bit.

Next definition is for liquor store. Our definition mirrors the statutory definition exactly. It's "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."

When discussing our proposed definition of casino, gambling casino, or gaming establishment, we know in the NPRM that the statute provides exclusions. So the term does not include a grocery store which also offers gaming activities or is located within the same building or complex as casino, gambling, or gaming activities and other establishments where such activities are incidental to the principal purpose of the business. We add to this proposed definition to be "an establishment with a primary purpose of accommodating the wagering of money," so the definition is no longer just exclusions, but it is actually this definition.

And the final definition for retail establishments, which provides adult-oriented entertainment in which performers disrobe or perform in an unclothed state to entertain, the statute is silent on the definition for this term. The term itself is the definition in the statute, so we decided to propose a definition to be "such an establishment that prohibits the entrance of minors under the age specified by state law." This really resulted from comments we've received about theaters showing movies with nudity. These would technically fall under the statutory definition, but our proposed definition aims to address this because minors are generally allowed in these types of establishments even though they are not allowed to see some films.

Requirements and Comments

So as far as adding the new requirements for the policies and practices, we amend 45 CFR 264.60. We talk about in the NPRM the goals of the new requirements, which we say are to ensure that cash assistance is used in a manner consistent with the purposes of TANF and to promote the integrity of the program and the responsible stewardship of public funds. With these goals in mind, we propose to accept any reasonable approach that further these goals and complies with the statutory and regulatory requirements.

The NPRM provides states flexibility in determining appropriate policies and practices to prevent the use of TANF assistance in EBT transactions at specified locations while ensuring reasonable access to cash assistance as directed by Congress. And we'll get into more specifics of acceptable policies and practices as we talk about the specific elements of the report.

So what you see on your screen now are the elements of the annual EBT report that we think will allow us to determine whether a state has fully implemented the required policies and practices, and we'll discuss each one in the next few slides. We'd like to see a discussion of initial and ongoing process for identifying the establishments subject to the requirements, approaches implemented by states that aim to prevent a recipient from accessing or using his or her TANF assistance at those locations identified, monitoring activities, and enforcing compliance, and we do note that there is no standard format that we propose to collect this information. And we really think that that these four elements really show that a state has taken the time to think about the process from the beginning to the end.

So and a discussion of possible procedures for identifying locations, the NPRM acknowledges the challenges. We heard in comments from the Request for Public Comment about ambiguous merchant category codes, ATMs moving, and we recognize those. Though we encourage states to explore an array of approaches that would identify those locations, we provide some examples. And, you know, depending on the actual policies and practices used, whether they are electronic blocking or non-electronic approach, you can choose ones that are appropriate. So some examples are reviewing transaction records for keywords, conducting Internet searches, other forms of searches as appropriate and feasible, and collaborating with state licensing agencies to try to identify the locations. And we'd like to see a discussion of ongoing procedures for identifying new establishments as they come up in a state.

There are two issues that we identified in the comments that we received in the Request for Public Comment that related to locations subject to the requirements. The first is the inability to impose restrictions on prohibited ATMs or point-of-sales terminals on sovereign tribal land. In our discussion in the imperium, we talked about how the requirements do not apply to tribal TANF programs, but states nevertheless have the responsibility to develop appropriate policies for preventing access to TANF cash assistance provided by state programs at prohibited locations, including those that are located on sovereign tribal land. So we encourage states to work with their tribes to prevent the assistance being used at those locations that are on sovereign tribal land, and we'd like to see in the reports a discussion about any steps you've taken to engage tribes if you have identified this as an issue in your state.

The second issue raised in the comments for Request for Public Comment related to Internet transactions. We talk about how 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's been suggested that the statute is only intended to apply to transactions occurring in the specified establishments and not to Internet transactions, but we do want to balance the goals of the legislation and feasibility of enforcing restrictions on Internet transactions. So this is the second area we requested specific feedback as we felt like we needed more information before we developed a proposed approach.

Just to talk briefly about the interaction with the requirements with the state plan requirements, the additional state plan requirements. We remind states to take adequate access into account when identifying locations as per the state plan requirement in the statute, or if the process of identifying prohibited locations reveals that imposing restrictions will limit access to cash assistance, we want to see what types of corrective actions you would take. The proposed regulations do not allow states the flexibility to avoid imposing a restriction at an ATM or POS terminal even if such a restriction would limit the ability of recipients in a geographic area to access their cash assistance.

Example

I do want to talk briefly about an example -- a good example that we received in a state report already. So this state reported that if an identified misuse is due to inadequate access, the state would find good cause and does not impose a penalty on a recipient, but as you may have seen in the Q&As we posted on our website, this alone does not suffice as an adequate access plan. We want to see corrective actions a state would take. So, in addition, this state reported that they referred the TANF recipient to a client help desk provided by a contractor, and that the contractor must ensure that no recipient travel more than 15 miles to any non-prohibited locations to access cash. And, finally, as they develop plans to ensure adequate access to cash assistance, we want you to also consider whether there is an adequate number of locations where recipients may obtain cash assistance at a minimal cost and at no cost, in accordance with the other state requirement in the statute.

Approaches to Policies and Practices

So the next element of the report is to talk about the actual policies and practices to prevent the use of TANF assistance via EBT transactions. As we talked about, the Proposed Rule allows significant state flexibility in the methods they choose to adopt. States are encouraged to periodically evaluate the effectiveness of their policies that they choose and adjust the policies as necessary and ensure that the recipients are informed and reminded of the restrictions on a regular basis.

Some possible approaches that you might choose are electronic or automated prevention measures such as reprogramming ATMs and POS terminals so that they deny the TANF EBT or EPC bank identification number, or some approaches that do not require electronic blocking is to communicate to recipients and/or establishments that recipients are not permitted to access their TANF benefits at those locations and enforce compliance with penalties for violations. Yeah, you can also require merchants to post signs next to terminals to inform TANF of the restrictions and provide a list of restricted establishments to recipients, which would be updated on a regular basis.

Again, we want to see that you are evaluating the effectiveness of these approaches and making any adjustments as necessary. And one way to do that is by monitoring. We feel that these activities are necessary to evaluate the effectiveness of the policies and practices, and then take the steps to enforce compliance. So some examples of monitoring would be auditing a certain percentage of recipients transaction records to determine compliance by individuals and businesses, reviewing monthly ATM activity reports and matching them against a list of terminal IDs or addresses of restricted locations, or random site visits even to establishments that are subject to the requirement.

Compliance

And, finally, the final element of the report is to discuss how you will enforce compliance. We feel that this is necessary in order for you to then take corrective actions as necessary. So some examples would be penalties or notices for the parties responsible for ensuring ATMs or POS terminals are reprogrammed. You can impose penalties on, or provide notice to, merchants who do not post signs for informing TANF recipients that they cannot use their TANF assistance at their at location. And, if authorized by state law, the state could impose financial penalties in relation to entities that are subject to state licensing requirements. And actually one state has reported that they have done this, and they are cooperating with their state licensing agencies, who would take the action as necessary. You can also choose to sanction or penalize a recipient who is found to have used his or her EBT or EPC card at the prohibited locations, and we've seen a few examples of assigning a protective payees as well. Again, it would really depend on the actual policies and practices you choose to prevent assistance from being used in those locations. And I do want to note that they don't necessarily have to be punitive, but they should result in action that addresses any ineffectiveness of the policy that you've chosen.

We also encourage you to share in your report any information that you develop concerning the effectiveness of the policies and practices and enforcement practices, whether the state was able to achieve your desired outcomes, any potential plans to modify policies in order to address challenges or improve effectiveness. We want to share information as necessary so other states might benefit from what some states have done and have learned from the approaches they've chosen.

Penalties

So, next, the NPRM adds a penalty to 45 CFR 262.1–3 and 264.61. We add the penalty for the failure to report by February 22, 2014, and annually thereafter, on the state's implementation of policies and practices in accordance with the statute or for failure to demonstrate that you've implemented and maintained such policies and practices. We note that the combined penalty will not exceed 5 percent of the adjusted SFAG. And the reports should address the four areas that we've just discussed. The penalty will be imposed for fiscal year 2014 and each succeeding year fiscal year, and states will have the option to appeal, submit reasonable cause justification, or enter into corrective compliance. And we do note that the statute provides for us the discretion to reduce the penalty based on the degree of noncompliance and will not base any penalty on fraudulent activity by any individual in an attempt to circumvent the policies and practices required by the statute.

So some next steps — we repeat this slide because we want to emphasize this point: The proposed rules are not in effect. You must submit reports based upon your reasonable interpretation of the statute by February 22, 2014. Again, there's the email address and some resources for guidance, and keep in mind the penalties for failure to report and for failure to demonstrate in your report that you've implemented the required policies and practices.

Submitting Comments

And the next steps related to the NPRM itself, submit comments, please; we want to hear from you. After the comment period, we'll evaluate our proposed rules based on those comments that we've received and then publish a Final Rule. Once a Final Rule is published, we'll inform states that they will need to review their policies and practices to determine whether they comply with the Federal regulations and then make any changes as necessary. And here are the Federal contacts; you can contact us in the Central Office, or again, the states can contact their regional office Federal contacts.

And with that, we're going to open it up to some questions and answers. Again, we can't answer questions about the content of the Notice of Proposed Rulemaking; any questions related to that or comments should be submitted to the Federal Register. We can answer questions about the process of submitting reports, things like that.

Questions

[Operator] And, if you would like to ask a question over the phone, please press the * key followed by the digit 1, and please make sure your mute function is turned off to allow your signal to reach your equipment. Once again, that is *1 on your telephone keypad to ask a question. And we'll pause for a moment.

[Operator] And we do have a question, and that comes from Ben Anderson, and he's with Ohio Department of Job and Family Services. Please go ahead.

[Ben Anderson] Yeah, my question is on the elements of the report. Our report is up for review through our director and the governor's office, and we're now seeing the four elements of the report. I understand they were in the NPRM, but does our report for this year have to contain all four elements, or are those four elements required for the annual reports starting 2015?

[Maria Sciannameo] So the reports this time around, that are due February 22, you are proceeding based on a reasonable interpretation of the statute, and you should really — as long as you think that your report reflects all of the information necessary for us to determine that you've fully implemented the required policies and practices, then that's fine.

[Ben Anderson] Thanks, appreciate it.

[Operator] And no one else is in the queue at this time, but I'd like to get everyone another opportunity. If you do have a question, please press *1 at this time, and again, we'll pause for a moment. And it appears there's no other question, so I'll turn it back to OFA for closing.

Closing

[Susan Golonka] Okay. Hi. Well, thank you, Maria, for running through the NPRM, and I think folks will see that we've tried to provide states with really a great deal of flexibility while also trying to comply with the provisions, obviously, of the law. As Maria said, we really encourage folks, states, to provide us with comments, questions, you know, if you portions of the Rule are unclear, we want to know that. If you have concerns, we want to know that.

One thing I think is — well, in some ways we felt it was going to be somewhat problematic and confusing to have the Rule come out, the Proposed Rule, just before the reports are due, but, on the other hand, it also provides you in a sense a test to say, “Well, if this Rule was in effect as I'm writing this report, would I had been able to do it?” So, hopefully, we'll all learn from the experience of these two coming out almost coincidentally.

I just want to emphasize again what Maria said, there are two issues in particular where we really did not propose a rule because we wanted more feedback. One has to do with whether or not the provisions should or could apply to direct deposits into individual bank accounts, and then the other has to do with the application of the prohibitions to the Internet. So purchases, for example, over the Internet. And so, you know, only to say finally, as Maria has said as well, submitting your reports — which are actually due close of business Saturday as it were — it is now based on a reasonable interpretation of the law. You should not necessarily be scared because of what you've done or what you were submitting is not completely in alignment with what we have in the Proposed Rule. If it is a reasonable interpretation, then we'll be good with that. If you submit the report, and many of you have already experienced this, if we have -- feel there are some deficiencies, then we'll definitely get back to you with some more questions and ask you to fill out your report further. So I'm going to pause now because I see we do have a couple of questions.

[Operator] We did have a couple of questions come in online. The first is, “Are there states that share the EBT card with other programs, such as child support, and do not have these restrictions?”

[Maria Sciannameo] So we do address this in the Q&As on our website. If there is more than one benefit that's loaded on the same card that TANF -- that TANF assistance is loaded on, the TANF restrictions still do apply to the TANF assistance, so your policies and practices should try to address that. And in states -- in states' reports, there have been -- we know some states have that experience.

[Operator] The next question, “I am confused regarding how states are expected to identify additional POS or ATM locations when participants live in an area where there are penurious current sites, especially rural areas.”

[Maria Sciannameo] Well, we -- I gave an example, you know, the state in particular put it on the contractor to ensure that there is reasonable access, which they interpreted as no less -- no more than 15 miles from the closest non-prohibited location. We can look through the reports that we've received, and we're going to be sharing that information to provide some ideas. We could certainly do that, but that is a state plan requirement, so it's up to you to determine the appropriate policies for addressing adequate access.

[Susan Golonka] Okay. To everyone, thank you for spending the afternoon with us and taking the time. We look forward to your comments. And thank you to Maria and to Earl.

[Operator] And thank you very much; that does conclude our conference for today. I'd like to thank everyone for your participation and have a great day.