Comments on Proposed TANF Regulations (45 CFR chapter II, Parts 270-275)

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Introduction

These comments are submitted in response to the November 20, 1997 Notice of Proposed Rule Making, concerning the implementation of the Temporary Assistance for Needy Families (TANF) Block Grant, on behalf of the Center for Law and Social Policy (CLASP). CLASP is a national non-profit organization engaged in research, analysis, advocacy, and technical assistance on a range of issues affecting low-income families. CLASP has closely followed developments relating to enactment and implementation of the TANF program, and CLASP staff have been actively engaged in issues relating to numerous aspects of implementation.

Included in the proposed regulations are a number of areas where HHS deserves support for thoughtful resolution of issues. However, there a number of areas where we believe HHS should reconsider the positions it has taken. Most of our analysis is contained in a section-by-section discussion of the proposed regulations. However, a set of issues are best discussed separate from the section-by-section analysis, because the HHS position is not reflected in a single regulation, but rather, in an overall approach cutting across a number of proposed regulations. Accordingly, this Introduction includes a detailed discussion of two major issues that cut across regulatory sections: HHS' proposed treatment of separate state programs; and of waivers that were in place at the time TANF was enacted.

I. Separate State Programs

One of the most significant - and most troubling - aspects of the proposed rules involves the approach that HHS has taken to "separate state programs" -- the usage of state dollars to operate programs of assistance for low-income families that are not subject to many of the rules governing the TANF Program. In the proposed regulations, HHS has recognized that a state can opt to put state funds into one or more separate state programs, that such programs are not subject to most TANF rules, and that in many instances, expenditures in a separate state program can count toward satisfying a state's TANF maintenance of effort requirement. However, while acknowledging the statutory flexibility provided to states in the use of state funds, HHS has seemingly sought to discourage the full use of that flexibility in its approach to TANF penalties: HHS proposes to limit the availability of reasonable cause exceptions and reductions in penalties for states that make use of separate state programs. The precise circumstances where reasonable cause exceptions and penalty reductions will be unavailable to states with separate state programs remains somewhat unclear, but it seems likely that the regulations, if not modified, may have a significant chilling effect in making states fearful to exercise their flexibility to develop separate state programs.

This part first explains the potential significance of separate state programs in the TANF structure, then describes the proposed regulatory approach, and then explains why that proposed approach is both ill-advised, and in some aspects, appears illegal. A set of preferable alternatives is then suggested.

Background: Separate State Programs in the TANF Structure

A key aspect of state flexibility in the TANF statutory structure is provided by the fact that a state can satisfy the TANF maintenance of effort requirement through expenditure of state funds in programs outside of TANF and not subject to most TANF rules. To understand why, some brief background is needed.

The AFDC Program operated on the principle of federal-state match: a state made expenditures to operate AFDC and a set of related programs and was reimbursed for a portion of those costs by the federal government. In contrast, the fiscal relationship in TANF is based on the principle of maintenance of effort. Each state is eligible to receive a block grant of federal TANF funds. The amount of the block grant will be reduced if the state fails to satisfy a basic maintenance of effort (MOE) requirement for the expenditure of state funds. To count toward MOE, expenditures must be for one of a set of qualified purposes, and must be for needy families with children (or for pregnant individuals). However, so long as the other statutory requirements are met, a state can choose to satisfy its TANF MOE requirement by spending state funds in any of three ways:

- by **commingling** state and federal funds in a single TANF Program, so that each family's assistance is funded with a mixture of federal and state funds;

- by expending state funds **segregated** from federal funds in the state's TANF Program, so that among families assisted in the TANF Program, some families are receiving federally-funded TANF assistance and some families are receiving state-funded TANF assistance; or

- by expending state funds in a **separate** state program or programs; a separate state program is one that receives no federal TANF funds.

The distinctions between the three models matter because some TANF requirements only apply to families receiving federally-funded TANF assistance, while other TANF requirements apply to any family receiving assistance (whether federally- or state-funded) in the TANF Program. For example:

- Most TANF prohibitions on assistance (including those prohibitions relating to providing assistance to categories of immigrants) only apply to use of federal TANF funds; accordingly, a state wishing to assist families subject to such federal prohibitions may do so and have the expenditures count toward basic maintenance of effort requirements, if the state provides assistance either with segregated state funds or in a separate state program.

- The TANF sixty-month time limit is calculated by counting the number of months that a family including an adult receives federally-funded TANF assistance. Thus, a state wishing to develop a different approach to time limits (e.g., allowing for categories of exemptions or extensions, identifying categories of families to which the time limits do not apply) may do so by making use of segregated state funds within TANF or through use of a separate state program.

- TANF work and participation requirements are based on all families with adults receiving assistance in the TANF Program. Accordingly, families assisted in TANF will be subject to these requirements, even if their assistance is funded with segregated state funds. A state could, however, make use of one or more separate state programs to address circumstances where the most appropriate activities for families are activities not countable toward TANF participation rates.

- Families receiving assistance in the TANF Program are required to assign child support rights to the state; when child support is collected for such a family, the state is required to send the federal share (half or more of the child support collected) to the federal government. A state wishing to allow families to keep their child support, or a state wishing to structure a program of child support assurance as an alternative to TANF, might accomplish this goal by assisting categories of families with child support orders in a separate state program.

Looking at the above structure as a whole, the basic summary that emerges is:

- If a state commingles state and federal funds in a single TANF program, then all of the key TANF requirements - time limits, other prohibitions, participation and work requirements, and child support requirements - will apply to all "assistance" provided under the program.

- If a state uses the model of segregated state funds within a TANF program, then the federal time limits and most other prohibitions will not apply to families receiving "assistance" funded with segregated state funds. However, the TANF participation and work requirements and TANF child support requirements will still apply to such families.
- If a state has one or more separate state programs, the families assisted in a separate state program will not be subject to TANF time limits or other prohibitions, TANF participation and work requirements, or TANF child support requirements.

An earlier CLASP document, **The New Framework: Alternative State Funding Choices Under TANF (**Savner and Greenberg, March 1997) provides considerably more detail on the three models of state spending, the TANF rules applicable to each model, and policy considerations in structuring state spending. That document provided the following basic guidance:

> Given the different consequences of the three models, is there a "right" way to structure state spending in the new framework? In our view, a state's analysis should not begin by assuming that any of the three models is necessarily the appropriate or preferred approach. Rather, a state should begin by considering the basic approach to welfare reform that the state wishes to take, and the policies that the state wishes to apply regarding who should be eligible for assistance, what conditions should apply to that assistance, how best to advance the state's approach to work, etc. Once the state has identified the policies it wishes to pursue, the

> question then becomes which of the three models (or which combination of the three) best helps the state effectuate those policies.

In developing a state approach, one potentially important consideration under the TANF statute concerns the impact of state spending structures in qualifying for the TANF contingency fund, i.e., the $2 billion matching fund available to states in times of economic downturn. A state seeking to access the Contingency Fund must have an expenditure of state funds exceeding 100% of a historic state expenditure level (defined differently than the one applicable to TANF MOE) in the year in which the state seeks contingency funding. (Sections 403(b)(4) and 409(a)(10)). While spending in separate state programs can count toward TANF MOE requirements, spending in a separate state program does not count toward Contingency Fund MOE requirements.

Separate State Programs: The Controversy

Before publishing the proposed regulations, HHS had expressed concern that states might misuse their statutory flexibility in usage of state funds for the purpose of undercutting TANF requirements.[1] In particular, HHS had highlighted two areas of concern: that states might use their flexibility to defeat the TANF work participation requirements or to avoid sharing child support collections with the federal government.

The concern about work participation requirements was that a state might, for instance, put half of its cases (or its most difficult cases) in a separate state program not subject to work requirements, so that it would be easier to satisfy federal participation requirements. The concern about child support was that a state might put its cases with child support collections in a separate state program to avoid paying the federal share of child support to the federal government.

It is true that a state might simply try to manipulate rules as a means of evading federal requirements. However, there are also very legitimate reasons why a state might want to take a different approach in its policies relating to work participation or child support. For example, in the context of work participation rates, CLASP had suggested the following considerations in **The New Framework.**

> In our view, the best way to think about these issues is not what is the "easiest" way to meet TANF participation rates. Rather, the basic TANF structure essentially assumes that families receiving TANF assistance are able to engage in work and specified work-related activities for at least 20 hours a week. If that assumption is not accurate for a family - either because the parent is unable to work or because the most appropriate activity for the parent is not countable toward TANF participation rates - then it may be most appropriate to provide an alternative structure in which assistance for that family can be provided.

[1] See TANF-ACF-PA-97-1 (Jan. 31, 1997).

Designing a separate state program need not simply mean creating a program that looks like the TANF program, but with different participation requirements. For example, a state wishing to enhance access to education and training activities for low-income families might consider using state maintenance of effort funds to develop a program of financial aid for post-secondary education for low-income families or to fund stipends for low-income parents participating in JTPA-approved activities or to extend unemployment compensation for low-income parents engaged in education and training activities. The broad point is that if the state wishes to provide support for participation in activities that do not count toward TANF participation, it may be preferable to use state maintenance of effort funds to develop an alternative to TANF.

Developing a separate state program or programs for those for whom work is not presently expected may also help the state in developing one set of time limit rules for those who appear readily employable and a different set of rules for those whose circumstances prevent employment. If a state wishes to have one set of time limit rules for those appearing employable and a different set for, e.g., families in which a member is disabled or incapacitated, the state could accomplish that approach by having a time limit with certain categories of exemptions. However, the state might prefer to have one program with a termination time limit, and another program with no time limit or a substantially different time limit. The state can do so through the vehicle of a separate state program.

As to child support, one of the most significant opportunities presented by the usage of separate state programs is the potential for a state to design a child support assurance program as an alternative to TANF for some families. The idea of child support assurance (a common approach in a number of other countries) is that government sets a guarantee level for families that have cooperated with child support enforcement system, and that the guarantee level will be assured in months when child support is not paid or falls short of the guarantee level. An effective child support assurance system might make it unnecessary for many families to seek or rely on TANF assistance.[2]

In addition, in any separate state program, the federal requirement that the state secure an assignment of child support payments from non-custodial payments will not apply. Therefore, the requirement that a federal share of assigned child support payments be calculated and paid to the federal government will also not apply. Thus, a separate state program that is designed to serve policy goals unrelated to child support will nonetheless have the effect of diminishing the amount of the federal share of child support payments collected by the state.

Thus, in developing its regulations, HHS was faced with a statutory structure that clearly permitted usage of separate state programs to count toward TANF MOE (but not Contingency Fund MOE); a fear that states might use separate state programs to undercut TANF requirements; and a set of

[2] See **Child Support Assurance: A New Opportunity in the Block Grant Structure** (CLASP, May 1997).

legitimate and potentially creative policy approaches that states might pursue through the separate state program approaches.

Separate State Programs: The Proposed Regulatory Approach

In its proposed regulations, HHS begins by recognizing and defining the three distinct ways a state could use state funds and have such expenditures count toward TANF MOE. HHS begins with the following definitions:

- **Commingled State TANF expenditures** means expenditure of State funds that are made within the TANF program and commingled with Federal funds.

- **Segregated State TANF expenditures** means the expenditure of State funds within the TANF program that are not commingled with Federal funds.

- **Separate State program** means a program operated outside of TANF in which the expenditures of State funds may count for TANF MOE purposes.

§270.30. Consistent with the federal statute, HHS then explains that structuring state spending in any of the three ways could count to satisfy TANF MOE requirements (62 Fed. Reg. 62153) but that expenditures in separate state programs would not count toward satisfying Contingency Fund MOE requirements (62 Fed. Reg. 62166).

In drawing distinctions between commingled, segregated, and separate funding, and in explaining the MOE consequences of each, HHS is simply explaining the requirements of the federal TANF statute.[3] However, HHS then faced the question of what, if anything, to do to encourage or discourage the usage of such programs. States risk an array of penalties in TANF, and HHS' basic approach is to increase the risk of penalties for states that elect to make use of separate state programs.[4] The specific means are as follows:

In determining the amount of a penalty for a state that has failed to meet TANF participation rates: The TANF statute provides that the penalty for a state failing to meet a required participation rate will be 5% in the first year of compliance, and an additional 2 percentage points in each subsequent year of noncompliance, up to a cap of 21%. The law

[3] See **HHS Policy Guidance on Maintenance of Effort, Assistance, and Penalties** (CLASP, February 1997)

[4] In a separate regulatory section, HHS also provided that in determining whether a state's work participation rate is adjusted downward based on caseload reduction, HHS would give consideration to the number of cases being assisted in separate state programs. Our analysis of this provision is contained in the discussion of 271.42.

further states that the Secretary of HHS "shall" impose reductions in the amount of the penalty based on the degree of noncompliance, and "may" reduce the penalty if the noncompliance was due to circumstances that caused the state to be a "needy state," i.e., meeting a federal definition of economic distress, or because the noncompliance was due to extraordinary circumstances such as a natural disaster or regional recession. (Sec. 409(a)(3)(C)). The TANF statute also provides that HHS "may not impose a penalty on a State" for failure to meet participation rates if HHS determines that the state has reasonable cause for failing to comply with the requirement. (Sec. 409(b)).

The regulations proposed to implement these statutory provisions provide:

- **Mandatory Reductions Based on Substantial Compliance:** If a state meets a required threshold (i.e., 90% of the required participation rate), the state will qualify for a reduction in the amount of the penalty. However, this reduction will only be available if the State demonstrates that "it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements." (§271.51(a)).

- **Discretionary Reductions Based on Special Circumstances:** A state will only be eligible for a reduction based on circumstances that caused the state to be a needy state or based on extraordinary circumstances (such as natural disaster or regional recession) if the state demonstrates that "it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements." (§271.51(a)).

- **Penalty Waivers Based on Reasonable Cause:** A state seeking a reasonable cause exemption for failure to meet participation rates will not qualify if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rate..." (§272.5(c)).

  Apart from the general reasonable cause provisions, proposed regulations provide that a state may qualify for a reasonable cause finding if failure to meet participation rates is attributable to the provision of good cause domestic violence waivers or attributable to provision of assistance to refugees in federally approved alternative projects; however, HHS also provides that in order to qualify for either of these exemptions, the state must demonstrate that "it has not diverted cases to a separate state program for the purpose of avoiding the work participation rates." (§271.52(b)).

In determining if a state qualifies for a "reasonable cause" exception to other TANF penalties, and in determining whether a state qualifies for a penalty reduction despite having failed to fully comply with a corrective compliance plan: Some TANF penalties are subject to a "reasonable cause" exception, i.e., the Secretary of HHS "may not impose a penalty" on the state if the Secretary determines that the state has reasonable cause for failing to comply with the requirement. Under the TANF statute, a state that does not receive a good cause exception may still avoid certain

penalties by submitting, having accepted, and complying with a corrective compliance plan. (§409(c)). The proposed regulations further provide that under limited circumstances, HHS may reduce a penalty despite the state's failure to completely correct or discontinue the violation in a timely manner pursuant to the state's corrective compliance plan. (§272.6(i)).

In implementing the reasonable cause/corrective compliance provisions, the proposed implementing regulations provide that:

- For certain penalties,[5] a state will not be eligible for a reasonable cause exception if HHS detects "a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rates..." (§272.5(c)). Similarly, a state facing one of these penalties will not be eligible for a reduction in the penalty amount when the state has failed to completely correct or discontinue the violation if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rates and the State fails to correct the diversion..." (§272.6(i)(2)(i)).

- For certain penalties,[6] a state will not be eligible for a reasonable cause exception if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of diverting the Federal share of child support collections." (§272.5(d)). Similarly, a state facing one of these penalties will not be eligible for a reduction in the penalty amount when the state has failed to completely correct or discontinue the violation if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of diverting the Federal share of child support collections and the State fails to correct the diversion..." (§272.6(i)(2)(ii)).

Analysis and Criticism of the HHS Proposed Approach

The HHS approach does not prohibit states from using separate state programs -- indeed, HHS lacks the statutory authority to do so. Instead, the HHS approach focuses on restricting the availability of relief from penalties for states with separate state programs under certain circumstances.

At least in theory, then, a state that does not believe that it would be at risk of a penalty could continue its approach without concern about the views of HHS on this issue (though the preamble and data

[5] The applicable penalties are those for failure to meet work participation rates, failure to comply with the five-year TANF time limit; failure to maintain assistance when an adult single custodial parent has been unable to obtain needed child care for a child under age six; and failure to reduce assistance for recipients who refuse to work without good cause.

[6] The applicable penalties are those for failure to meet work participation rates, failure to enforce child support enforcement non-cooperation penalties, failure to comply with the five-year TANF time limit; and failure to reduce assistance for recipients who refuse to work without good cause.

collection regulations suggest that HHS also envisions using data about separate state programs for purposes of calculating high performance bonuses to states. See 62 Fed. Reg. 62175; 275.3(d).)

In practice, however, no state wishes to risk a penalty, and states are likely to be fearful of engaging in conduct that increases the risk of a penalty being imposed for state conduct. The clear and intended effect, albeit indirect, of the proposed regulations will thus be to regulate and limit state decisions about separate state programs.

Generally, and in several specific respects, the proposed HHS approach appears to be unlawful.

- Congress chose not to make the restrictions and requirements relating to the use of federal TANF funds, and the operation of a state TANF program, applicable to separate state programs in which state expenditures are counted toward the basic MOE requirement. Had Congress intended for these restrictions to apply, it could, as it did in the case of Contingency Fund MOE, have made them applicable. The effect of this decision was to accord states broad flexibility in the development and implementation of separate state programs. Through the Department's general approach of conditioning penalty relief on its assessment of a state's purpose or motivation in establishing a separate state program, the Department is attempting to do indirectly, what Congress determined not to do. As such, the HHS approach may properly be viewed as an abuse of its discretion in implementing the various penalty provisions addressed in the proposed regulations.

C In the case of participation rates, the TANF statute says that HHS "shall" impose reductions in penalties based on the degree of noncompliance, i.e., there is a mandatory duty on HHS to reduce work participation penalties based on the degree of noncompliance. Yet HHS would deny any reduction to a state unable to demonstrate that "it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements," regardless of the degree of noncompliance.

C Except for those penalties where reasonable cause is unavailable, the TANF statute says that the Secretary "may not impose a penalty on a state" if the Secretary determines that the state had reasonable cause. Sec. 409(b)(1). While this language is somewhat ambiguous, the better reading seems to be that Congress was directing HHS to provide penalty relief for the specified penalties when reasonable cause was present. Yet the proposed regulation would provide, in effect, that regardless of the overall circumstances and the reasonableness of the state's explanation, the state cannot qualify for this exemption if there is an offending separate state program. In addition, a court might consider arbitrary HHS' unwillingness to consider the entire set of circumstances for which a state claims reasonable cause.

C In several instances, there is no reasonable linkage between the conduct to which HHS objects and the penalty consequences. For example, suppose that the state had failed to comply with

the TANF child care protection, or the requirement to impose TANF sanctions on those violating work requirements, due to formally issued federal guidance that provided incorrect information resulting in the state's failure. As drafted, the proposed regulations would deny such a state a reasonable cause exemption on the basis that there had been a significant diversion of families to a separate state program achieving the effect of avoiding the work participation rates, even though the state plainly had reasonable cause. A court could well conclude that it is arbitrary and capricious to deny reasonable cause when reasonable cause is present, simply because the state has engaged in unrelated lawful action of which HHS disapproves.

If the Department nonetheless determines to include consideration of separate state programs in the final regulations, it is essential that HHS apply reasonable and clearly defined standards when articulating how the usage of a separate state program will affect the availability of penalty relief.

Unfortunately, HHS' language is not consistent: the regulations use two different phrases, and the preamble provides little guidance in understanding either phrase or whether there is in fact a difference between them:

- The proposed regulations provide that a state seeking a penalty reduction based on having met or exceeded the 90% threshold, or a state seeking a discretionary reduction, must demonstrate that "it **has not diverted cases** to a separate State program **for the purpose of** avoiding the work participation requirements." (§271.51(a)). (emphasis added). The same standard applies if a state is seeking a reasonable cause finding based on the provision of good cause domestic violence waivers or attributable to the provision of assistance to refugees in federally approved alternative projects.

- In possible contrast, a state seeking a general reasonable cause exemption for failing to meet work participation rates or for certain other penalties will not qualify if HHS detects "**a significant pattern of diversion** of families to a separate State program that **achieves the effect of** avoiding the work participation rate..." (§272.5(c)). (emphasis added). Similarly, a state facing one of these penalties will not be eligible for a reduction in the penalty amount when the state has failed to completely correct or discontinue the violation if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rates and the State fails to correct the diversion..." (§272.6(i)(2)(i)). A comparable standard applies to the availability of reasonable cause exemptions or reductions in penalties for certain penalties if HHS detects "a significant pattern of diversion of families to a separate State program that achieves the effect of diverting the Federal share of child support collections." (§272.5(d)); (§272.6(i)(2)(ii)).

It is not clear how either standard would be applied, or whether they are different from each other. They appear different, because in the context of work participation, the first standard puts the burden

on the state to make a demonstration, and focuses on whether there has been any diversion "for the purpose of" avoiding the requirements. The second standard focuses on whether HHS detects a "significant pattern of diversion" which "has the effect of" avoiding the work participation rate requirement. This difference, if intended, could be significant, because there can be a difference between looking at the state's purpose and looking at the effects of a state approach. For example, a state might structure a separate state program for disabled parents or caretakers as part of an overall state disability policy; the purpose of doing so might not be to make it easier to meet TANF participation rates, though that could be one of the effects. Similarly, a state might structure a new state approach to student financial aid for low-income families outside of TANF; again, the principal purpose might be to design a better and more effective means of helping low-income parents attend school, but an effect could be to make it easier for the state to meet TANF participation rates.

While the standards appear different, nothing in the preamble suggests that a difference was intended. The only language that appears to offer any explanation is in the context of the "significant diversion" standard, and reads as follows:

> We plan to monitor States' actions to determine if they constitute a significant pattern of diversion. For example, if, based on an examination of statistical or other evidence, we came to the conclusion that a State was assigning people to a separate State program in order to divert the Federal share of child support collections, or in order to evade the work requirements, we would conclude that this is a significant pattern of diversion and would deny the State certain types of penalty relief.
>
> A State would be permitted the opportunity to prove that this pattern was actually the result of State policies and objectives that were entirely unrelated to the goal of diversion, but we would make the final judgment as to what constitutes a significant pattern of diversion.

62 Fed. Reg. 62130. Thus, the wording of this preamble language makes it sound as if the focus of the "significant pattern" standard is on the state's purpose, rather than the effects. It also suggests, however, that state policies and objectives must be "entirely unrelated" to the goal of diversion. Again, it is unclear how this would work in practice. Consider the state developing a separate program for the disabled, or a separate state program of low-income financial aid. In either case, the principal state purpose may be wholly unrelated to attainment of TANF participation rates, but if the state is aware, however incidentally, that the result will be to make it easier to meet TANF rates, does that taint the entire state policy?

Or, consider the case of child support assurance. A state may wish to implement a child support assurance policy because the state hopes it offers an attractive, non-welfare means of assisting single parent families that have cooperated with child support enforcement. (In fact, the Administration's original welfare reform bill, in 1994, had proposed a set of child support assurance demonstration projects). Necessarily, an effect of the state implementing a state-funded child support assurance

demonstration will be to reduce the federal share of child support collected; even if that is not the goal, the state will certainly be aware that it will be a (not undesirable) consequence of the approach taken. How would the HHS standard be applied in such a case?

Thus, the proposed HHS standards are unclear and inconsistent, and are likely to have a chilling effect on state behavior, because it is not clear when a separate state program will put the state at risk of being denied penalty relief.

HHS makes clear that much of its concern about separate state programs is its fear that states will use the device to avoid the TANF focus on work:

> We are proposing that, a State will not receive a penalty reduction based on the severity of the failure or our discretionary authority, if a State has diverted cases to a separate State program for the purpose of avoiding the work participation rates. We want to ensure that each State makes a serious effort to provide work and work-related activities in any State-only funded programs. As we indicated in program announcement TANF-ACF-PA-97-1, we do not believe Congress intended a State to use separate State welfare programs to avoid TANF's focus on work.

62 Fed. Reg. 62142. This framing of the issue is unsatisfactory in two respects. First, there are many ways to promote work other than through the specific mechanics of the TANF participation rates. A state might readily conclude that a greater emphasis on barrier removal, or on job search, or on training and postsecondary education or on other activities that do not count (or only count to a limited extent) toward participation rates will be a more effective means of advancing work. If a state wishes to pursue such approaches through a separate state program, the state is free to do so under the TANF structure, and should not face a greater risk of penalties because the state has elected to do so.

Second, work is one, but not the only, goal of TANF, and it is not the only basis for measuring the legitimacy of a state's goal in a separate state program. The TANF statute specifically lists an array of qualified state expenditures that can count toward maintenance of effort, including cash assistance, child care, education and job training. If, for example, a state uses separate state funding to design a food assistance program for immigrant children losing eligibility for food stamps, the state might reasonably conclude that the principal focus of the program is nutrition rather than work. A state is free to take this approach under the TANF structure, and should not face an increased risk of penalty because the state has elected to do so.

Finally, there is a serious inconsistency in HHS' overall approach to the risks of inappropriate state conduct in the TANF framework. HHS emphasizes that "the central goal of the new law is to move welfare recipients into work" (62 Fed. Reg. 62127) and that the limitation on reasonable cause exceptions and penalty reductions is needed because "[g]etting recipients to work is the most critical component to achieving the purposes of TANF..." (62 Fed. Reg. 62130). HHS does not note,

however, that there is a far easier means for states to meet participation rates than the adoption of separate state programs: states can simply restrict the availability of assistance for needy families. The first statutory purpose of TANF is to "provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives..." Sec. 401(a)(1). Under the proposed regulations, a state developing a comprehensive set of services to disabled families with state funds may be at risk of penalty; a state that simply imposes rigid program requirements and cuts off families that do not meet its requirements is under no similar risk. A state that creates a separate state program for grandparent or non-parent caretakers may be at risk; a state that imposes requirements which have the effect of driving grandparent caretakers away is not.

Because TANF eliminates entitlements to assistance and most protections for poor families that existed under prior law, there is considerable risk that some states will respond to their new flexibility by restricting eligibility, failing to provide needed services, failing to provide needed supports to help families enter and succeed in the workforce. Yet a state taking such an approach could readily qualify for good cause exceptions and penalty reductions under the HHS approach. For example, one statutory provision which HHS fails to mention in the proposed regulations provides that a state TANF plan must set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and equitable treatment..." Sec. 402(a)(1)(B)(iii). If HHS wishes to take the approach of denying reasonable cause for a penalty because a state has engaged in objectionable conduct elsewhere, why not extend the approach to those instances where the objectionable conduct is the failure to assist needy families? The best way to ensure that states work with needy families to help get them to work would be if there were some federal incentive to assist families in need.

Proposed Alternative Approaches

HHS should, on legal and policy grounds, reconsider its approach to separate state programs. Our principal recommendations are:

C It is reasonable and appropriate for HHS to require collection of sufficient data to ensure that maintenance of effort requirements are being satisfied and to understand how those funds are being used by states. HHS should be able to use this data for purposes of generating public reports, informing Congress, and (if needed) generating legislative proposals. Note however (as discussed, infra, in our discussion of Part 275) that HHS could collect sufficient information to understand how a separate state program was being used with less extensive disaggregated data about all families receiving assistance in such a program, particularly in instances where a state would not otherwise be collecting such data.

C In determining whether a state has reasonable cause to avoid a penalty or should receive a reduction in the penalty amount, final regulations should identify factors that will be considered, and those factors should be limited to how the state has structured and implemented its TANF program, without regard to any separate state programs that may be in operation.

C In articulating factors relevant to determining whether a state has "reasonable cause" for failure to meet participation rates, or should qualify for a penalty reduction, the list of factors given consideration should include, among others: the extent to which the state's caseload has increased; the extent to which the state's performance in attempting to achieve the required rate has improved; evidence as to whether the state is providing appropriate services to individuals with significant barriers to employment; evidence as to whether state-imposed requirements are reasonable and within the capacity of program participants; evidence as to whether the state has a system for ensuring the availability of good cause exceptions for inability to meet program requirements; evidence as to whether needed supports and services are provided to families required to comply with participation requirements; evidence as to whether the state is complying with provisions designed to protect against displacement in work activities; and evidence as to whether the state program is operating with objective criteria for the delivery of benefits and determination of eligibility and for fair and equitable treatment.

• If HHS determines that consideration of factors outside of the state's TANF program such as separate state program activity should be given when determining a state's eligibility for a penalty reduction, or a reasonable cause waiver of a penalty, such activity should be just one of the factors reviewed. Most importantly, consideration should also be given to the extent to which financially eligible families with children are not being assisted in either the state's TANF program, or any separate state program. In addition, as noted above, a range of factors concerning the operation of the state's TANF program should be considered as well.

- A state's eligibility for a reasonable cause exception or penalty reduction should be based on the state's conduct in relation to the penalty at issue, not based on other conduct that has no reasonable relation to the conduct in question. For example, if a state has reasonable cause to avoid a penalty (e.g., the state violated the child care protection due to reliance on formally issued Federal guidance), HHS should not deny reasonable cause based on an unrelated factor (e.g., that the state placed families in a separate state program with the effect of avoiding the work participation rates).

- Where there is a direct relation between the penalty at issue and the conduct of the state (e.g., the state failed to meet participation rates, and had placed families in a separate state program with the effect of avoiding the rates), a state should still be permitted to demonstrate reasonable cause by showing that its conduct flowed from a legitimate and reasonable state policy which had an independent justification separate and apart from any effect that the policy had on affecting whether the state met its applicable participation rate. Under no circumstances should the implementation of a separate state program be considered a negative factor to the extent that the state has articulated a rational policy basis that includes the provision of income support to: families that do not include a parent as caretaker; families in which the parent(s) are not capable of working; families in which the parent(s) are capable of working and in which employment-related activities determined to be appropriate by the state are being provided.

- As to child support enforcement, a state is entitled to place families in separate state programs where there is not a requirement to send the federal share of child support to the federal government. To the extent that HHS considers this a problem, HHS should respond by developing a legislative proposal to Congress, rather than by restricting the availability of reasonable cause and penalty reductions in circumstances where states would otherwise be eligible for them.

II. Waivers and TANF Requirements

A second area where HHS has exercised regulatory authority to constrain state flexibility is in the treatment of waivers that were approved or pending at the time of enactment of TANF. Congress had provided that if a state had a waiver in effect at the time of enactment of the PRWORA, the state could choose to continue the waiver until its completion, and that amendments made by the PRWORA would not apply to the state before the expiration of the waiver "to the extent such amendments are inconsistent with the waiver." In interpreting this requirement, HHS has developed an inappropriately narrow interpretation of what constitutes an "inconsistency", and has significantly restricted the relief from certain penalties that may be available to states electing to continue waivers.

This part begins with a summary of the relevant provisions of the federal statute concerning treatment of waivers; then describes HHS' regulatory approach; then explains the problems and concerns presented by the HHS approach; and concludes with suggested alternatives.

Waivers and the PRWORA

At the time of enactment of the PRWORA, almost all states had approved or pending requests for "waivers" of certain sections of the Social Security Act. Generally, a state sought federal waiver approval because the state wished to test or implement a policy inconsistent with the requirements of federal law. In the years leading up to the enactment of the PRWORA, state waiver requests tended to become larger and more comprehensive, as many states used the waiver process to develop their state-based approaches to welfare reform.

Waivers were granted under §1115 of the Social Security Act, which authorized HHS to grant waivers of federal requirements for experimental demonstration projects. Because they were experimental in nature, each waiver was granted for a discrete period of time (negotiated between the state and federal government), and HHS required an experimental design. Most commonly, in a statewide waiver, there would be "experimental treatment groups" and "control groups," used to generate data on the costs and impacts of the waiver, and a non-experimental treatment group (often, most of the state) subject to the waiver provisions.

At the time of enactment of the PRWORA, Congress (and the states) faced a difficult policy choice. Many states had developed state-based approaches to welfare reform, reflected in their waiver packages, at considerable expense and sometimes after broad public involvement in the formulation of state policy. The expressed goal of the PRWORA was to "increase the flexibility of states..." §401(a). How should Congress treat the waivers and waiver requests that were approved or pending?

Congress addressed the question by enacting a new §415 of the Social Security Act, which relates to both waivers that were in effect as of the date of enactment of the PRWORA (i.e., August 22, 1996), and to waivers that were pending as of the date of enactment and approved on or before July 1, 1997.[7]

First, §415 provided that if a State had a waiver which relates to the provision of assistance under a State plan (as in effect on September 30, 1996) and which was in effect as of the date of enactment of the PRWORA (i.e., August 22, 1996), then the amendments made by the PRWORA (other than those relating to the repeal of certain child care programs) shall not apply to the State before the expiration of the waiver "to the extent such amendments are inconsistent with the waiver."

Second, the PRWORA provided that if a waiver application was filed before the date of enactment, but was granted subsequent to the date of enactment (but on or before July 1, 1997), then such a waiver would be treated in the same manner as waivers in effect as of the date of enactment, subject to two key differences:

[7] This text only discusses the law relating to the effect of a provision of the PRWORA being inconsistent with a State waiver. A more detailed discussion of §415 may be found in CLASP's **WAIVERS AND BLOCK GRANT IMPLEMENTATION: INITIAL QUESTIONS** (August 12, 1996).

- The state would only be freed from the obligation to comply with inconsistent provisions of the Act if the State demonstrated to the satisfaction of the Secretary that the waiver would not result in Federal expenditures under Title IV of the Social Security Act (as in effect without regard to the amendments made by the Act) that were greater than would occur in the absence of the waiver; and

- Receiving approval after the date of enactment for a waiver application pending on the date of enactment "shall not affect the applicability of §407 to the State." §407 is the provision of TANF that establishes the all-family and two-parent-family participation rates, the requirements for sanctioning in connection with non-compliance with work requirements, and the limited protection for single parents of children under age 6 who are unable to comply with work requirements due to the unavailability of needed child care.

HHS' Regulatory Approach

In the months after enactment of the PRWORA, numerous questions arose as to how to interpret §415. Among the key questions were:

- What constitutes a "waiver"?

- What constitutes an "inconsistency"?

- Under what circumstances does a waiver affect the application of federal time limits and work participation rates?

- To what extent is the determination of an inconsistency to be made by HHS or by the state?

Initially, HHS did not provide any guidance in answering these questions. Instead, HHS' only written discussion was a suggestion, in draft State Plan Guidance, that a State's Plan should include a discussion of whether the State intends to continue one or more individual waivers, along with an identification of each waiver provision and provision of the new law that the State believes is inconsistent, and the basis for the assessment of inconsistency. HHS' draft guidance also noted that: "Future legislative or regulatory action may limit which provisions of the TANF may be considered inconsistent with waivers for purposes of determining penalties. If this happens, States will have an opportunity to submit a new plan in order to come into compliance with the requirements."[8]

In the proposed regulations, HHS offers proposed definitions of "inconsistent" and "waiver;" explains how it would apply those definitions in the context of work participation rates and time limits; and

[8] Department of Health and Human Services, DRAFT State Guidance for the Temporary Assistance for Needy Families Program (September 1996), p.4.

describes the consequences if a state fails to comply with TANF participation rates or time limit requirements as modified by its alternative policies.

Definitions: Initially, HHS offers the following definitions of "waiver" and "inconsistent:"

> Waiver refers to a specific action taken by the Secretary under the authority of §1115 of the Act to allow a State to operate a program that does not follow specific requirements of prior law. For the purpose of parts 270 through 275 of this chapter and §415 of the Act, it consists of provisions necessary to achieve the State's policy objective. It includes the approved revised AFDC requirements, articulated in the State's waiver list. It also includes those provisions of prior law that:
>
> > 1. Did not need to be waived as part of the waiver package; and
> >
> > 2. Were integral and necessary to achieve the State's policy objective for the approved waiver.
>
> Inconsistent means that complying with a TANF requirement would necessitate that a State change a policy reflected in an approved waiver.

§270.30. The preamble explains that HHS' proposed definition of waiver rejects an interpretation under which only those provisions expressly listed in a state's terms and conditions could be considered part of the waiver; at the same time, HHS rejects an interpretation under which all of prior law could continue. Instead, HHS explains:

> It seems most consistent with the Congressional intent to allow States to finish testing the welfare reform policies they had initiated through waivers by allowing sufficient flexibility to continue relevant aspects of those policies. It recognizes that, although some requirements may not have specifically been part of the waiver (as there was no need for a waiver under AFDC), the requirements are an integral part of the demonstration embodied in the waiver.

62 Fed. Reg. 62133. As to inconsistencies, HHS explains:

> We propose that a provision of TANF is inconsistent with a waiver only if the State must change its waiver policy in order to comply with the TANF requirement. A TANF provision is not inconsistent if it is possible for the TANF requirement and the waiver policy to operate concurrently.

62 Fed. Reg. 62133. While a state can assert an inconsistency between a waiver and an array of TANF requirements, the only instances where HHS expressly explains how it would apply its definitions are in the context of TANF participation rates and time limits.

Waivers and TANF Participation Rates: The proposed regulations recognize (as required by the federal TANF statute) that provisions of §407 (i.e., the overall and two-parent participation rate provisions of the statute) do not apply to a state that had a waiver in effect at the time of enactment of the PRWORA to the extent they are inconsistent with the waiver. §271.60(a). HHS then proposes the following standards:

- **Countable activities:** An individual must be engaged in certain countable activities to count as being "engaged in work" for purposes of TANF participation rates. A waiver could be inconsistent because the set of allowable activities under the waiver are different from those that count as being "engaged in work" for purposes of TANF rates. In such a case, the state may use its waiver-based definitions of allowable activities and have such activities count toward TANF participation rates. §271.60(b)(1).[9]

- **Hours of participation:** To count toward TANF participation rates, an individual must be engaged in a countable activity for a specified number of hours. HHS proposes that a waiver could be inconsistent with the TANF hours requirements if the waiver specified an individual's mandated hours of participation in accordance with his/her particular circumstances, either as specified by criteria described in the waiver or under an individualized plan or similar agreement for achieving self-sufficiency. However, a waiver which had simply increased the mandatory

[9] The preamble explains: "As part of the waiver demonstrations, a number of States expanded the JOBS work activities. Those States believed that a broader range of activities would be most effective in helping the recipients in their States find and retain work and achieve self-sufficiency. In creating this package of activities, States generally kept some of the prior law activities, changed others, and added new ones. While only the changed and new activities required waivers, we would include the prior law activities under the waiver because they are necessary for the State to carry out the objectives of the approved waiver. Some of these activities are inconsistent with the definition of work activities in §407(d), so States could use the activities defined under the waivers instead of the TANF list of work activities. Thus, States could count participation in a broader range of activities as participation in work." 62 Fed. Reg. 62144.

hours of participation for a class of recipients under the former JOBS program would not be considered inconsistent. §271.60(b)(2).[10]

- **Exemptions, Participation Rate Denominator:** The TANF statute defines a "denominator" for purposes of the overall and two-parent rates, i.e., the base from which the participation rate is calculated. A state might have received waivers to expand the number of non-exempt recipients in JOBS. However, HHS specifies that even if a state had developed its own exemption rules for purposes of its waiver project, such rules will not be considered to create an "inconsistency" for purposes of TANF, and the denominator for participation rate purposes will not be modified, except for research cases (discussed below). §271.60(c).[11]
- **Research Groups:** If a State is continuing research group policies in order to complete an impact evaluation of a waiver demonstration, the demonstration's control group may be subject to prior law and its experimental treatment group may be also subject to prior law, except as modified by the waiver. §271.60(d). Thus, if a research evaluation is continuing, the "experimental research group" and "control group" will not be part of the participation rate numerator or denominator, although the non-experimental research group would be part of the participation rate denominator. 62 Fed. Reg. 62144.

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[10] The preamble explains (at 62 Fed. Reg. 62144): In approving waivers of required hours of participation, we allowed States to implement two kinds of policies.

First, States expanded the number of required hours of participation for a class or classes of recipients. Because those classes of recipients are already required to participate for a greater number of hours under TANF than under prior law, there is no inconsistency. Those waivers would not continue under this proposed regulation.

Second, we approved waivers that allowed a State to set the number of hours an individual must participate in accordance with an individualized plan for achieving self-sufficiency. This gave States additional freedom to tailor work requirements to the circumstances of the individual. For example, some States removed the JOBS exemption for the disabled. The intent of such a waiver was to find an appropriate level of participation based on the particular circumstances and abilities of the individual. Because continuing these policies could be inconsistent with TANF, due to requiring a lesser number of hours of participation than TANF, we will recognize such waivers as allowable inconsistencies.

[11] The preamble explains: "For example, a State might have had a waiver requiring single parents with children under one year of age and pregnant recipients to participate in JOBS, while maintaining the JOBS exemptions for the disabled and the elderly. In this example, the objective of the waiver, as reflected in the application and terms and conditions, was to expand the group of recipients who were required to participate in work activities. Maintaining the other statutory exemptions would not be necessary to achieve this objective and, in fact, would be inconsistent with the fundamental purpose of the waiver. Therefore, the prior law exemptions would not be included as part of the waiver; the waiver would include only the expanded participation requirements for single parents of young children and pregnant recipients. Moreover, because those two groups can also be required to participate under TANF, there is no inconsistency. Thus, in this example, the prior law exemptions would not be included in the waiver, and the waiver itself would not be inconsistent with TANF." 62 Fed. Reg. 62144.

- **Data Reporting:** A state using an alternative participation rate calculation will still be required to submit data sufficient to calculate the state's participation rate under the TANF standards. HHS will use this data to calculate and make public the state's participation rate under both its alternative and the TANF standards. §272.8(c).

Waivers and TANF time limits: The proposed regulations specify that if the TANF five-year limit is inconsistent with a waiver that was submitted before August 22, 1996, and approved by July 1, 1997, the State need not comply with the inconsistent provisions of the five-year limit until the waiver expires. §274.1(e). HHS then provides that the five year limit would be inconsistent with the state's waiver only if:

- the State has an approved waiver that provides for terminating cash assistance to individuals or families because of the receipt of assistance for a period of time, specified by the approved waiver; and the State would have to change its waiver policy in order to comply with the five-year limit; or

- the state needs to maintain prior law policies for control group or experimental treatment cases in order to continue an experimental research design for the purpose of completing an impact evaluation of the waiver policies. §274.1(e)(1),(4).

HHS further explains:

- Months which count against a state time limit under a waiver will also count against the federal time limit if assistance is provided with federal TANF funds and the months would otherwise count against the federal time limit. §274.1(e)(2)(i).

- The State need not count months against the federal time limit during a period in which the adult is exempt from the state's time limit under the terms of the waiver. §274.1(e)(2)(ii).

- If a non-exempt family reaches and exceeds the 60-month point due to extension of assistance under state waiver time-limit policies, the state may continue to use federal TANF funds to provide assistance without counting the case against its 20% exceptions to the federal time limit, until the state's waiver expires. §274.1(e)(3).

Process for asserting inconsistencies relating to work participation and time limits: The proposed regulations provide that HHS will only consider a state's alternative waiver requirements in the calculation of work participation rates and time limit requirements if the Governor certifies in writing:

- the specific inconsistencies (i.e., alternative waiver requirements) that the State chooses to continue;

- the reasons for continuing the alternative waiver requirements, including how their continuation is consistent with the purposes of the waiver; and
- consistent with the waiver and its purpose, the standards that the State will use to: assign individuals to the alternative waiver work activities or to an alternative number of hours; and determine exemptions from or extensions to the time limit.

§272.8(a). HHS further explains: "we will not recognize inconsistencies related to continuation of alternative waiver requirements for the explicit purpose of avoiding penalties for failing to meet the work participation rate or implement the time limit as these were not part of the original purpose of the waiver." 62 Fed. Reg. 62150.

Relief from penalties: The proposed regulations provide that if a State using alternative waiver requirements fails to meet the work participation rate or the time limit requirement:

- The state will not be eligible for a reasonable cause exception from the applicable penalty, or (in the case of participation rate penalties) a reduction in the penalty based on the degree of noncompliance, having been a "needy" state, or based on extraordinary circumstances such as natural disaster or regional recession. §272.8(b)(1). The preamble explains that HHS is taking this position because states using alternative requirements under their waivers are already at an advantage in meeting TANF requirements. 62 Fed. Reg. 62150.

- The State must consider modification of its alternative waiver requirements as part of its corrective compliance plan. §272.8(b)(2)

- If the State continues waivers related to the failure to achieve compliance with the work requirements or time limits and still fails to correct the violation, it will not be eligible for a reduced penalty for related noncompliance, despite the provisions of the proposed regulations which would otherwise allow for reduction in penalties when a state has not fully corrected noncompliance. §272.8(b)(3).

Analysis and Criticism of Proposed HHS Approach

The definition of "waiver" offered by HHS is reasonable. However, the definition of "inconsistent" presents two distinct problems. First, there is a need to broaden it to more adequately reflect the TANF statutory option for a state to assert inconsistencies. The proposed regulation provides that: "Inconsistent means that complying with a TANF requirement would necessitate that a State change a policy reflected in an approved waiver." A requirement of "necessity" is unreasonably restrictive. In many instances, a state might reasonably fear that it was putting itself at risk of penalty by following a waiver policy, but the state might not be able to demonstrate with certainty that a penalty would flow from continuing its waiver conduct.

Second, when HHS purports to apply its definition of "inconsistent" to participation rates and time limits, the results are arbitrarily restrictive, and seemingly not consistent with HHS' own definition. However, in its treatment of both participation rates and time limits, HHS then provides that particular state policies will not be considered inconsistent even though a state would have to alter those policies to comply with TANF requirements.

For example, in the context of participation rates, the proposed regulations essentially provide that: a) all states will be subject to TANF participation rates; b) states may use a modified definition of countable activities for being "engaged in work;" c) states may not use modified hourly standards for when an individual will count as being engaged in work if those hourly standards had applied to classes of recipients, though a state can depart from the federal hourly standards if under its waiver, hours of participation were set based on individualized plans for achieving self-sufficiency; and d) if under the waiver, certain categories of recipients were exempt from required participation, the state may not have its denominator recalculated to reflect those exemptions.

It is difficult to see any consistent principle that explains the distinctions drawn by HHS. Suppose a state had a waiver under which it had set specific hourly requirements of participation that differ from those in TANF. This state will now have to alter its hourly requirements to meet TANF participation rates. If an inconsistency means that a state will have to change its policies, why doesn't this constitute an inconsistency? What is the principled difference between those states that had individualized plans and those states that had set hourly requirements for classes of recipients?

Or, in the context of exemptions, HHS suggests that if a state had had a waiver which broadened the non-exempt group, the objective was to expand the group required to participate, and so maintaining its other exemptions would not be necessary to achieve this objective. 62 Fed. Reg. 62144. However, a state could just as easily articulate that its objective was to require participation where the state considered it appropriate, and not require participation where the state did not consider it appropriate; the choice to maintain exempt groups was just as much a choice as the determination to expand non-exempt groups. It is simply arbitrary for HHS to assert what the framing of the state's objective must have been in this manner.

A state may also conclude that its basic approach to encouraging and promoting work was different from that reflected in the §407 design, and that it would have to fundamentally alter its waiver approach in order to comply with §407. The relief under §415 is not permanent; it only lasts for the duration of the waiver, and if a state concludes it would have to alter its basic waiver approach to comply with §407, that would seem to create the kind of inconsistency for which relief is permitted under §415.

In the preamble, HHS suggests that it has taken its approach to participation rates because: "In considering how this provision affects the work rules applicable in a State, we wanted to draft a regulation that would balance the legislative emphasis on helping recipients find work quickly with the intent to allow States to continue reform activities they had already undertaken." 62 Fed. Reg. 62143-

44. This perspective misunderstands the function of §415. The TANF statute imposes a set of requirements, and §415 allows states to complete their prior waivers even when inconsistent with TANF requirements. The statutory section does not ask HHS to balance state policies against the perceived virtues of other provisions of the law; it says that if a state wishes to continue an inconsistent prior policy until the waiver expires, the state may do so. No "balancing" by HHS is called for.

HHS' restrictive approach to time limits is also inappropriate and troubling. As discussed above in greater detail, there are an array of different possible approaches to time limits -- termination time limits, reduction time limits, work-program time limits, and states that had expressly rejected the concept of imposing time limits. HHS limits those states that can claim inconsistencies to those who cut cash assistance after a specified time limit, but there are a number of different other situations in which a state would now be forced to alter its waiver approach in order to comply with the TANF time limits.

Nor is HHS' treatment of alternative waivers in the context of penalties a reasonable one. HHS indicates that if a state takes an alternative approach to participation rates or time limits under its waiver, and then faces a penalty, then: a) no "reasonable cause" exception will be available, regardless of the state's circumstances; b) in the case of participation rate penalties, the state will be ineligible for a reduction in the penalty based on the degree of noncompliance, having been a "needy" state, or based on extraordinary circumstances such as natural disaster or regional recession; and c) if the State continues waivers related to the failure to achieve compliance with the work requirements or time limits and still fails to correct the violation, it will not be eligible for a reduced penalty for related noncompliance, despite the provisions of the proposed regulations which would otherwise allow for reduction in penalties when a state has not fully corrected noncompliance. HHS indicates that it is taking this position because states that maintain alternative approaches will have an advantage in meeting the federal requirements based on their alternative approaches. This is likely to be true, but whether the state has a big or little advantage will depend on the details of the state approach, and whether the advantage is so large as to overwhelm any other factor cannot be known without looking at the specific situation.

For example, consider a state that has a waiver that allows for mandated participation in substance abuse treatment, and the state elects to continue that waiver and treat involvement in substance abuse treatment as counting toward participation rates. Suppose then, that the state is hit by both a severe recession and a set of natural disasters, and falls just short of meeting a TANF participation rate. Does it seem reasonable to say that regardless of any other circumstances, the state is barred from making a claim of reasonable cause simply because the state had an alternative approach under its waiver? It is not inappropriate for HHS to consider the extent of advantage that the state had in light of its waiver policies, but it is arbitrary to deny reasonable cause or penalty reductions simply because the state had an alternative policy permitted by Congress.

Proposed Alternative Approaches

In final regulations, there is no need to modify the definition of "waiver." Similarly, it is not inappropriate for HHS to require a Governor's certification in connection with a continued waiver policy.

As to the definition of "inconsistent," the greatest concerns are in HHS' application of its definition, but the definition would be improved if modified to include a statement that "An inconsistency exists if a state has a reasonable basis to believe that continuation of a waiver policy would materially increase the state's risk of a TANF penalty."

The regulatory treatment of participation rates should be modified to make clear that a state may assert an inconsistency based on its definition of engaged in work; its hourly requirements; its exemption policies; or based on the fact that compliance with §407 would force the state to alter its basic waiver approach. Similarly, a state should be able to assert a time limit inconsistency based on an alternative approach to exemptions, extensions, the consequences of reaching a time limit, or the state's rejection of time limits in its welfare reform policies under its waiver.

In the context of penalties, final regulations should provide that the fact that a state has been operating with an alternative policy under its waiver will be a factor in determining the availability of a reasonable cause exception or penalty reduction, but must be viewed in the context of the state's overall circumstances.

PART 270 -- GENERAL TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROVISIONS

§270.10 What does this part cover?

This part includes regulatory provisions that generally apply to the Temporary Assistance for Needy Families (TANF) program.

§270.20 What is the purpose of the TANF program?

The TANF program has the following four purposes:

(a) Provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
(b) End the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
(c) Prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies;
(d) Encourage the formation and maintenance of two-parent families.

Analysis: §270.20 simply restates the statutory purposes for Part A, omitting only the introductory phrase: "The purpose of this part is to increase the flexibility of the States in operating a program designed to:..."

§270.30 What definitions apply under the TANF regulations?

The following definitions apply under parts 270 through 275 of this chapter:

ACF means the Administration for Children and Families.

Act means Social Security Act, unless otherwise specified.

Adjusted State Family Assistance Grant, or adjusted SFAG, means the SFAG amount, minus any reductions for Tribal Family Assistance Grants paid to Tribal grantees on behalf of Indian families residing in the State.

Analysis: regarding Adjusted State Family Assistance Grant (adjusted SFAG);§412 of the Act directs the Secretary to provide a "tribal family assistance grant" to each Indian tribe that has an approved plan. Any amount provided to an Indian tribe must be deducted from the State Family Assistance Grant for the state or states in which lies the service area or areas of the Indian tribe.

Adult means an individual who is not a "minor child," as defined elsewhere in this section.

AFDC means Aid to Families with Dependent Children.

Aid to Families with Dependent Children means the welfare program in effect under title IV-A of prior law.

> Assistance means every form of support provided to families under TANF (including child care, work subsidies, and allowances to meet living expenses), except: services that have no direct monetary value to an individual family and that do not involve implicit or explicit income support, such as counseling, case management, peer support, and employment services that do not involve subsidies or other forms of income support; and one-time, short-term assistance (i.e., assistance paid within a 30-day period, no more than once in any twelve-month period, to meet needs that do not extend beyond a 90-day period, such as automobile repair to retain employment and avoid welfare receipt and appliance repair to maintain living arrangements). This definition does not apply to the use of the term assistance at part 273, subpart A, of this chapter.

Analysis: regarding Assistance; §404(a) authorizes states to use the grants provided to them in any manner calculated to accomplish the purposes of the Act, or in any manner that they were authorized to use funds under the former AFDC, EA, and JOBS programs "subject to this part," i.e., except as otherwise provided in the TANF statute. Allowable uses thus include cash assistance to families, and a wide range of other forms of aid. Except in language expressly permitting states to use their grants to provide low income households with assistance in meeting home heating and cooling costs, §404(a) does not use or define the term "assistance." However, several other statutory sections of particular significance use the term "assistance." In some cases, a requirement will apply to assistance provided with federal TANF funds; in other cases, the requirement will apply to any assistance provided in the TANF program, whether with federal or state funds.

§408(a) prohibits states from providing assistance in their TANF programs or using TANF funds to provide assistance in a number of situations. In every instance except the prohibition on the use of funds to provide medical services, (§408(a)(6)), states are prohibited from using funds to provide "assistance." In addition to imposing time limits on assistance and other prohibitions on when states can provide assistance, §408(a)(3)(A) requires families receiving assistance to assign their support rights in an amount "...not exceeding the total amount of assistance so provided to the family...", and §457 requires that when child support is assigned, the federal share of child support collected must be provided to the federal government.

§407 sets forth the requirements imposed on states regarding individuals' participation in work-related activities and uses the term "assistance" in defining how each state's participation rate is to be calculated; and

§411 sets forth specific data reporting requirements applicable to families receiving "assistance."

In its definition of the term "assistance" HHS is proposing that most forms of aid provided in a state's TANF program, whether in the form of cash or non-cash, will be considered assistance, with exceptions falling into two broad categories.

First, services that have no direct monetary value and are not intended as income support, that is, services that are not intended to help families meet their day to day living expenses will not be considered to be assistance. Within this category of "non-assistance" the proposal specifically mentions "counseling, case management, peer support, and employment services that do not involve subsidies or other forms of income support..." Thus, subsidies to employers to help cover the costs of employment or on-the-job training provided to a recipient will be considered assistance, as will living allowances paid to recipients who participate in employment-related activities such as education and training. However, the employment-related services themselves will not be considered to be assistance. Similarly, subsidies to meet the cost of child care, or the value of child care provided to a recipient will be considered to be assistance, while child care information and referral services or counseling will not be considered to be assistance.

In the Preamble HHS indicates its intention to include wage subsidies as assistance. HHS explains that, "[W]ork subsidies includes payments to employers to help cover the costs of employment or on-the-job training." (62 Fed. Reg. 62132) In our view, wage subsidies should not be included in the definition of assistance. Insofar as work subsidies are designed to defray all or part of an employer's costs in hiring a recipient, they should be viewed no differently than a tax incentive, which presumably would not be considered assistance, even if funded with federal TANF funds. Insofar as some or all of the subsidy is designed to pay for training provided by the employer, it should be treated similarly to other training services which will not be considered assistance. More broadly, in the Preamble, HHS indicates that its starting point for defining assistance is to identify types of benefits or services that would be considered welfare. In this context, TANF funds used to provide, or help to pay for jobs which pay wages and confer employee status should be treated as non-assistance. We would suggest inclusion in this category not only programs which provide subsidies to companies or organizations which hire recipients, but also programs in which wage-paying publicly funded jobs are created and provided for recipients

Second, one-time, short-term assistance will not be considered to be assistance. That is, aid that would fall within the definition of assistance if provided on an ongoing basis, such as cash income support or child care, will not be considered to be assistance when provided on an occasional, short-term basis. The proposed rule defines "one-time, short-term" to mean that the assistance is 1) paid to the family within a 30 day period, 2) is paid no more frequently than once in any twelve month period, and 3) is intended to meet needs that do not extend beyond a 90-day period.

There appear to be at least two categories of aid that HHS intended to exclude from consideration of assistance by this definition of "one-time, short-term" assistance. First, many of the types of assistance formerly provided under state Emergency Assistance programs designed to prevent or relieve homelessness, which sometimes included the payment of rent or utility arrears and temporary emergency shelter will fall within this category. However, it appears that the provision of temporary emergency shelter that extends beyond 90 days would fall outside the definition of one-time, short-term, and would thus be considered to be assistance under the Act.

The second broad category of aid that would fall within the definition of one time, short term, are many forms of aid provided in so-called "diversion" programs. These programs which have been developed by a number of states during the past several years are designed to provide short-term assistance through which a family can avoid becoming ongoing recipients of cash assistance. Typically such programs make available one-time cash payments to meet specific needs, e.g., car repairs, and frequently offer access to other services as well. Some of these programs specify a maximum amount of a cash that may be provided in terms of a multiple of the amount of assistance that the family would be eligible to receive in the form of ongoing cash assistance, e.g., no more than three times the monthly grant for which the family would otherwise be eligible. While the definition specifies that in order to fit within the category of one-time, short-term assistance, the needs to be met must not extend beyond 90 days, this language would not appear to require that the cash payment made to a family be limited to the amount of assistance for which the family would otherwise qualify in a 90 day or three month period. Thus for example, if car repairs needed so that a family member could accept or retain a job were equal to four time the monthly benefit amount, a payment to meet that need would still qualify for exclusion from assistance since the need for which the payment was being made does not extend beyond 90 days.

In the preamble to the proposed regulations, HHS expresses the concern that while it wishes to allow states the flexibility to provide some forms of aid without the need to comply with the various restrictions and requirements that apply when the aid provided is considered to be "assistance", it does not wish to create opportunities for states to undermine the goals of the statute concerning work, time limits, etc., through the use of such "non-assistance." In order to monitor the use of "non-assistance," HHS proposes in Part 275 (discussed below) to collect data on expenditures for non-assistance.

One important implication of the broad definition of assistance that HHS proposes is that it potentially broadens significantly the types of aid for which an assignment of child support must be made. It was well established under the AFDC program that while an assignment was required to cover the amount of cash assistance provided to a family, other forms of aid provided under Title IVA were not subject to assignment, including child care, JOBS related services, and benefits provided under a state Emergency Assistance program. It is extremely unclear that Congress intended to modify this basic structure to extend the assignment requirement to be commensurate with all of the types of benefits and services that may now be defined as assistance. As noted above, §403(a)(3)(A) requires an assignment in an amount "...*not exceeding* the total amount of assistance so provided to the family..." (Emphasis added) Given historic practices in this area and the language of the statute, this provision should clarify that states can take an assignment for less than the amount of assistance provided to the family, and that states may disregard the value of noncash assistance in determining the amount of the assignment.

The definition of assistance provided in §270.30 does not apply to the use of the term in Part 273, subpart A, concerning the state maintenance of effort (MOE) requirement. Thus, when the term

assistance is used in that section it will include all forms of assistance and non-assistance for the purpose of determining the state expenditures that may be counted towards a state's MOE obligation.

> CCDF means the Child Care and Development Fund, or those child care programs and services funded either under section 418(a) of the Act or the Child Care and Development Block Grant Act of 1990, 42 U.S.C. 9801 note.
>
> Commingled State TANF expenditures means expenditure of State funds that are made within the TANF program and commingled with Federal funds.

Analysis: regarding Commingled State TANF expenditures; There are three ways in which states can structure the expenditure of state MOE funds: 1) commingling state MOE and federal TANF funds; 2) segregating state TANF expenditures from federal TANF funds within the state's TANF program; and 3) using state MOE funds in a separate state program in which federal TANF funds are not used. For a complete discussion of these three options and the implications of each see, TANF-ACF-PA-97-1 (Jan. 31, 1997), **The New Framework: Alternative State Funding Choices Under TANF** (CLASP, March 1997), and Section I of the Introduction to these comments.

> Contingency Fund means Federal funds available at section 403(b) of the Act, and contingency funds means the Federal monies made available to States under that section. It does not include any State funds expended as a requirement of that section.
>
> Contingency Fund MOE means the MOE expenditures that a State must make in order to: meet the MOE requirements at sections 403(b)(4) and 409(a)(10) of the Act and subpart B of part 274 of this chapter; and retain contingency funds made available to the State. The only expenditures that qualify for Contingency Fund MOE are State TANF expenditures and, in certain cases, child care expenditures made under the Child Care and Development Fund (CCDF).

Analysis: regarding Contingency Fund MOE; This provision should be modified to delete the portion of the definition indicating that child care expenditures may be counted. §5502(e) of the Balanced Budget Act, modified the original provision in the PRWORA to eliminate consideration of child care spending in calculating a state's Contingency Fund MOE expenditures.

> EA means Emergency Assistance.
>
> Eligible State means a State that, during the 2-year period immediately preceding the fiscal year, has submitted a TANF plan that we have determined is complete.
>
> Emergency Assistance means the program option available to States under sections 403(a)(5) and 406(e) of prior law to provide short-term assistance to needy families with children.
>
> Family Violence Option (or FVO) means the provision at section 402(a)(7) of the Act under which States may elect to implement comprehensive strategies for identifying and serving victims of domestic violence.

FAMIS means the automated statewide management information system under sections 402(a)(30), 402(e), and 403 of prior law.

Federal expenditures means expenditures by a State of Federal TANF funds.

Federal funds and Federal TANF funds have the same meaning as TANF funds, as defined in this section.

Fiscal year means the 12-month period beginning on October 1 of the preceding calendar year and ending on September 30.

FY means fiscal year.

Good cause domestic violence waiver means a waiver of one or more program requirements granted by a State to a victim of domestic violence under the Family Violence Option that is:

Granted appropriately, based on need, as determined by an individualized assessment;
Temporary, for a period not to exceed six months; and
Accompanied by an appropriate services plan designed to provide safety and lead to work.

Analysis: regarding Good cause domestic violence waiver; §402(a)(7) allows each state the option to establish and enforce standards and procedures to screen and identify individuals with a history of domestic violence, refer such individuals to counseling and supportive services, and waive any program requirement established under the Act, for as long as necessary, if such requirement would make it more difficult for individuals receiving assistance to escape domestic violence or unfairly penalize individuals who are or have been at risk of domestic violence.

The proposed regulation incorporates two elements that appear to be unwarranted by the statutory language. First, the statute specifies that waivers may be granted "for so long as necessary," while the regulation specifies that waivers are to be granted on a temporary basis, for periods not to exceed six months. Although the preamble, as well as subsequent provisions of the regulations make clear than more than one six month waiver may be granted to an individual, the terms of this definition unnecessarily emphasize a temporal limit that may or may not be consistent with an individual's particular circumstances. In addition, the administrative burden involved in establishing service plans every six months may deter some administrators from fully implementing the protections intended to be made available by the statute.

Second, in specifying that service plans be designed to "provide safety and lead to work," HHS includes a reference to "work" that is not included in the statutory provision. In the preamble, the description of this provision contains similarly troubling language suggesting that service plans must "protect victims from any immediate dangers, stabilize their living situations, and explore avenues for overcoming dependency." (62 Fed. Reg. 62128) Requiring the inclusion of a work goal in domestic violence service plans muddies the singular purpose of the provision - to assure that states have the

flexibility to provide appropriate services designed to help those who have been, or are at risk of being the victims of domestic violence. Congress has made clear throughout the statute that work and overcoming dependency are overarching goals that inform the entire statutory framework it has created. Yet in §402(a)(7), Congress carved out an exception from any and all program requirements intended, presumably, to serve a goal of even higher importance, the physical and emotional well being of individuals who have been or are at risk of being the victims of domestic violence. The ultimate legal significance of the provision is that it authorizes states to waive requirements of general applicability under appropriate circumstances. By requiring that service plans focus on work as well as safety appears to reimpose precisely the sort of broader policy goal from which individuals were intended to be insulated. The proposed regulation unnecessarily compromises the goal and explicit statutory language of §402(a)(7).

Finally, the definition should be modified to clarify that service plans should be designed, when appropriate, to include services necessary to address the consequences of violence or the threat of violence. As written, the definition's focus on safety might be read to preclude the inclusion of compensatory services, particularly when a threat to the victim's safety has ceased. A proper reading of the statute suggests that counseling and supportive services to address the consequences of violence are properly included, whether or not a current threat to the victim's safety exists.

> IEVS means the Income and Eligibility Verification System operated pursuant to the provisions in section 1137 of the Act.
>
> Inconsistent means that complying with a TANF requirement would necessitate that a State change a policy reflected in an approved waiver.

Analysis: regarding Inconsistent; §415 of the Act specifies that if a state had received a waiver under §1115 of the Act prior to enactment of the PRWORA, any provisions of the PRWORA that are "inconsistent" with the waiver shall not apply to the state until the expiration of the waiver. One of the central ambiguities of §415 is the meaning of term "inconsistent." As discussed more fully above at pp. 22-24, there is a need to broaden the definition to more adequately reflect the TANF statutory option for a state to assert inconsistencies. The proposed regulation's requirement of "necessity" is unreasonably restrictive. In many instances, a state might reasonably fear that it was putting itself at risk of penalty by following a waiver policy, but the state might not be able to demonstrate with certainty that a penalty would flow from continuing its waiver conduct. The definition should be modified to specify: "An inconsistency exists if a state has a reasonable basis to believe that continuation of a waiver policy would materially increase the state's risk of a TANF penalty."

> Indian, Indian Tribe and Tribal Organization have the meaning given such terms by section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b), except that the term "Indian tribe" means, with respect to the State of Alaska, only the Metlakatla Indian Community of the Annette Islands Reserve and the following Alaska Native regional nonprofit corporations:
>
> Arctic Slope Native Association;

Kawerak, Inc.;
Maniilaq Association;
Association of Village Council Presidents;
Tanana Chiefs Council;
Cook Inlet Tribal Council;
Bristol Bay Native Association;
Aleutian and Pribilof Island Association;
Chugachmuit;
Tlingit Haida Central Council;
Kodiak Area Native Association; and
Copper River Native Association.

Job Opportunities and Basic Skills Training Program means the program under title IV-F of prior law to provide education, training and employment services to welfare recipients.

JOBS means the Job Opportunities and Basic Skills Training Program.

Minor child means an individual who:

Has not attained 18 years of age; or
Has not attained 19 years of age and is a full-time student in a secondary school (or in the equivalent level of vocational or technical training).

MOE means maintenance-of-effort.

Needy State is a term that pertains to the provisions on the Contingency Fund and the penalty for failure to meet participation rates. It means, for a month, a State where:

> (1)(i) The average rate of total unemployment (seasonally adjusted) for the most recent 3-month period for which data are published for all States equals or exceeds 6.5 percent; and
>
> (ii) The average rate of total unemployment (seasonally adjusted) for such 3-month period equals or exceeds 110 percent of the average rate for either (or both) of the corresponding 3-month periods in the two preceding calendar years; or
>
> (2) The Secretary of Agriculture has determined that the average number of individuals participating in the Food Stamp program in the State has grown at least ten percent in the most recent three-month period for which data are available.

Prior law means the provisions of title IV-A and IV-F of the Act in effect as of August 21, 1996. They include provisions related to Aid to Families with Dependent Children (or AFDC), Emergency Assistance (or EA), Job Opportunities and Basic Skills Training (or JOBS), and FAMIS.

PRWORA means the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, or Pub. L. 104-193, 42 U.S.C. 1305 note.

Qualified Aliens has the meaning prescribed under section 431 of PRWORA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, or Pub. L. 104-208, 8 U.S.C. 1101 note.

Qualified State Expenditures means the total amount of State funds expended during the fiscal year that count for TANF MOE purposes. It includes expenditures, under any State program, for any of the following with respect to eligible families:

Cash assistance;
Child care assistance;
Educational activities designed to increase self-sufficiency, job training, and work, excluding any expenditure for public education in the State except expenditures involving the provision of services or assistance of an eligible family that is not generally available to persons who are not members of an eligible family;
Any other use of funds allowable under subpart A of part 273 of this chapter; and
Administrative costs in connection with the matters described in paragraphs (1), (2), (3) and (4) of this definition, but only to the extent that such costs do not exceed 15 percent of the total amount of qualified State expenditures for the fiscal year.

Secretary means Secretary of the Department of Health and Human Services or any other Department official duly authorized to act on the Secretary's behalf.

Segregated State TANF expenditures means the expenditure of State funds within the TANF program that are not commingled with Federal funds.

Separate State program means a program operated outside of TANF in which the expenditures of State funds may count for TANF MOE purposes.

SFAG means State Family Assistance Grant, as defined in this section.

SFAG payable means the SFAG amount, reduced, as appropriate, for any Tribal Family Assistance Grants made on behalf of Indian families residing in the State and any penalties imposed on a State under this chapter.

Single audit means an audit or supplementary review conducted under the authority of the Single Audit Act at 31 U.S.C. chapter 75.

State means the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa, unless otherwise specified.

State Family Assistance Grant means the amount of the basic block grant allocated to each eligible State under the formula at section 403(a)(1) of the Act.

State MOE expenditures means the expenditure of State funds that may count for purposes of the TANF MOE requirements at section 409(a)(7) of the Act and the Contingency Fund MOE requirements at sections 403(b)(4) and 409(a)(10) of the Act.

State TANF expenditures means the expenditure of State funds within the TANF program.

TANF means The Temporary Assistance for Needy Families Program.

TANF funds means all funds provided to the State under section 403 of the Act, including the SFAG, any bonuses, supplemental grants, or contingency funds.

TANF MOE means the expenditure of State funds that must be made in order to meet the MOE requirement at section 409(a)(7) of the Act.

TANF program means a State program of family assistance operated by an "eligible State" under its State TANF plan. Territories means Puerto Rico, the Virgin Islands, Guam, and American Samoa.

Title IV-A refers to the title and part of the Act that now includes TANF, but previously included AFDC and EA. For the purpose of the TANF program regulations, this term does not include child care programs authorized and funded under section 418 of the Act, or their predecessors, unless we specify otherwise.

Tribal Family Assistance Grant means a grant paid to a Tribe that has an approved Tribal family assistance plan under section 412(a)(1) of the Act.

Tribal grantee means a Tribe that receives Federal funds to operate a Tribal TANF program under section 412(a) of the Act.

Tribal TANF program means a TANF program developed by an eligible Tribe, Tribal organization, or consortium and approved by us under section 412 of the Act.

Tribe means Indian Tribe or Tribal organization, as defined elsewhere in this section. The definition may include Tribal consortia (i.e., groups of federally recognized Tribes or Alaska Native entities that have banded together in a formal arrangement to develop and administer a Tribal TANF program).

Victim of domestic violence means an individual who is battered or subject to extreme cruelty under the definition at section 408(a)(7)(B)(iii) of the Act.

Waiver refers to a specific action taken by the Secretary under the authority of section 1115 of the Act to allow a State to operate a program that does not follow specific requirements of prior law. For the purpose of parts 270 through 275 of this chapter and section 415 of the Act, it consists of provisions necessary to achieve the State's policy objective. It includes the approved revised AFDC requirements, articulated in the State's waiver list. It also includes those provisions of prior law that:

Did not need to be waived as part of the waiver package; and
Were integral and necessary to achieve the State's policy objective for the approved waiver.

Analysis: regarding Waiver; This proposed definition specifies that the term "waiver" includes not only the specific policies which necessitated waivers of prior law, but may also include provisions of prior law that did not need to be waived, provided that they were "integral and necessary" to meet the policy objective of the waiver. Under prior law, states used §1115 waivers to redesign the terms upon which cash assistance was made available in order to achieve a range of policy goals. Frequently the policy

framework a state sought to establish included existing statutory provisions as well as provisions that were inconsistent with prior law for which specific waiver authority was necessary. By the terms of the proposed definition, HHS recognizes that to effectuate the purpose of §415, the term waiver must be defined broadly enough to capture fully the policy framework for which the §1115 waivers were granted, and for which Congress intended to accord special status under the Act.

> We (and any other first person plural pronouns) means the Secretary of Health and Human Services or any of the following individuals or organizations acting in an official capacity on the Secretary's behalf: the Assistant Secretary for Children and Families, the Regional Administrators for Children and Families, the Department of Health and Human Services, and the Administration for Children and Families.
>
> Welfare-to-Work means the new program for funding work activities at section 403(a)(5) of the Act.
>
> WTW means Welfare-to-Work.
>
> **§270.40 When are these provisions in effect?**
>
> (a) The TANF statutory requirements go into effect no sooner than a State's implementation of its TANF program. Each State must implement its TANF program no later than July 1, 1997.
> (b) In determining whether a State is subject to a penalty under parts 271 through 275 of this chapter, we will not apply the regulatory provisions in parts 270 through 275 of this chapter retroactively. We will judge State behavior and actions that occur prior to [effective date of final rules] only against a reasonable interpretation of the statutory provision in title IV-A of the Act.

Analysis: This provision clarifies that until final regulations are issued, in determining whether a penalty should be imposed, and the amount of any penalty, states are not bound by the proposed regulations. Rather, they will be expected only to have conducted their activities in a manner consistent with a reasonable interpretation of the statute. Note, however, that a court might conclude that in some instances, the HHS interpretation reflected in the proposed regulations was the only reasonable interpretation of the statute.

PART 271 -- ENSURING THAT RECIPIENTS WORK

§271.1 What does this part cover?

This part includes the regulatory provisions relating to the mandatory work requirements of TANF.

§271.2 What definitions apply to this part?

The general TANF definitions at section 270.30 of this chapter apply to this part.

§271.10 What work requirements must an individual meet?

(a) A parent or caretaker receiving assistance must engage in work activities when the State has determined that the individual is ready to engage in work or when (s)he has received assistance for a total of 24 months, whichever is earlier. The State must define what it means to engage in work for this requirement, which can include participation in work activities in accordance with section 407 of the Act.
(b) If a parent or caretaker has received assistance for two months, (s)he must participate in community service employment, unless the State has exempted the individual from work requirements or (s)he is already engaged in work activities as described at section 271.30. The State will determine the minimum hours per week and the tasks the individual must perform as part of the community service employment. This requirement takes effect no later than August 22, 1997, unless the governor of the State opts out of this provision by notifying HHS.

Analysis: §271.10(a) implements §402(a)(1)(A)(ii) specifying that states must require a parent or caretaker to engage in "work" once he or she is "job ready" or after having received assistance for 24 months, whichever is earlier. The proposed rule clarifies that the state, rather than federal law, will define work, and that work can include, among other activities, any of the work activities listed in §407 of the Act. The proposed regulation, as well as the statute, leave open to the state to determine any requirements regarding the number of hours per week, or per month, that an individual must be required to work. This proposed regulation should be modified to note that this provision must be implemented consistently with §407(e)(2) which provides that a state may not reduce or terminate assistance for a single custodial parent who refuses to engage in work because she is caring for a child under the age of six for whom child care is unavailable.

§271.10(b) tracks the statutory provision at §402(a)(1)(B)(iv), except that it fails to reference the portion of that section which specifies that the community service requirement must be implemented consistently with the above-noted child care protection in §407(e)(2). The provision should be modified to explicitly note the applicability of §407 (e)(2).

§271.11 Which recipients must have an assessment under TANF?

(a) The State must make an initial assessment of the skills, prior work experience, and employability of each recipient who is at least age 18 or who has not completed high school (or equivalent) and is not attending secondary school.

(b) The State may make any required assessments within 90 days (180 days, at State option) of the date it implements the TANF program for anyone receiving assistance as of that date. For anyone else who must have an assessment, the State may assess an individual within 30 days (90 days, at State option) of the date (s)he becomes eligible for assistance.

Analysis: This provision tracks the statute.

§271.12 What is an individual responsibility plan?

An individual responsibility plan is a plan developed at State option, in consultation with the individual, on the basis of the assessment made under section 271.11. The plan:
(a) Should set an employment goal for the individual and a plan for moving immediately into private sector employment;
(b) Should describe the obligations of the individual. These could include going to school, maintaining certain grades, keeping school-age children in school, immunizing children, going to parenting or money management classes, or doing other things that will help the individual become and remain employed in the private sector;
(c) Should be designed to move the individual into whatever private sector employment (s)he is capable of handling as quickly as possible, and to increase over time the responsibility and the amount of work the individual handles;
(d) Should describe the services the State will provide the individual; and
(e) May require the individual to undergo appropriate substance abuse treatment.

Analysis: This provision tracks the statute.

§271.13 May an individual be penalized for not following an individual responsibility plan?

Yes. If an individual fails without good cause to comply with an individual responsibility plan that (s)he has signed, the State may reduce the amount of assistance otherwise payable to the family, by whatever amount it considers appropriate. This penalty is in addition to any other penalties under the State's TANF program.

Analysis: This provision tracks the statute.

§271.14 What is the penalty if an individual refuses to engage in work?
If an individual refuses to engage in work required under section 407 of the Act, the State must reduce or terminate the amount of assistance payable to the family, subject to any good cause or other exceptions the State may establish. A grant reduction must be at least prorated, based on the portion of the month in which the individual refuses to work, but could be greater.

Analysis: This proposed regulation generally tracks the statutory provision at §407(e)(1). The regulation is apparently intended to leave to state discretion a definition of the minimum prorated reduction that will be required. This intention should be made explicit.

§271.15 Can a family be penalized if a parent refuses to work because (s)he cannot find child care?

(a) If the individual is a single custodial parent caring for a child under age six, the State may not reduce or terminate assistance for the parent's refusal to engage in required work if (s)he demonstrates an inability to obtain needed child care for one or more of the following reasons:

(1) Appropriate child care within a reasonable distance from the home or work site is unavailable;

(2) Informal child care by a relative or under other arrangements is unavailable or unsuitable; or

(3) Appropriate and affordable formal child care arrangements are unavailable.

(b)(1) The State will determine when the individual has demonstrated that (s)he cannot find child care, in accordance with criteria established by the State.

(2) These criteria must:

(i) Address the procedures that the State uses to determine if the parent has a demonstrated inability to obtain needed child care;

(ii) Include definitions of the terms "appropriate child care," reasonable distance," "unsuitability of informal care," and "affordable child care arrangements"; and

(iii) Be submitted to us.

Analysis: Subsection 271.15(a) tracks the language of §407(e)(2) of the Act. Subsection (b) requires that states establish procedures for determining whether a custodial parent has demonstrated an inability to obtain needed child care, define the terms used in subsection (a) and submit the procedures and definitions that will be used to HHS.

This provision must be read together with regulations proposed for the Child Care and Development Fund (CCDF), under which a state's CCDF plan would need to provide that the CCDF lead agency would inform parents of the child care protection under §407(e)(2), including the procedures used by the TANF agency to determine a demonstrated inability to obtain needed child care, the criteria or definitions applied by the TANF agency in determining whether a parent has a demonstrated inability to obtain needed care, and of the fact that the time limit applicable to assistance provided with federal TANF funds is not extended by virtue of a parents' inability to obtain child care. See [Proposed] 45 CFR 98.33, 62 Fed. Reg. 39610, 39646 (July 23, 1997).

The preamble to the TANF regulations notes that this statutory provision "...underscores the pivotal role of child care in supporting work, and also recognizes that the lack of appropriate, affordable child care can create unacceptable hardships on children and families..." (62 Fed. Reg. 62135). Unfortunately, HHS fails to take this opportunity to provide definitions of the critical terms included in the statute which are intended to provide the core of these "pivotal" protections.

In reviewing the proposed TANF approach, in conjunction with the proposed CCDF requirements, the following concerns emerge:

- Under the proposed CCDF regulations, the CCDF lead agency would have a responsibility for informing parents of the TANF child care protections. However, if the TANF agency doesn't

refer a family to the CCDF lead agency, the family might never have occasion to have contact with the CCDF agency. Nothing in either set of proposed regulations imposes a duty on the TANF agency to refer the family to the CCDF lead agency for child care counseling prior to (or after) imposition of the TANF work requirements.

- The TANF statute provides that the child care protection applies when the individual has a demonstrated inability (as determined by the State) to obtain needed child care, for one of a set of statutory reasons. Under the statute, it is up to the state to determine if the demonstrated inability is present, but the statute does not say that it is up to the state to define all relevant terms, e.g., "unavailability," "appropriate child care," "reasonable distance," "unsuitability," "appropriate and affordable formal child care arrangements." Under the proposed CCDF regulations, a state would submit its definitions to HHS, but there is no indication that there will be any review of the definitions for their adequacy or reasonableness.

- Moreover, the proposed regulation do not require states to submit a definition of a key term: "unavailability." For example, if appropriate child care exists within a reasonable distance from the individual's home, but the state provides no or minimal child care assistance and the individual cannot afford the care, is it "unavailable?"

To ensure that the child care protection operates effectively, we recommend that final TANF regulations:

- provide that a state found to have violated the child care protection will not qualify for a reasonable cause exception unless the state can demonstrate that it had procedures in place to inform families of the existence and nature of the child care protection;

- include definitions of all of the key statutory terms: specifically, "unavailability," "appropriate child care," "reasonable distance," "unavailability or unsuitability of informal child care by a relative or under other arrangements" and "appropriate and affordable formal child care arrangements." Alternatively, if HHS elects to allow states to develop their own definitions, final regulations should expressly provide that a state will not be found to have had reasonable cause for failure to comply with the child care protection if HHS determines that the definitions used by the state were unreasonable.

For other concerns about the proposed HHS approach to the child care protection, see the discussion of §274.20, infra.

§271.16 Does the imposition of a penalty affect an individual's work requirement?

A penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under TANF shall not be construed to be a reduction in any wage paid to the individual, and shall not result in a reduction in the number of hours of work required.

Analysis: The TANF statute, as amended by the Balanced Budget Act of 1997, provides that a penalty imposed against a family by reason of an individual's failure to comply with a TANF requirement shall not be construed to be a reduction in any wage paid to the individual. However, if a state wishes to reduce the family's hours of work in light of its reduced assistance, nothing in the amendment suggests that the state should not be free to do so. Accordingly, 271.16 should be modified to delete the last clause.

§271.20 How will we hold a State accountable for achieving the work objectives of TANF?

(a) Each State must meet two separate work participation rates, one based on how well it succeeds in helping adults in two-parent families find work activities described at section 271.30 (the two-parent rate), the other based on how well it succeeds in finding those activities for adults in all families it serves (the overall rate).
(b) Each State must submit data to allow us to measure its success in requiring adults to participate in work activities, as specified at section 275.3 of this chapter.
(c) If the data show that a State met both participation rates in a fiscal year, then the percentage of historic State expenditures that it must expend under TANF, pursuant to section 273.1 of this chapter, decreases from 80 to 75 percent for that fiscal year. This is also known as the State's "maintenance of effort" requirement.
(d) If the data show that a State did not meet either minimum work participation rate for a fiscal year, a State could be subject to a financial penalty.
(e) Before we impose a penalty, a State will have the opportunity to claim reasonable cause or enter into a corrective compliance plan, pursuant to sections 272.5 and 272.6 of this chapter.

Analysis: This provision tracks the statute.

§271.21 What overall work rate must a State meet?

Each State must achieve the following minimum overall participation rate:

If the fiscal year is:	then the minimum participation rate is:
1997	25
1998	30
1999	35
2000	40
2001	45
2002 and thereafter	50

Analysis: This provision tracks the statute.

§271.22 How will we determine a State's overall work rate?

(a) The overall participation rate for a fiscal year is the average of the State's overall participation rates for each month in the fiscal year.

(b)(1) We determine a State's overall participation rate for a month as follows:

(i) The number of families receiving TANF assistance that include an adult or a minor head-of-household who is engaged in work for the month (the numerator); divided by
(ii) The number of families receiving TANF assistance during the month that include an adult or a minor head-of-household minus the number of families that are subject to a penalty for refusing to work in that month (the denominator). However, if a family has been sanctioned for more than three of the last 12 months, we will not deduct it from the denominator.

(2) States may define families receiving TANF assistance...that include an adult or a minor child head-of household, but may not exclude families from the definition solely for the purpose of avoiding penalties under section 271.50.

(i) States shall report to us annually on the number of families excluded because of the State's definition and the circumstances underlying each exclusion.
(ii) Where we find that a State has excluded families for the purpose of avoiding a penalty for work participation, we shall include those families in the calculation in paragraph (b)(1) of this section in determining whether a State is subject to the penalty described in section 271.50.

(c) A State has the option of not requiring a single custodial parent caring for a child under age one to engage in work. If the State adopts this option, it may disregard such a family in the participation rate calculation for a maximum of 12 months.
(d) If a family receives assistance for only part of a month, the State may count it as a month of participation if an adult in the family is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month.

Analysis:

Treatment of child only cases

This section generally tracks provisions of §407 of the Act regarding the calculation of the "all families" participation rate. The statute and the proposed regulation provide that only families that include an adult or minor child head of household are to be included when calculating a state's participation rate. The proposed regulation provides that each state will be allowed to define the term "families receiving TANF assistance ... that include an adult or a minor child head of household." However, the proposed regulation then warns states that HHS may redefine some families and include them in the participation rate calculation if HHS determines that the state has excluded families "solely" for the purpose of avoiding penalties connected to failure to meet the participation rates.

HHS' focus on the risk that a state might create categories of child-only cases in order to keep them out of the rate calculation is inappropriate in at least two respects. First, as discussed elsewhere in the context of their treatment of separate state programs, a state that truly wishes to minimize the burden of meeting the participation rates is free to deny assistance altogether. This ought to be of at least as great

concern, but warnings or cautions about policies that restrict access to assistance do not appear here or elsewhere in the rules concerning participation rates. Second, as discussed below, there are legitimate policy considerations that are served by providing assistance to child-only cases, and ample historical precedent for such policies. HHS has attempted to couch its warnings in terms designed to avoid discouraging states from legitimate uses of this policy tool. However, the inherent difficulty in assessing a state's motivation, lack of clarity in the regulation, and state concerns about HHS implementation are likely to combine to inappropriately limit state activity in this area.

It is unclear how HHS intends to determine whether a state's purpose in defining a "family" is to avoid a penalty or to meet some other policy objective. While subsection (2) specifies that states may not exclude families "solely" for the purpose of avoiding penalties, subsection (2)(ii) does not repeat the use of the modifier "solely." If the standard to be employed is that HHS will only add families back into the calculation if it determines that the state's sole purpose was to avoid a penalty, then any reasonable alternative policy objective should suffice. Prior to the enactment of the PRWORA, there were a number of instances in which adults in a family did not receive assistance while the children in the family did. For example, under former AFDC rules, when a family with a non-parent caretaker relative sought assistance for dependent children, the relative had the option of choosing whether to be included in the assistance unit. The policy basis for giving non-parent caretakers this option was presumably to maximize the extent to which they would determine that it was feasible to take in a relative's child. Continuation of such a policy ought not to create any question about an "improper" motive tied to TANF participation rates. A more difficult question would be created if a state modifies the policy to mandate the exclusion of all non-parent caretakers from assistance and to limit assistance to the child in every case. While a state might justify this policy on the grounds of limited resources and the new block grant funding structure under TANF, one might certainly question whether part of the state's motive related to the new participation rate requirements.

Under former law, and under waivers authorized under former law, there were several instances in which families headed by parents were also sometimes defined to be child-only cases. These included families in which the parent received SSI benefits, or did not meet the citizenship requirements for AFDC eligibility, and, pursuant to waivers, several states imposed time limits on adults in a family which can result in a case being converted into a child-only case when the adult reaches the time limit and no longer qualifies for assistance. Here again, to the extent that former federal policies or state polices developed prior to the enactment of TANF justified the creation of child-only cases, it would appear that continuation of the policies ought not to create any question that these policies had been designed to avoid penalties for failing to meet TANF participation rates. However, treatment of new policies that result in the creation of child only cases would appear to be quite uncertain under the proposed regulation.

In the absence of any documented abuses to date, HHS should confine itself to gathering the information that is called for in subsection (b)(2)(i). Such information may or may not suggest the need for further legislative or regulatory action on this issue. To the extent that HHS determines that the final

rule will include a provision allowing the Department to ignore a state's definition of a family as a child-only case, the provision should make clear that: any reasonable policy basis for the state's definition will be acceptable; and that at a minimum, any definition of a child-only case available to a state under the former AFDC program or under AFDC waivers will be acceptable, whether or not the state had previously adopted the definition. Finally, HHS should establish a procedure through which a state can be advised at the time it adopts a definition, or at any time thereafter, whether the Department will find a definition to have been developed solely to avoid a penalty.

Subsection (b)(2)(i) requires that states report to HHS annually regarding the number of families who are excluded from calculation of the rates because they do not include an adult or minor child head of household, and the basis for each such exclusion. Final regulations should clarify the nature of the required reporting. As drafted, this subsection could be read as requiring an individual explanation for each case, as opposed to an aggregate reporting of the numbers falling into each category of exclusion; requiring individualized explanations (if that is what is envisioned) would be excessive and unreasonable.

Partial Months

Subsection (d) specifies that states will be allowed to count an individual as a participant for a month if the individual is engaged in work for the minimum average number hours required during each week of month for which the family receives assistance. This is not explicitly addressed in the statute, but HHS' proposed regulatory approach appears reasonable.

§271.23 What two-parent work rate must a State meet?

A State receiving a TANF grant for a fiscal year must achieve the following minimum two-parent participation rate:

If the fiscal year is:	then the minimum participation rate is:
1997	75
1998	75
1999 and thereafter	90

Analysis: This section generally tracks the statute. In the preamble (62 Fed. Reg. 62136) HHS clarifies that if a state provides TANF services to a non-custodial parent, the family will not be considered to be a two-parent family for purposes of the participation rate requirements. This approach seems reasonable.

§271.24 How will we determine a State's two-parent work rate?

(a) The two-parent participation rate for a fiscal year is the average of the State's two-parent participation rates for each month in the fiscal year.

(b)(1) We determine a State's two-parent participation rate for a month as follows:

(i) The number of two-parent families receiving TANF assistance that include an adult (or minor child head-of-household) and other parent who meet the requirements set forth in section 271.32 for the month (the numerator); divided by
(ii) The number of two-parent families receiving TANF assistance during the month minus the number of two-parent families that are subject to a penalty for refusing to work in that month (the denominator). However, if a family has been sanctioned for more than three of the last 12 months, we will not deduct it from the denominator.

(2) States may define families receiving TANF assistance...that include an adult or a minor child head-of household, but may not exclude families from the definition solely for the purpose of avoiding penalties under section 271.50.

(i) States shall report to us annually on the number of families excluded because of the State's definition and the circumstances underlying each exclusion.
(ii) Where we find that a State has excluded families for the purpose of avoiding a penalty for work participation, we shall include those families in the calculation in paragraph (b)(1) of this section in determining whether a State is subject to the penalty described in section 271.50.

(c) If a family receives assistance for only part of a month, the State may count it as a month of participation if an adult in the family (both adults, if they are both required to work) is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month.
(d) If a family includes a disabled parent, the family is not considered a two-parent family for the participation rate. Such a family is not included in either the numerator or denominator of the two-parent rate.

Analysis: This section generally tracks the statute. It also includes the same warning that is included in §271.22 regarding the potential that states may define "family receiving assistance" to avoid penalties for failing to meet the participation rates. See the analysis of §271.22, above, for a discussion of the problems with this approach. HHS appears to be leaving it to state discretion to define the term "disabled parent" as used in this subsection(d), and this approach seems reasonable.

§271.25 Does a State include Tribal families in calculating these rates?

A State has the option of including families that are receiving assistance under an approved tribal family assistance plan or under a tribal work program in calculating the State's participation rates under sections 271.22 and 271.24.

Analysis: This provision tracks the statute.

§271.30 What are "work activities"?

Work activities include:

(a) Unsubsidized employment;
(b) Subsidized private sector employment;
(c) Subsidized public sector employment;
(d) Work experience;
(e) On-the-job training (OJT);
(f) Job search and job readiness assistance;
(g) Community service programs;
(h) Vocational educational training;
(i) Job skills training directly related to employment;
(j) Education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
(k) Satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, if a recipient has not completed secondary school or received such a certificate; and
(l) Providing child care services to an individual who is participating in a community service program.

Analysis: This provision tracks the statute. In the Preamble, 62 Fed. Reg. 62137-8, HHS explains that it has chosen not to define the various work activities listed in the statute, and repeated in this provision, in order to allow states the flexibility to define work activities in any reasonable manner consistent with the objectives of the statute. HHS notes that since a state might define activities in ways that do not further Congressional intent, states will be required to provide HHS with the definitions it uses so that HHS can monitor state activity in this area. This approach is reasonable in light of the need for continue research and experimentation in the area of effective approaches to employment-related services.

§271.31 How many hours must an individual participate to count in the numerator of the overall rate?

(a) An individual counts as engaged in work for a month for the overall rate if (s)he participates in work activities during the month for at least the minimum average number of hours per week listed in the following table.

If the fiscal year is:	then the minimum average hours per week is:
1997	20
1998	20
1999	25
2000 or thereafter	30

(b)(1) In addition, for the individual to count as engaged in work, at least 20 per week of the above hours must come from participation in certain of the activities listed in section 271.30. The following nine activities count for the first 20 hours of participation: unsubsidized employment; subsidized private sector employment; subsidized public sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training; and providing child care services to an individual who is participating in a community service program.

(2) Above 20 hours per week, the following three activities may also count for participation: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

(c) The following chart lists when each activity counts, for both the overall and the two-parent rates:

	When does the activity count?				
Activity	**Overall rate**			**2-Parent rate**	
	20 hours	**hours above 20**		**30/50 hours (without/with Fed child care)**	**hours above 30/50**
(a) unsubsidized employment	__	__		__	__
(b) subsidized private sector employment	__	__		__	__
(c) subsidized public sector employment	__	__		__	__
(d) work experience	__	__		__	__
(e) OJT	__	__		__	__
(f) job search & job readiness	__	__		__	__
(g) community service programs	__	__		__	__
(h) vocational educational training	__	__		__	__
(i) job skills training	**no**	__		**no**	__
(j) education directly related to employment	**no[1]**	__		**no[1]**	__
(k) high school or GED	**no[1]**	__		**no[1]**	__
(l) providing child care services to a community service participant	__	__		__	__
[1]Teen parents may count due to participation in these activities. Refer to section 271.33.					

Analysis: This provision tracks the statute.

§271.32 How many hours must an individual participate to count in the numerator of the two-parent rate?

(a) If an individual and the other parent in the family are participating in work activities for an average of at least 35 hours per week during the month, then (s)he counts as engaged in work for a two-parent family for the month, subject to paragraph (c) of this section.
(b)(1) In addition, at least 30 of the 35 hours per week must come from participation in certain of the activities listed in section 271.30 for the individual to count as engaged in work. The following nine activities count for the first 30 hours of participation: unsubsidized employment; subsidized private sector employment; subsidized public sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training; and providing child care services to an individual who is participating in a community service program.

(2) Above 30 hours per week, the following three activities may also count for participation: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

(c)(1) If the family receives federally-funded child care assistance and an adult in the family is not disabled or caring for a severely disabled child, then the individual and the other parent must be participating in work activities for an average of at least 55 hours per week for the individual to count as engaged in work for a two-parent family for the month.

(2) At least 50 of the 55 hours per week must come from participation in the activities listed in paragraph (b)(1) of this section.

(3) Above 50 hours per week, the three activities listed in paragraph (b)(2) of this section may also count for participation.

(d) The chart in section 271.31 lists when each activity counts in the two-parent rate.

Analysis: This provision generally tracks the language of the statute. The provision clarifies that parents' hours of participation during a month may be averaged on a weekly basis to determine if they can be counted as participants in determining the state's participation rate.

§271.33 What are the special requirements concerning educational activities in determining monthly participation rates?

(a) Vocational educational training may only count for a total of 12 months for any individual.
(b) A married or single head-of-household under 20 years old counts as engaged in work in a month if (s)he:

(1) Maintains satisfactory attendance at a secondary school or the equivalent during the month; or

(2) Participates in education directly related to employment for an average of at least 20 hours per week during the month.

(c) In counting individuals for each participation rate, not more than 30 percent of individuals engaged in work may be included because they are participating:

(1) In vocational educational training; or

(2) In fiscal year 2000 or thereafter, as a teen parent in educational activities described in paragraph (b) of this section.

Analysis: This provision tracks the statute.

§271.34 Are there any limitations in counting job search and job readiness assistance toward the participation rates?

Yes. There are four limitations concerning job search and job readiness.
(a) Except as provided in paragraph (b) of this section, an individual's participation in job search or job readiness assistance counts for only six weeks in any fiscal year.
(b) If the State's total unemployment rate for a fiscal year is at least 50 percent greater than the United States' total unemployment rate for that fiscal year or if the State meets the definition of a needy State, specified at section 270.30 of this chapter, then an individual's participation in job search or job readiness assistance counts for up to 12 weeks in that fiscal year.
(c) An individual's participation in job search and job readiness assistance counts for no more than four consecutive weeks in a fiscal year.
(d) Not more than once for any individual in a fiscal year, a State may count three or four days of job search and job readiness assistance during a week as a full week of participation.

Analysis: This provision clarifies that the time limit on an individual's participation in job search and job readiness activities is to be applied for participation in each fiscal year, rather than during an individual's spell on assistance, or over the course of an individual's lifetime. The statute does not expressly address whether the limit on job search is a fiscal year limitation or a lifetime limit, but HHS' interpretation is a reasonable one.

§271.35 Are there any special work provisions for single custodial parents?

Yes. A single custodial parent or caretaker relative with a child under age six will count as engaged in work if (s)he participates for at least an average of 20 hours per week.

Analysis: This provision tracks the statute.

§271.36 Do welfare reform waivers affect what activities count as engaged in work?

A welfare reform waiver could affect what activities count as engaged in work, if it meets the requirements at section 271.60.

§271.40 Is there a way for a State to reduce the work participation rates?

(a) If the average monthly number of cases receiving assistance, including assistance under a separate State program, in a State in the preceding fiscal year was lower than the average monthly number of cases that received assistance in FY 1995, the minimum participation rate the State must meet for the fiscal year will decrease by the number of percentage points the caseload fell in comparison to the FY 1995 caseload. The number of percentage points by which the caseload falls is referred to as the caseload reduction factor.
(b) The calculation in paragraph (a) of this section must disregard any caseload reductions due either to requirements of Federal law or to changes that a State has made in its eligibility criteria in comparison to its criteria in effect in FY 1995.
(c) To establish the caseload base for fiscal year 1995, we will use the number of AFDC cases reported on ACF-3697, Statistical Report on Recipients Under Public Assistance. For subsequent years, we will use AFDC data from this same report, supplemented by caseload information from the TANF Data Report and the TANF MOE Data Report for appropriate States beginning with the fourth quarter of fiscal year 1997. To qualify for a caseload reduction, a State must have reported monthly caseload information, including cases in separate State programs, for the preceding year for cases receiving assistance as defined at section 271.43.

Analysis: Under §407(b)(3), the participation rate a state is required to meet in any year is to be reduced by a percentage amount equal to the reduction in the state's TANF caseload in the immediately preceding year, as compared to the state's IV-A caseload in 1995. However, caseload reductions due to changes in federal law or changes in the eligibility criteria established under state law are not to be counted in determining the state's caseload in the immediately preceding year. Under §407(b)(3) HHS is mandated to promulgate regulations to implement the so-called "caseload reduction credit."

This provision generally tracks the statute. Although the statutory reference here could potentially be interpreted to require the inclusion of a state's Emergency Assistance caseload, the HHS interpretation of the provision as being limited to AFDC cases seems appropriate and reasonable. The provision specifies the reports that will be used to determine each state's AFDC caseload for 1995, and the TANF caseload for the immediately preceding year that will be used to calculate the credit. In order to ensure that overall caseload data for the immediately preceding year is available, any state that wishes to receive a caseload reduction credit will be required to have reported monthly caseload information for families receiving assistance for both all families and for two parent families, and also to report on the number of families receiving assistance in separate state programs. The statute does not expressly address how to treat cases in separate state programs for purposes of the caseload reduction credit. However, if there was no consideration of separate state cases, a state could, for example, simply divide its caseload in half, put half in a separate state program, and assert a 50% caseload reduction. Thus, there is a legitimate need to look at cases in separate state programs in determining a state's eligibility for the caseload reduction credit. However, as noted below, there are some circumstances where cases in separate state programs should not be counted in the calculations, and HHS needs to clarify its standards to address these situations.

> **§271.41 How will we determine the caseload reduction factor?**
>
> (a) We will determine the appropriate caseload reduction that applies to each State based on reliable, validated information and estimates reported to us by the State. We will determine whether the information and estimates provided are acceptable, based on the criteria listed in paragraph (d) of this section. We will also conduct periodic, on-site reviews and inspect administrative records on applications and terminations to validate the accuracy of the State estimates.
> (b) In order to receive a reduction in the overall participation rate, a State must submit the Caseload Reduction Report to us containing the following information:
>
> > (1) A complete listing of and implementation dates for all eligibility changes, as defined at section 271.42, made by the State since the beginning of FY 1995, all changes in Federal requirements and implementation dates for each change since FY 1995, and a listing of the reasons (such as found employment) for case closures;
> > (2) A numerical estimate of the impact on the caseload of each eligibility change or case closure reason;
> > (3) A description of the methodology and the supporting data that it used to calculate its caseload reduction estimates; and
> > (4) A certification from the Governor that it has taken into account all reductions resulting from changes in Federal and State eligibility.

(c) A State requesting a caseload reduction shall provide separate estimates and information for the overall and two-parent family rates.

(1) The State must base its estimate for the overall case rate on decreases in its overall caseload compared to the AFDC caseload in FY 1995.

(2) The State must base its estimate for two-parent cases on decreases in its two-parent caseload compared to the AFDC Unemployed Parent caseload in FY 1995.

(d)(1) For each State, we will assess the adequacy of information and estimates using the following criteria: methodology, estimates and impact compared to other States; quality of data; and completeness and adequacy of the documentation.

(2) If we request additional information, the State must provide the information within two weeks of the date of our request.

(3) The State must provide sufficient data to document the information submitted under paragraph (b) of this section.

(e) We will not consider a caseload reduction factor for approval unless the State reports case-record data on individuals and families served by any separate State program, as required under section 275.3(d) of this chapter.

(f) A State may only apply the caseload reduction factor that we have determined to its participation rate. If a State disagrees with our caseload reduction factor, then the determination may be considered an adverse action; therefore, a State has the right to appeal such a decision, as specified at section 272.7 of this chapter.

Analysis: In the Preamble, 62 Fed. Reg. 62140-1, HHS explains various methodological options it considered for calculating a state's caseload reduction credit, particularly for estimating the impact of changes in federal and state eligibility criteria on the state's caseload. HHS considered two alternatives that would have relied on data already available to HHS either through Medicaid caseload information, or through computer modeling based on information provided by the Current Population Survey. HHS rejected both of these alternatives because of concerns that neither method would provide a simple and reliable mechanism for making the needed calculations.

HHS has proposed instead to establish a procedure under which each state will be able to apply for a caseload reduction credit. In its application the state will be asked to specify the eligibility changes that may have affected the caseload, to provide its own estimate of how each eligibility change affected the caseload, and to describe the method(s) by which it arrived at such estimates. HHS will then review the data and methodologies provided by the state, determine whether the methodologies used by the state were reasonable and generally consistent with the approaches taken in other states, undertake discussions with state officials and on-site reviews as it determines necessary, and then calculate the caseload reduction credit that the state will receive.

The difficulty that HHS faced in developing these proposed regulations is that it is not clear how a state or HHS will be able to calculate an appropriate caseload reduction credit consistent with the statutory language. It is true that it would be impossible to determine eligibility for the credit without knowing what eligibility changes the state had implemented since FY 95. However, even if that information exists, it remains unclear how either the state or HHS will use the information in determining what share of a state's caseload reduction is attributable to these eligibility changes, and what share is attributable

to other factors. Notwithstanding this difficulty, the general approach of requiring each state to submit an application with supporting documentation seems reasonable.

If a state or HHS is going to attempt to calculate a caseload reduction credit, data such as is described in the proposed regulation will be needed. However, the following modifications of the process should be considered in the development of final regulations:

- The process of determining a state's credit would benefit from public input. In reviewing a state's submission, members of the public might be able to contribute information that could help HHS in analyzing the submission, e.g., eligibility changes the state had failed to list, data and evidence that the impact of particular changes was greater or less than that suggested by the state. Accordingly, the process should be modified to provide that the state's submission should be made available for public review and comment for a reasonable period of time. HHS might consider making use of electronic posting on its web page for these purposes, as other states would also benefit from being able to review and analyze another state's submission.

- A state's caseload might have declined either due to terminations or due to changes in approvals of applications. Data should be provided concerning application denials as well as case closures.

All-families and two-parent caseload reduction credits

The regulation specifies that separate caseload reduction credits will be calculated for the state's overall caseload, and for its two-parent family caseload. These credits will then be applied against the two respective participation rates to which each state is subject. This approach seems reasonable.

Separate State Programs

This provision also specifies that a state will not qualify for any caseload reduction credit unless it has reported case-record data (as specified in §275.3(d)) for individuals and families served in separate state programs. (See the discussion of §271.42 for an analysis of the treatment of separate state programs in the calculation of a state's caseload reduction credit.)

§271.42 Which reductions count in determining the caseload reduction factor?

(a)(1) Each State's estimate must factor out any caseload decreases due to Federal requirements or State changes in eligibility rules since FY 1995 that directly affect a family's eligibility for assistance (e.g., more stringent income and resource limitations, time limits).

(2) A State need not factor out calculable effects of enforcement mechanisms or procedural requirements that are used to enforce existing eligibility criteria (e.g., fingerprinting or other verification techniques) to the extent that such mechanisms or requirements identify or deter families ineligible under existing rules.

> (b) States must include cases receiving assistance in separate State programs as part of its caseload. However, we will consider excluding cases in the separate State program under the following circumstances, if adequately documented:
>
> (1) The cases overlap with or duplicate cases in the TANF caseload;
> (2) They are cases made ineligible for Federal benefits by Pub. L. 104-193 that are receiving only State-funded cash assistance, nutrition assistance, or other benefits; or
> (3) They are cases that are receiving only State earned income tax credits, child care, transportation subsidies or benefits for working families that are not directed at their basic needs.

Analysis: In this provision HHS indicates some of the changes in program rules that it will consider to be changes in eligibility criteria whose impact on a state's caseload will be ignored when calculating the caseload reduction in the immediately preceding year, and provides a framework for determining which changes will not be considered to be changes in eligibility criteria. The provision also describes how families who are receiving assistance in a separate state program will be treated when calculating a state's caseload reduction credit.

Eligibility Criteria

In the Preamble, HHS indicates that it has sought to strike a balance, consistent with Congressional intent, to allow credit that rewards successful state efforts in moving families into employment and off of a state's caseload, while at the same time not allowing credit in situations that would effectively reward a state for reducing its caseload simply by denying assistance to families. Several types of changes in program rules are mentioned in either the text of the regulation, in the Preamble, or in both, that HHS will consider to be changes in eligibility criteria for which credit will not be allowed. The list, which does not purport to include all of the changes a state might make that will be considered changes in eligibility criteria, includes: more stringent income and resource limitations, time limits, grant reductions, changes in requirements based on residency, age or other demographic or categorical factors. The provision also specifies that states can receive credit for reductions that result from changes in enforcement mechanisms or procedural requirements to the extent such mechanisms identify or deter families who are ineligible under existing rules. Examples of such mechanisms include fingerprinting "or other verification techniques..."

The proposed regulation leaves considerable uncertainty as to the status of behavioral requirements that many states now impose as criteria of eligibility. In recent years, through the waiver process, and now at state discretion under the PRWORA, many states have established certain behavioral requirements as conditions of eligibility for a family - most commonly, participation in work-related activities and cooperation with child support enforcement activities. Under AFDC, states were required to impose penalties on families in both of these areas, but unless a state obtained a waiver, the penalties were limited to a reduction in assistance to the family, and the penalties were only applicable to recipients, not to applicants. Increasingly, states have begun to condition an entire family's eligibility for assistance on compliance with requirements in either or both of these areas. This area of state policy is not explicitly addressed in the proposed regulation. While it might be argued that denying aid to a family when the

parent does not participate in work-related activities, or comply with child support enforcement activities is an "enforcement mechanism," such rules are not intended to identify or deter individuals who do not satisfy some other eligibility criterion. Rather, they are the rules that set forth the substantive eligibility criteria. That is, fingerprinting, and other verification requirements are not imposed because the state's policy is to have on record fingerprints, or specific pieces of verification, but rather they are required to confirm that the individual or family has met some independent eligibility requirement, e.g., the amount of their income or assets, the fact that they are not already receiving assistance, etc. However, when state policy denies assistance to families in which an individual does not comply with work requirements, child support enforcement cooperation, or other behavioral requirements, the state is not using those requirements to determine whether the family has met some other eligibility criterion. It is defining the categories of families who will qualify for assistance - those who behave in the prescribed manner, and the categories of families who will not qualify - those who do not behave in the prescribed manner. Moreover, to the extent to which the underlying rationale for the credit is to reward states that achieve success "moving families into employment" it would appear to be inappropriate to give credit based simply on the denial of assistance for failure to comply with a behavioral requirement. For all of the same reasons, work-related requirements, child support enforcement and cooperation requirements, and any other behavioral requirements that are imposed on applicants for assistance, and which can result in a denial of the family's application or failure to process the application, should also be treated as eligibility criteria.

A second area in which the regulation may create uncertainty is in its treatment of families who are eligible for assistance but who are unable to verify their eligibility because of changed verification requirements, or who are deterred from applying or following through on an application because of new enforcement mechanisms such as fingerprinting. The language of the proposed regulation appears to contemplate giving states credit only to the extent that ineligible families are identified or deterred, and presumably not for cases in which otherwise eligible families are screened out. More importantly, the manner in which verifications and enforcement mechanisms are categorized would suggest that states need not enumerate changes in their application, nor estimate the extent to which any caseload reduction may have resulted from the denial or deterrence of eligible families. The regulation should be clarified to provide that states will not get credit for caseload reductions that are generated by the denial or discouragement of eligible families, and that states will be required to report on policy changes in these areas.

Treatment of Families Receiving Assistance in Separate State Programs

The proposed regulation generally provides that families receiving assistance in a separate state program will be considered to be part of a state's caseload when determining a state's credit. This appears to be consistent with HHS' expressed intention of implementing the credit so as to reward states that are successful in moving families into employment and off the caseload. However, the exception to the general rule would appear to be more ambiguous and discretionary than appropriate to implement the expressed intent of the rule. Subsection (b) specifies that HHS will consider excluding

cases under certain circumstances. However, to the extent that a state documents that a case or cases fit within the exceptions specified in subsections (1) -(3), it is unclear what more HHS will "consider," or on what basis it will make a final determination.

If cases overlap with or duplicate cases in the TANF caseload, then HHS should exclude (rather than "consider" excluding) them in the caseload count; there is no reason why a family should be counted twice in the caseload simply because it is receiving assistance in both a TANF and a separate state program. Similarly, if, as a policy matter, a state elects to use state funds to provide assistance to immigrants made ineligible for federal benefits, those cases should also be excluded; a state should not be disadvantaged in the calculation of a caseload reduction credit because it is electing to use state funds to assist federally-ineligible immigrant families.

In addressing the situation of working families, subsection (3) appears to be creating a distinction among various types of aid that might be provided where no real difference exists. The provision specifies that "working families" receiving certain forms of assistance in a separate state program may be excluded. Examples of the types of assistance that might be received include "...state earned income tax credits, child care, transportation subsidies, or benefits for working families that are not directed at their basic needs." The wording suggests for example that income support provided to a working family might be treated one way if paid in the form of an earned income tax credit, but be treated differently if paid in another form. In addition, it is unclear how one might determine whether a particular form of assistance is "...directed at ...basic needs." It is unclear whether such benefits as transportation subsidies and child care are considered to be directed at basic needs. Accordingly, we recommend that families receiving assistance in separate state programs designed to provide income support, services, or both, to families in which employment provides the family's primary source of income should be excluded. To the extent that states design and impalement programs of assistance for families that have achieved the goals of the Act, there is no legitimate policy basis for denying a state the benefit of the caseload reduction credit.

> **§271.43 What is the definition of a "case receiving assistance" in calculating the caseload reduction factor?**
>
> (a) The caseload reduction factor is based on decreases in caseload (other than those excluded pursuant to section 271.42) in both a State's TANF program and in any separate State programs that are used to meet the maintenance-of-effort requirement.
> (b)(1) For fiscal year 1995, we will use AFDC caseload data.
> (2) For all other fiscal years, we will determine the caseload based on all cases in a State receiving assistance (according to the definition of assistance at section 270.30).

Analysis: This section clarifies that only families receiving assistance as defined in § 270.30, in either the state's TANF program, or in a separate state program for which the state counts its spending toward the MOE requirement will be counted in determining the state's caseload. Families who receive only "non-assistance," in either a state TANF program or in a separate state program will not be considered as part of the state caseload. This provision should also be modified to make it clear that

when a state will not need to count all of its spending in a separate state program in order to meet MOE requirements, only a pro rata share of the caseload consistent with the MOE funding the state is counting will be considered part of the state's caseload when determining its caseload reduction credit.

§271.44 When must a State report the required data on the caseload reduction factor?

(a) A State must report the necessary documentation on the caseload reduction factor for the preceding fiscal year by November 15.
(b) We will notify the State of whether we approve or reject the proposed reduction factor by the following February 15.

Analysis: This section provides a timetable to govern the procedure that HHS proposes to establish for the submission and consideration of applications for the Caseload Reduction Credit. States will be allowed 11/2 months from the end of the fiscal year to submit their applications, and HHS will provide a decision by February 15. Under the proposed time frames, a state will not know its effective participation rate until almost half way through the fiscal year to which the rate will apply. Unfortunately, though, this appears to be a necessary consequence of the complexity of and amount of information needed to calculate the caseload reduction credit consistent with the statutory requirements.

§271.50 What happens if a State fails to meet the participation rates?

(a) If we determine that a State did not achieve one of the required minimum work participation rates, we must reduce the SFAG payable to the State.
(b)(1) If there was no penalty for the preceding fiscal year, the penalty for the current fiscal year is five percent of the adjusted SFAG.
(2) For each consecutive year that the State is subject to a penalty under this part, we will increase the amount of the penalty by two percentage points over the previous year's penalty. However, the penalty can never exceed 21 percent of the State's adjusted SFAG.
(c) We impose a penalty by reducing the SFAG payable for the fiscal year that immediately follows our final determination that a State is subject to a penalty and our final determination of the penalty amount.
(d) In accordance with the procedures specified at section 272.4 of this chapter, a State may dispute our determination that it is subject to a penalty.

Analysis: This provision generally tracks the statute. However, whereas the statute specifies that any penalty for failing to meet the participation rates should be imposed in the fiscal year immediately following the year in which the rates are not met, the regulation specifies that the penalty will be imposed in the fiscal year following the fiscal year in which HHS determines that the penalty should be imposed. For example, a state which fails to meet the rates in fiscal year 1998, would be determined by HHS to be subject to a penalty in fiscal year 1999, and the penalty would be imposed against the TANF block grant for fiscal year 2000.

More significantly, although unstated in the regulation itself, in the Preamble HHS indicates that "...[I]f a state fails to provide complete and accurate data on work participation as required under §411(a) of

the Act, and Part 275 of the proposed regulations, we will determine that a State has not achieved its participation rates, and the State will be subject to a penalty under this part." (62 Fed. Reg. 62142) The rationale for this proposal is that: 1) it is consistent with HHS' proposed treatment of a state's failure to report data relevant to other penalties; and 2) HHS does not "...want to create a situation where non-reporting states would face lower penalties than reporting states." (62 Fed Reg. 62142) The second reason listed is a reference to the fact that under the statute, a mandatory 4% penalty must be imposed for failure to comply with the reporting requirements, while the maximum penalty for failing to meet participation rates is 5%. However, as discussed below, a state that fails to meet participation rates may not be subject to a the maximum penalty, or any penalty at all. This proposal should be modified so that the participation rate penalty will only be imposed in cases where HHS is unable to determine whether the state met the participation rate as a result of failure to provide complete and accurate data. However, if, for example, the state's data was inaccurate in some respects, but the state clearly met the rates, the participation rate penalty should not be imposed.

§271.51 Under what circumstances will we reduce the amount of the penalty below the maximum?

(a) In order to qualify for a penalty reduction under paragraphs (b)(3) and (c) of this section, the State must demonstrate that it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements.

(b) We will reduce the amount of the penalty based on the degree of the State's noncompliance.

(1) If the State fails only the two-parent participation rate specified at section 271.23, its maximum penalty will be a percentage of the penalty specified at section 271.50. This percentage will equal the percentage of the State's two-parent cases.

(2) If the State fails the overall participation rate specified at section 271.21, or both rates, its maximum penalty will be the penalty specified at section 271.50.

(3)(i) In order to receive a reduction of the penalty amounts determined under paragraphs (b)(1) or (b)(2) of this section, the State must achieve participation rates equal to a threshold level defined as 90 percent of the applicable minimum participation rate, at section 271.23 or section 271.21. If a State met this threshold, we would base its reduction on the severity of the failure.

(ii) For this purpose, we will calculate the severity of the State's failure as the ratio of:

(A) The difference between the participation rate achieved by the State and the 90 percent "threshold" level; and

(B) The difference between the minimum applicable participation rate and the threshold level.

(c)(1) We may reduce the penalty if the State failed to achieve a participation rate because:

(i) It meets the definition of a needy State, specified at section 270.30 of this chapter, or

(ii) Noncompliance is due to extraordinary circumstances such as a natural disaster or regional recession.

(2) In determining noncompliance under paragraph (c)(1)(ii) of this section, we will consider objective evidence of extraordinary circumstances if the State chooses to submit it.

Analysis: Under §409(a)(3), the maximum penalty that may be imposed for the first year in which a state fails to meet required participation rates is 5%. In this provision of the proposed regulations, HHS specifies that different maximums will be applied to the overall (all-families) rate and the two-parent family rate. If a state fails to meet the all-families rate, or if it fails to meet both the all-families and the two-parent families rates, the maximum penalty will be 5%. If a state fails to meet only the two-parent family rate, the maximum penalty will be equal to the percentage of the state's TANF caseload that is composed of two-parent families, multiplied by 5%. For example, if two-parent families comprise 10% of a state's TANF caseload, then the maximum penalty for the first year in which the state fails to meet the two-parent rate will be .5%, 10% times 5%. The statute does not specifically address how HHS should determine the appropriate level of penalty for a failure to meet the two-parent rate, but the approach developed by HHS appears reasonable. Finally, it appears that HHS did not intend that separate state program activity would affect the maximum penalty established for failing to meet the two-parent rate. The final rule should clarify this point.

Penalty Reductions

§409(a)(3)(C) requires HHS to reduce the penalty that is imposed on a state for failing to meet the rates "..based on the degree of noncompliance..." HHS proposes to impose two significant restrictions on a state's eligibility for this "mandatory" penalty reduction: 1) "...the State must demonstrate that it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements..." and 2) the state must have achieved at least 90% of the required rate.

Separate State Programs

As discussed in the introduction, this is one of a number of provisions in which HHS would make it more likely that a state which has established a separate state program will be subject to a penalty, or to a larger penalty, than might otherwise be the case. There are a number of problematic aspects with this portion of the proposed regulation. First, HHS' authority to deny a penalty reduction to a state based on the purpose for which the state has established a separate state program appears extremely doubtful. The statute, as HHS recognizes, authorizes the expenditure of state funds in a separate state program to be counted toward a state's MOE obligation, provided the requirements of §409(a)(7) are met. The statute also mandates that HHS reduce the penalty to be imposed for failing to meet participation rates based on the state's degree of compliance. The measure of the state's degree of compliance in its TANF program should be based on the state's performance in its TANF program, not based on reviewing how a state chose to spend maintenance of effort funds that were not a part of the state's TANF program. Nothing in the statute would appear to support an investigation into the state's purpose or intent in establishing a separate state program, when determining whether it should be eligible for a reduction that is mandated by the statute.

Beyond any legal considerations, as a matter of policy, HHS' concern seems misplaced. HHS focuses on how a state might seek to avoid a penalty by finding other ways to assist families outside of the

TANF structure; however, an alternative open to any state that truly wishes to avoid a participation rate penalty is simply to restrict access to assistance. Denying assistance to a family altogether will help a state just as much to meet the participation rate as will providing assistance in a separate state program. Indeed, it may be more beneficial to deny aid because depending upon how assistance is denied, the state may also be able to take advantage of the caseload reduction credit. In our view, HHS ought to be more concerned about state policies designed to deny assistance to families than about the 'danger' that states might be seeking to find alternative ways to assist poor families. Based on these considerations, we recommend that the final rules should omit any reference to separate state programs in determining whether a state qualifies for penalty reductions.

If HHS determines that final rule ought to limit access to a penalty reduction based on the purpose for which a state has established a separate state program, the formulation in the proposed regulation is unsatisfactory. The standard HHS proposes to employ in determining the purpose of the state's separate program is unclear. Any separate state program in which recipients do not engage in countable activities might be viewed as having the purpose of avoiding a participation rate penalty, as any such program will reduce the number of families in the state's TANF program and make it easier for the state to meet the participation rates. Yet it is likely that a state will have an independent policy rationale for providing assistance in a separate state program. For example, if a state establishes a separate state program that provides assistance to families in which the adult is attending an approved post-secondary education program, it likely does so because state decisionmakers believe that post-secondary education provides improved access to stable employment and higher wages. The regulation leaves open the possibility that notwithstanding such an independent policy rationale, HHS might find that the state's purpose was to avoid a penalty. The regulation also does not appear to allow for consideration of the size of the state's separate program, and thus may lead to denial of a reduction even if only very few families are in the separate program.

The Preamble contains several statements that may shed light on HHS' intentions, however, the limitations suggested in these statements are not reflected in the regulation itself. HHS suggests that its principal concern about separate state programs is that such programs will not have a serious focus on work:

> We are proposing that, a State will not receive a penalty reduction based on the severity of the failure or our discretionary authority, if a State has diverted cases to a separate State program for the purpose of avoiding the work participation rates. We want to ensure that each State makes a serious effort to provide work and work-related activities in any State-only funded programs. As we indicated in program announcement TANF-ACF-PA-97-1, we do not believe Congress intended a State to use separate State welfare programs to avoid TANF's focus on work. 62 Fed. Reg. 62142

If this statement can be read to describe how HHS will determine a state's purpose in establishing or operating a separate state program, then it would appear that programs which focus on the provision of

work-related services and activities ought to be insulated from a finding that the state's purpose was improper. Two questions arise if this assessment is correct. First, does the focus on work in the separate state program need to be limited to activities that would be countable toward TANF participation rates, or will other activities be considered within the "focus on work" framework? Second, will separate state programs that provide assistance to families with a disabled parent or caretaker, or to families in which the parent or caretaker is providing care to an ill or incapacitated family member automatically be presumed to have been established for an improper purpose? In either of these two circumstances, e.g., programs that provide work-related services that do not fit within the definition of countable activities, and programs that provide assistance to families whose circumstances make work, or work-related activities infeasible, legitimate policies separate from any purpose or intention to avoid TANF participation rates are manifest. Yet the status of such programs remains extremely unclear under the proposed regulation.

Finally, the extent to which the size of the separate state program, e.g., the number of TANF eligible families being served in the program, will be a factor in examining the state's purpose is unclear. The language of the regulation would not appear to allow for consideration of this factor. However, in the Preamble HHS describes its concerns as being limited to "...a significant pattern of diversion..." (62 Fed. Reg. 62129) HHS needs to clarify the extent to which the size of the separate state program will influence any assessment of the state's purpose, and preferably in the text of the regulation itself, rather than in its commentary regarding the regulation.

If the final rule will include consideration of a state's separate program in determining whether a penalty reduction will be available or the amount of any penalty reduction, the separate state program should be only one of a range of factors that might also include the factors indicated in the Introduction, p. 14. Moreover, a separate state program should not be viewed as a negative factor if supported by legitimate, independent policies such as those noted above and in the Introduction, p. 15.

The 90% Standard

Subsection (b)(3) is designed to implement the portion §409(a)(3)(C) which mandates penalty reductions "...based on the degree of noncompliance..." It appears that the Department is interpreting this language to limit its consideration of a state's degree of noncompliance to a comparison between the state's actual participation rate and the rate the state was required to meet for the year. HHS proposes to establish a threshold, set at 90% of the applicable rate, that a state must meet to be eligible for a mandatory penalty reduction. If a state were to meet that threshold, it would be eligible for a reduction equal to the percentage of the difference between 90% and 100% that the state had achieved (except in those circumstances where HHS proposes that penalty reductions be unavailable.). Thus, if a state achieved a rate equal to 95% of the required rate, the maximum penalty to which it might be subject would be 50% of the otherwise applicable maximum. The 90% threshold seems unnecessarily high. For example, in FY 1999, when the overall rate is 35%, a state that achieved a participation rate of 30% would not be eligible for a reduction. Moreover, given the many difficulties that are likely to be

present in the collection and reporting of TANF data, the proposed rules would make large fiscal consequences turn on small and difficult-to-measure differences in reported data. It does seem reasonable to establish a threshold level below which a state would not be eligible for a mandated reduction (particularly because discretionary reductions might still be available based on particular circumstances, see discussion of discretionary reductions, below), and any threshold will be arbitrary to some extent. However, setting the definition of substantial compliance at a lower threshold, e.g., somewhere between 65% and 75%, would have two advantages: first, it would more reasonably allow for reductions in penalties based on the degree of noncompliance; and second, it would reduce the extent to which large variations in penalties resulted from small variations in reported performance.

An alternative construction of the statutory provision would be to allow for consideration of others factors regarding how the state has structured and implemented its TANF program and the size and composition of the caseload being served, in addition to the actual rate the state achieved. If HHS determines to adopt a broader reading of this provision, there are a number of factors that relate to a state's efforts and ability to meet a required participation rate that should be considered. These factors would include, most importantly: the extent to which the state's caseload had increased; the extent to which the state's performance had improved in comparison to the prior year; the extent to which individuals were participating in work-related activities but for too few hours to be counted as participants in calculating the state's official rate, including particularly individuals in work experience or community service whose benefit levels were too low to allow for participation for the mandated number of hours; evidence as to whether the state is providing appropriate services to individuals with significant barriers to employment; evidence as to whether state-imposed requirements are reasonable and within the capacity of program participants; evidence as to whether the state has a system for ensuring the availability of reasonable good cause exceptions for inability to meet program requirements; the extent to which the state has granted good cause domestic violence waivers; evidence as to whether needed supports and services are provided to families required to comply with participation requirements; and evidence as to whether the state is complying with provisions designed to protect against displacement in work activities.

Discretionary Reductions

Subsection (c) is consistent with the statute, except with regard to the proposed consideration of separate state program activity discussed above, and in the Introduction.

> **§271.52 Is there a way to waive the State's penalty for failing to achieve either of the participation rates?**
>
> (a) We will not impose a penalty under this part if we determine that the State has reasonable cause for its failure.
> (b) In addition to the general reasonable cause criteria specified at 272.5 of this chapter, a State may also submit a request for a reasonable cause exemption from the requirement to meet the minimum participation rate in two specific case situations, if it demonstrates that it has not diverted cases to a separate State program for the purpose of avoiding the work participation rates.

(1) We will determine that a State has reasonable cause if it demonstrates that failure to meet the work participation rates is attributable to its provision of good cause domestic violence waivers as follows:

(i) To demonstrate reasonable cause, a State must provide evidence that it achieved the applicable work rates, except with respect to any individuals receiving good cause waivers of work requirements (i.e., when cases with good cause waivers are removed from the calculations in sections 271.22(b) and 271.24(b)); and

(ii) A State must grant good cause domestic violence waivers appropriately, in accordance with the criteria specified at sections 270.30 of this chapter. If a State fails to meet the criteria for "good cause domestic violence waivers" specified at section 270.30 of this chapter, the Secretary will not grant reasonable cause under this paragraph (b).

(2) We will determine that a State has reasonable cause if it demonstrates that its failure to meet the work participation rates is attributable to its provision of assistance to refugees in federally-approved alternative projects under section 412(e)(7) of the Immigration and Nationality Act (8 U.S.C. 1522(e)(7)).

(c) In accordance with the procedures specified at section 272.4 of this chapter, a State may dispute our determination that it is subject to a penalty.

Analysis: Under the statute, if HHS determines that a state had reasonable cause for failing to comply with certain requirements, then HHS "...may not impose a penalty under subsection [409] (a)..." (§409(b)).[13] Although somewhat ambiguous, it appears that the better reading of this provision would interpret the "may not impose" language as prohibiting HHS from imposing a penalty if it finds reasonable cause.

This provision establishes reasonable cause criteria specific to penalties for failure to meet participation rates; these criteria are in addition to more general reasonable cause criteria applicable to a range of penalties, including those for failing to meet participation rates, described in §272.5. However, as with the penalty reductions, this relief would be unavailable to a state if the state failed to demonstrate that it has not diverted cases to a separate state program for the purpose of avoiding the participation rates. Comments on this approach are included in the discussion of the prior regulation and in the Introduction.

[13] Reasonable cause is not available to avoid a penalty for failing to comply with TANF maintenance of effort requirements; failure to comply with TANF maintenance of effort requirements during a year in which a Welfare-to-Work grant is received; failure to comply with Contingency Fund maintenance of effort requirements, failure to repay a loan on a timely basis; and failure to expend additional state funds to replace grant reductions due to imposition of a penalty. 62 Fed. Reg. 62148 The proposed regulations do not address the penalty for failure to substantially comply with child support enforcement requirements, but reasonable cause exceptions are not available for that penalty either.

The proposed regulation recognizes two specific grounds which can lead to a determination of reasonable cause: 1) the provision of good cause domestic violence waivers; or 2) provision of assistance to refugees in federally-approved alternative projects under §412(e)(7) of the Immigration and Nationality Act (8 U.S.C. 1522(e)(7)). These are reasonable grounds for making reasonable cause determinations. In addition, just as the proposed regulations recognize that a state might have more difficulty meeting participation rates due to its willingness to develop appropriate service plans for victims of domestic violence, so might a state have more difficulty meeting the rates due to the fact that a state has elected to develop appropriate service plans for other categories of families with significant barriers to employment, e.g., families in which a member is in need of substance abuse treatment or mental health services, families in which a member has a severe learning disability or employment-impairing basic skills deficit, or families in which a member has an employment-impairing incapacity or disability. These factors should be included as independent grounds for a reasonable cause determination.

Additional factors which should also be considered include: the extent to which a state's caseload has increased, either due to policy changes that broaden eligibility for needy families, or due to economic conditions that reduce employment prospects but fall short of recessionary conditions; the extent to which the state's performance had improved in comparison to the prior year; the extent to which individuals were participating in work-related activities but for too few hours to be counted as participants in calculating the state's official rate, including particularly individuals in work experience or community service whose benefit levels were too low to allow for participation for the mandated number of hours; evidence as to whether state-imposed requirements are reasonable and within the capacity of program participants; evidence as to whether the state has a system for ensuring the availability of reasonable good cause exceptions for inability to meet program requirements; evidence as to whether needed supports and services are provided to families required to comply with participation requirements; and evidence as to whether the state is complying with provisions designed to protect against displacement in work activities.

Further, it is possible that a state's time-limit policy could also affect its ability to meet participation rates. For example, consider two states, one of which terminates assistance to families at the two-year point with minimal exemptions or extensions, and the other of which has a longer time limit and/or provides for more substantial exemptions and extensions for families with barriers to employment or who are unable to attain employment despite their best efforts. It is entirely possible that the second state, which is furthering the TANF goal of assisting needy families, and which may be doing more to help families enter employment, will have a greater difficulty in meeting TANF participation rates. Accordingly, a state's willingness to provide and continue assistance to families unable to enter or maintain employment, as reflected in the state's time-limits policy, should be another factor considered in determining whether reasonable cause is present.

The regulation also fails to allow for the possibility that a combination of the factors identified by HHS will result in a reasonable cause finding. That is, if a state failed to meeting the participation rates in part

because of good cause domestic violence waivers and in part because of the provision of assistance to refugees it would not appear to be eligible for a finding of reasonable cause. This should be included in the final rule.

§271.53 Can a State correct the problem before incurring a penalty?

(a) Yes. A State may enter into a corrective compliance plan to remedy a problem that caused its failure to meet a participation rate, as specified at section 272.6 of this chapter.
(b) To qualify for a penalty reduction under section 272.6(i)(1) of this chapter, based on significant progress in discontinuing a violation, a State must reduce the difference between the participation rate it achieved in the year for which it is subject to a penalty and the rate applicable during the penalty year by 50 percent.

Analysis: See discussion of §272.6, below.

§271.54 Is a State subject to any other penalty relating to its work program?

(a) If we determine that, during a fiscal year, a State has violated section 407(e) of the Act, relating to imposing penalties against individuals, we must reduce the SFAG payable to the State.
(b) The penalty amount for a fiscal year will equal between one and five percent of the adjusted SFAG.
(c) We impose a penalty by reducing the SFAG payable for the fiscal year that immediately follows our final determination that a State is subject to a penalty and our final determination of the penalty amount.

Analysis: This provision tracks the statute.

§271.55 Under what circumstances will we reduce the amount of the penalty for not properly imposing penalties on individuals?

(a) We will reduce the amount of the penalty based on the degree of the State's noncompliance.
(b) In determining the size of any reduction, we will consider objective evidence of:
(1) Whether the State has established a control mechanism to ensure that the grants of individuals are reduced for refusing to engage in required work; and
(2) The percentage of cases for which the grants have not been appropriately reduced.
(c) Neither the reasonable cause provisions at section 272.5 of this chapter nor the corrective compliance plan provisions at section 272.6 of this chapter applies to this penalty.

Analysis: §5004 of the Balanced Budget Act created a §409(a)(14) for this new penalty. However, the statutory provisions containing limitations on the availability of reasonable cause and corrective compliance were not modified to include a reference to the new penalty, so reasonable cause/corrective compliance should be available.

§271.60 How do existing welfare waivers affect the participation rate?

(a) If a State is implementing policies in accordance with an approved waiver that meets the provisions of section 415(a)(1)(A) of the Act and the definition of a waiver at §270.30 of this

chapter, the provisions of section 407 of the Act do not apply, to the extent that they are inconsistent with the waiver.

(b)(1) In the case of waivers addressing activities in which an individual may participate in order to be "engaged in work" and count toward the minimum participation rates (as specified at §271.30):

(i) We will include provisions of prior law as part of such waivers; and

(ii) We will recognize such waivers as inconsistent.

(2) In the case of waivers addressing minimum average hours of work per week necessary to be "engaged in work" for a month (as specified at §§271.31 and 271.32):

(i) We will recognize the waiver as inconsistent if it specifies an individual's mandated hours of participation in accordance with his/her particular circumstances, either as specified by criteria described in the waiver or under an individualized plan or similar agreement for achieving self-sufficiency; and

(ii) We will not recognize as inconsistent any waiver designed to increase the mandatory work hours for a class of recipients under the former JOBS program.

(c) Except as applicable to research cases in paragraph (d) of this section, we will not recognize any prior law exemptions as part of the waiver with respect to the denominator of the participation rates, found at §§ 271.21 and 271.23.

(d) If a State is continuing research group policies in order to complete an impact evaluation of a waiver demonstration, the demonstration's control group may be subject to prior law and its experimental treatment group may be also subject to prior law, except as modified by the waiver.

(e) The additional requirements at §272.8 of this chapter apply to the use of continuing waiver alternative work requirements in the calculation of the work participation penalty.

Analysis: HHS' proposed treatment of waivers in the context of participation rates is discussed in detail at pp. 22-25. As described in greater detail in that discussion, the key HHS decisions are:

- all states will be subject to TANF participation rates, i.e., a state cannot assert that there is an inconsistency between its waiver policies and being subject to TANF participation rate requirements;

- a state may use a modified definition of countable activities for being "engaged in work," based on those activities that were allowed under the state's approved waiver;

- states may not use modified hourly standards for when an individual will count as being engaged in work if those hourly standards had applied to classes of recipients under the waiver, though a state can depart from the federal hourly standards if under its waiver, hours of participation were set based on individualized plans for achieving self-sufficiency; and

- if under the waiver, certain categories of recipients were exempt from required participation, the state may not have its denominator recalculated to reflect those exemptions; the only

permissible adjustments to the denominator will be to exclude treatment and control cases in a continuing research study.

As explained in the Introduction, at pp. 22-25, it is difficult to see any coherent principle that justifies the distinctions that HHS seeks to draw. The HHS posture would prevent states from asserting inconsistencies in instances where a state would plainly need to alter its waiver policies in order to avoid a risk of failing to meeting to meet federal TANF participation rates. The regulatory treatment of participation rates should be modified to make clear that a state may assert an inconsistency based on its definition of engaged in work; its hourly requirements; its exemption policies; or based on the fact that compliance with §407 would force the state to alter its basic waiver approach.

§271.70 What safeguards are there to ensure that participants in work activities do not displace other workers?

(a) An adult taking part in a work activity outlined in section 271.30 may not fill a vacant employment position if:

(1) Another individual is on layoff from the same or any substantially equivalent job; or

(2) The employer has terminated the employment of any regular employee or caused an involuntary reduction in its work force in order to fill the vacancy with an adult taking part in a work activity.

(b) A State must establish and maintain a grievance procedure to resolve complaints of alleged violations of the displacement rule in this section.

(c) This section does not preempt or supersede State or local laws providing greater protection for employees from displacement.

Analysis: This provision tracks the statute.

PART 272 -- ACCOUNTABILITY PROVISIONS -- GENERAL

§272.0 What definitions apply to this part?

The general TANF definitions at section 270.30 of this chapter apply to this part.

§272.1 What penalties will apply to States?

(a) We will assess fiscal penalties against States under circumstances defined in parts 271 through 275 of this chapter. The penalties are:

(1) A penalty of the amount by which a State misused its TANF funds;

(2) A penalty of five percent of the adjusted SFAG for intentional misuse of such funds;

(3) A penalty of four percent of the adjusted SFAG for failure to submit an accurate, complete and timely required report;

(4) A penalty of up to 21 percent of the adjusted SFAG for failure to satisfy the minimum participation rates;

(5) A penalty of no more than two percent of the adjusted SFAG for failure to participate in IEVS;

(6) A penalty of no more than five percent of the adjusted SFAG for failure to enforce penalties on recipients who are not cooperating with the State Child Support Enforcement (IV-D) Agency;

(7) A penalty equal to the outstanding loan amount, plus interest, for failure to repay a Federal loan;

(8) A penalty equal to the amount by which a State fails to meet its TANF MOE requirement;

(9) A penalty of five percent of the adjusted SFAG for failure to comply with the five-year limit on Federal assistance;

(10) A penalty equal to the amount of contingency funds unremitted by a State for a fiscal year;

(11) A penalty of no more than five percent of the adjusted SFAG for the failure to maintain assistance to an adult single custodial parent who cannot obtain child care for a child under age six;

(12) A penalty of no more than two percent of the adjusted SFAG plus the amount a State has failed to expend of its own funds to replace the reduction to its SFAG due to the assessment of penalties in this section in the year of the reduction;

(13) A penalty equal to the amount of the State's Welfare-to-Work formula grant for failure to meet its TANF MOE requirement during a year in which the formula grant is received; and

(14) A penalty equal to not less than one percent and not more than five percent of the adjusted SFAG for failure to reduce assistance for recipients refusing without good cause to work.

(b) In the event of multiple penalties for a fiscal year, we will add all applicable penalty percentages together. We will then assess the penalty amount against the adjusted SFAG that would have been payable to the State if no penalties were assessed. As a final step, we will subtract other (fixed) penalty amounts from the adjusted SFAG.

(c)(1) We will take the penalties specified in paragraphs (a)(1), (a)(2) and (a)(6) of this section by reducing the SFAG payable for the quarter that immediately follows our final decision.

(2) We will take the penalties specified in paragraphs (a)(3), (a)(4), (a)(5), (a)(7), (a)(8), (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), and (a)(14) of this section by reducing the SFAG payable for the fiscal year that immediately follows our final decision.

(d) When imposing the penalties in paragraph (a) of this section, the total reduction in an affected State's grant must not exceed 25 percent. If this 25 percent limit prevents the recovery of the full penalty amount imposed on a State during a fiscal year, we will apply the remaining amount of the penalty to the SFAG payable for the immediately succeeding fiscal year.
(e)(1) In the same fiscal year, a State must expend additional State funds to replace any reduction in the SFAG resulting from penalties.

(2) The State must document compliance with this provision on its TANF Financial Report (or Territorial Financial Report).

Analysis: This provision generally tracks the statute. For purposes of reader understanding, it would be helpful if this regulation expressly explained or cross-referenced the listing of which penalties are and are not subject to reasonable cause/corrective compliance. Although the statute does not expressly explain how HHS is to address multiple penalties, their approach seems reasonable.

§272.2 When do the TANF penalty provisions apply?

(a) A State will be subject to the penalties specified in sections 272.1(a)(1), (2), (7), (8), (9), (10), (11), (12), (13), and (14) for conduct occurring on and after the first day the State operates the TANF program.
(b) A State will be subject to the penalties specified in sections 272.1(a)(3), (4), (5), and (6) for conduct occurring on and after July 1, 1997, or the date the at is six months after the first day the State operates the TANF program, whichever is later.
(c) For the period of time prior to [effective date of final rules], we will assess State conduct as specified in section 270.40(b) of this chapter.

Analysis: This provision generally tracks the statute. §270.40(b) is addressed above.

§272.3 How will we determine if a State is subject to a penalty?
(a) We will use the single audit, as implemented through OMB Circular A-133, to determine if a State is subject to a penalty for misusing Federal TANF funds (section 273.10 of this chapter), intentionally misusing Federal TANF funds (section 273.12 of this chapter), failing to participate in IEVS (section 274.10 of this chapter), failing to comply with paternity establishment and child support requirements (section 274.31 of this chapter), failing to maintain assistance to an adult single custodial parent who cannot obtain child care for child under six (section 274.20 of this chapter), and failing to reduce assistance to a recipient who refuses without good cause to work (section 271.14 of this chapter).
(b) We will use data reports required under part 275 of this chapter to determine if a State failed to meet participation rates (section 271.21 of this chapter) or failed to comply with the five-year limit on Federal assistance (section 274.1 of this chapter).

(1) Data in these reports are subject to our verification in accordance with section 275.7 of this chapter.

(2) States may not revise the sampling frames or program designations for cases in the quarterly TANF and TANF MOE Data Reports retroactively (i.e., after submission).

(c) We will use the TANF Financial Report (or, as applicable, the Territorial Financial Report) to determine if a State should be penalized for failure to meet the TANF MOE requirement (section 273.7 of this chapter), the Contingency Fund MOE requirement (section 274.76 of this chapter), and to replace SFAG reductions with State-only funds (section 274.50 of this chapter). Data in these reports are subject to our verification in accordance with section 275.6 of this chapter.

(d) We will determine that a State is subject to the specific penalties for failure to perform, if we find information in the reports under paragraphs (b) and (c) of this section to be insufficient or if we determine that the State has not adequately documented actions verifying that it has met the participation rates.
(e) To determine if a State has met its TANF MOE requirement, we will use the additional information listed at section 273.7 of this chapter.
(f) States should maintain records in accordance with section 92.42 of this title.

Analysis: This provision describes the various reports and procedures that HHS intends to use to monitor state compliance with statutory requirements. The approach described generally appears reasonable. Comments with regard to particular reporting requirements referenced in this section are addressed below in response to the provisions of Part 275.

§272.4 What happens if we determine that a State is subject to a penalty?

(a) If we determine that a State is subject to a penalty, we will notify the State in writing, specifying which penalty we will impose and the reasons for the penalty.
(b) Within 60 days of when it receives our notification, the State may submit to ACF, a written response that:
(1) Demonstrates that our determination is incorrect because our data or the method we used in determining the penalty was in error or was insufficient, or that the State acted, prior to the [effective date of final regulations], on a reasonable interpretation of the statute;
(2) Demonstrates that the State had reasonable cause for failing to meet the requirement(s); and/or
(3) Provides a corrective compliance plan, pursuant to section 272.6.
(c) If we find that we determined the penalty erroneously, or that the State has adequately demonstrated that it had reasonable cause for failing to meet one or more requirements, we will not impose the penalty.
(d) Reasonable cause and a corrective compliance plan are not available for failing to repay a Federal loan; failing to meet the TANF MOE requirement; failing to maintain 100 percent TANF MOE after receiving Contingency Funds; failing to expend additional State funds to replace adjusted SFAG reductions due to the imposition of one or more penalties listed in section 272.1; or failing to maintain 80, or 75, percent, as appropriate, TANF MOE during a year in which a Welfare-to-Work grant is received.
(e) We will notify the State in writing of our findings regarding its response.
(f) If we request additional information from a State, it must provide the information within two weeks of the date of our request.

Analysis: This provision describes the initial administrative appeal process that will be available to states upon notification that HHS has determined that the state is subject to a penalty. States are allowed 60 days to provide a response to HHS that may indicate that the state believes that imposition of the penalty is improper, that the state had reasonable cause for failing to comply with the statutory provision at issue, or that the state proposes to implement a corrective compliance plan, or any combination of the three. In the Preamble, HHS makes clear that if a state wishes to claim that it had reasonable cause for failing to comply with a statutory provision it may submit that request, and then submit a request for a corrective compliance plane within 60 days after it receives HHS' response to its

reasonable cause claim. The 60 day period is specified in the statute for submission of a corrective compliance plan, and it seems reasonable to use the same time frame for either or both of the other two possible state responses.

This provision tracks the statute with regard to the listing of penalties for which reasonable cause and corrective compliance procedures are not available.

The provision does not include any specific time frame within which HHS will respond to a state's claim that the proposed penalty is improper or for responding to a reasonable cause claim. Time frames for HHS responses on these two issues should be included in the regulation. Although not included here, §272.6, below, does address the HHS response with regard to corrective compliance plans.

> **§272.5 Under what general circumstances will we determine that a State has reasonable cause?**
>
> (a) We will not impose a penalty against a State if we determine that the State had reasonable cause for its failure. The general factors a State may use to claim reasonable cause are limited to the following:
>
> (1) Natural disasters and other calamities (e.g., hurricanes, earthquakes, fire) whose disruptive impact was so significant as to cause the State's failure;
>
> (2) Formally issued Federal guidance that provided incorrect information resulting in the State's failure; or
>
> (3) Isolated, non-recurring problems of minimal impact that are not indicative of a systemic problem.
>
> (b) A State may also use the additional factors for claiming reasonable cause for failure to satisfy the five-year limit at section 274.3 of this chapter and to meet the minimum participation rates at section 271.52 of this chapter.
>
> (c) We will not forgive a State penalty under sections 272.1(a)(4), (a)(9), (a)(11), or (a)(14) based on reasonable cause if we detect a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rates at sections 271.22 or 271.24.
>
> (d) We will not forgive a State penalty under sections 272.1(a)(4), (a)(6), (a)(9), or (a)(14) based on reasonable cause if we detect a significant pattern of diversion of families to a separate State program that achieves the effect of diverting the Federal share of child support collections.

Analysis: Under §409(b) of the Act, HHS must waive a penalty if it determines that a state had reasonable cause for failing to comply with the underlying statutory requirement, except in those instances where the Act specifies that a reasonable cause exception is unavailable. In this provision, HHS identifies the factors that it will consider when making a reasonable cause determination. HHS also indicates in the Preamble that it views the reasonable cause criteria and procedures, and the corrective compliance procedures described below in §272.6 as an integrated process for resolving states' failure to comply with statutory requirements. HHS also indicates that it wishes to emphasize corrective compliance procedures over reasonable cause waivers. This is not unreasonable, but it appears that even given this emphasis the criteria established are too narrow. It also appears that the criteria are too narrow to implement what HHS indicates in the Preamble it wishes to consider in making reasonable cause determinations. At 62 Fed. Reg. 62149, HHS states:

> In determining reasonable cause, we will consider the efforts the State made to meet the requirement. We will also take into consideration the duration and severity of the circumstances that led to the State's failure to achieve the requirement.

It is difficult to see how HHS can adequately take into account state efforts or the duration and severity of circumstance leading to a state's failure given how narrowly drawn are the criteria included in subsection (a). In subsection (a), HHS states that the general factors to be considered are limited to those specifically listed; at minimum, this text should be modified to indicate that the general factors to be considered include (rather than are limited to) the ones specifically listed. It would be preferable to also identify other factors that could be considered, without precluding a state from asserting a reasonable cause basis that is not specifically listed. While it is difficult to foresee all of the circumstances that might lead to noncompliance with the various statutory provisions that might lead to a penalty, general criteria that explicitly identify good faith state efforts to comply, duration and extent of noncompliance, and the duration and severity of circumstances that lead to noncompliance would be reasonable additions to the grounds upon which HHS might grant a reasonable cause waiver.

This provision includes one of the number of provisions throughout the regulations in which HHS expresses its intent to restrict penalty relief for states that have established separate state programs where there is a significant pattern of diversion which has the effect of avoiding the work participation rates or diverting the federal share of child support collections. The problems with the HHS approach are discussed at length in the introduction and in response to §271.51 of the proposed regulations, above. It is worth only repeating here, that any action HHS ultimately determines to take against states that establish separate state programs to avoid the participation requirements or to divert the federal share of child support collections should be limited to the penalties available for failing to comply with the participation rates of for failing to comply with IV-D requirements. This issue is discussed in the Introduction, at pp. 10, 15.

> **§272.6 What if a State does not demonstrate reasonable cause?**
>
> (a) A State may accept the penalty or enter into a corrective compliance plan that will correct or discontinue the violation within six months in order to avoid the penalty if:
>
> (1) A State does not claim reasonable cause; or
>
> (2) We find that the State does not have reasonable cause.
>
> (b) A State that does not claim reasonable cause will have 60 days from receipt of our notice described in section 272.4(a) to submit its corrective compliance plan.
>
> (c) A State that unsuccessfully claimed reasonable cause will have 60 days from the date it received our second notice, described in section 272.4(f), to submit its corrective compliance plan.
>
> (d) The corrective compliance plan must include:
>
> (1) A complete analysis of why the State did not meet the requirements;
>
> (2) A detailed description of how the State will correct or discontinue, as appropriate, the violation in a timely manner;
>
> (3) The milestones, including interim process and outcome goals, the State will achieve to assure it comes into compliance within the specified time period; and
>
> (4) A certification by the Governor that the State is committed to correcting or discontinuing the violation, in accordance with the plan.

(e) During the 60-day period following our receipt of the State's corrective compliance plan, we may request additional information and consult with the State on modifications to the plan.
(f) If an acceptable corrective compliance plan is not submitted on time, we will assess the penalty immediately.
(g) A corrective compliance plan is deemed to be accepted if we take no action during the 60-day period following our receipt of the plan.
(h) We will not impose a penalty against a State with respect to any violation covered by a corrective compliance plan that we accept if the State completely corrects or discontinues, as appropriate, the violation within the period covered by the plan. This period must be no longer than six months from the date we accept a State's compliance plan.
(i)(1) Under limited circumstances, and subject to paragraph (i)(2) of this section, we may reduce the penalty if the State fails to completely correct or discontinue the violation pursuant to its corrective compliance plan and in a timely manner. To receive a reduced penalty, the State must demonstrate that it met one or both of the following conditions:

(i) Although it did not achieve full compliance, the State made substantial progress towards correcting or discontinuing the violation; or
(ii) The State's failure to comply fully was attributable to either a natural disaster or regional recession.

(2) We will not reduce a State's penalty:

(i) Under sections 272.1(a)(4), (a)(9), (a)(11), or (a)(14) if we detect a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rates and the State fails to correct the diversion; or

(ii) Under sections 272.1(a)(4), (a)(6), (a)(9), or (a)(11) if we detect a significant pattern of diversion of families to a separate State program that achieves the effect of diverting the Federal share of child support collections and the State fails to correct the diversion.

Analysis: In this provision HHS details how it proposes to implement §409(c) of the Act concerning corrective compliance plans.

Subsection (a) specifies that a corrective compliance plan must propose to completely correct the violation within 6 months of the of the date the plan is accepted by HHS. The TANF statute does not specify a particular time frame; in most instances, six months would seem reasonable, but it would be preferable if final regulations provided sufficient flexibility for a state to make a demonstration that a period of more than six months might be needed in unusual circumstances.

Subsection (d) specifies the information which a state must include in its proposed plan. The TANF statute does not specify the contents of a corrective compliance plan; the factors listed in the proposed regulations appear to be reasonable.

Subsection (i) addresses §409(c)(3) which provides that HHS shall assess some or all of a penalty if a state fails to correct the violation in the established time frame. The provision specifies that HHS will consider reducing the penalty if the state has made substantial progress in correcting or discontinuing the violation or if failure to do so was the result of a natural disaster or regional recession. This appears to be a reasonable approach to exercising the discretion accorded to HHS under the statute, though there could be severe economic circumstances in a part of the state that fall short of constituting a "regional recession." Given that HHS will still be able to exercise discretion in determining whether it wishes to reduce the penalty, it would be preferable if the final regulations were modified to allow for the possibility of reduction in the case of a natural disaster or economic circumstances that significantly impaired the state's ability to correct the violation.

Finally, subsection (i)(2) indicates that a reduction will not be available on either of the grounds listed in subsection (i)(1) for violation of specified penalties if HHS determines that the state established a separate state program with a significant pattern of diversion which has the effect of either avoiding the participation rates or which has the effect of diverting the federal share of child support collections, unless the state corrects the diversion. Responses to HHS' approach to this issue are included above in the Introduction and in comments to §271.51.

§272.7 How can a State appeal our decision to take a penalty?

(a) We will formally notify the chief executive officer of the State of an adverse action (i.e., the reduction in the SFAG) within five days after we determine that a State is subject to a penalty under parts 271 through 275 of this chapter.
(b) The State may file an appeal of the action, in whole or in part, to the HHS Departmental Appeals Board (the Board) within 60 days after the date it receives notice of the adverse action. The State must include the brief and all supporting documents with its appeal when it is filed. The State must send a copy of the appeal to the Office of the General Counsel, Children, Families and Aging Division, Room 411-D, 200 Independence Avenue, S.W., Washington, D.C. 20201.
(c) ACF must file its reply brief and supporting documentation within 30 days after the State files its appeal.
(d) The appeal to the Board must follow the provisions of the rules under this section and those at sections 16.2, 16.9, 16.10, and 16.13 through 16.22 of this title.
(e) The Board will consider an appeal filed by a State on the basis of the documentation and briefs submitted, along with any additional information the Board may require to support a final decision. In deciding whether to uphold an adverse action or any portion of such action, the Board will conduct a thorough review of the issues and make a final determination within 60 days after the appeal is filed.
(f)(1) The filing date shall be the date materials are received by the Board in a form acceptable to it.
(2) If the Board requires additional documentation to reach its decision, the 60 days shall be tolled for a reasonable period, specified by the Board, to allow production of the documentation.
(g)(1) A State may obtain judicial review of a final decision by the Board by filing an action within 90 days after the date of such decision. It should file this action with the district court of the United States in the judicial district where the State agency is located or in the United States District Court for the District of Columbia.
(2) The district court will review the final decision of the Board on the record established in the administrative proceeding, in accordance with the standards of

review prescribed by 5 U.S.C. 706(2). The court will base its review on the documents and supporting data submitted to the Board.

Analysis: This provision tracks the statute.

§272.8 What is the relationship of continuing waivers on the penalty process for work participation and time limits?

(a) In order for the State's alternative waiver requirements to be considered in the calculation of the work participation rate and the time limit requirement, the Governor must certify in writing to the Secretary:

(1) The specific inconsistencies (i.e., alternative waiver requirements) that the State chooses to continue;

(2) The reasons for continuing the alternative waiver requirements, including how their continuation is consistent with the purposes of the waiver; and

(3) Consistent with the waiver and its purpose, the standards that the State will use to:

(i) Assign individuals to the alternative waiver work activities or to an alternative number of hours; and

(ii) Determine exemptions from or extensions to the time limit.

(b) If a State using the alternative waiver requirements fails to meet the work participation rate or the time limit requirement:

(1) The State is not eligible for a reasonable cause exception from the applicable penalty under §§ 272.2(a)(4) or (a)(9), nor for any reduction of the work penalty under §§ 271.51(b)(3) or (c) of this chapter;

(2) The State must consider modification of its alternative waiver requirements as part of its corrective compliance plan; and

(3) If the State continues waivers related to the failure to achieve compliance with the work requirements described in subparts B and C of part 271 of this chapter or the time limits described in §§ 274.1 and 274.2 of this chapter and still fails to correct the violation, it will not be eligible for a reduced penalty for related noncompliance under §272.6(i)(1).

(c) The Secretary will use the data submitted by the States pursuant to §275.3 of this chapter to calculate and make public the work participation rates and the percentage of families with an adult that received Federal TANF benefits for more than 60 months under both the TANF requirement and the State's alternative waiver requirement.

Analysis: This proposed regulation would essentially do four things:

- establish a process that states must use to asserting inconsistencies relating to work participation and time limits;

- provide that if a State using alternative waiver requirements fails to meet the work participation rate or the time limit requirement, the state will not be eligible for a reasonable cause exception from the applicable penalty, or (in the case of participation rate penalties) a reduction in the penalty based on the degree of noncompliance, having been a “needy” state, or based on extraordinary circumstances such as natural disaster or regional recession.

- require that if a State using alternative waiver requirements fails to meet the work participation rate or the time limit requirement, the State must consider modification of its alternative waiver requirements as part of its corrective compliance plan, and that if the State continues waivers related to the failure to achieve compliance with the work requirements or time limits and still fails to correct the violation, it will not be eligible for a reduced penalty for related noncompliance, despite the provisions of the proposed regulations which would otherwise allow for reduction in penalties when a state has not fully corrected noncompliance.

- provide that for those states operating under alternative participation rates or time limits due to waivers, HHS will publicly report both their performance under their waiver standards and the performance standards that would have been attained had TANF rules been used.

As discussed in greater detail in the introduction, it is not unreasonable to consider the state policies operating under the waiver in determining whether reasonable cause exists or whether a penalty reduction is appropriate, but the fact that a state has been operating with an alternative policy under its waiver should not, in itself, preclude relief; rather, it should be viewed in the context of the state's overall circumstances.

PART 273 -- STATE TANF EXPENDITURES

§273.0 What definitions apply to this part?

(a) Except as noted in §273.2(d), the general TANF definitions at §270.30 of this chapter apply to this part.

(b) Administrative costs means costs necessary for the proper administration of the TANF program or separate State programs. It includes the costs for general administration and coordination of these programs, including indirect (or overhead) costs. Examples of administrative costs include:

(1) Salaries and benefits and all other indirect (or overhead) costs not associated with providing program services (such as diversion, assessment, development of employability plans, work activities and post-employment services, and supports) to individuals;
(2) Preparation of program plans, budgets, and schedules;
(3) Monitoring of programs and projects;
(4) Fraud and abuse units;
(5) Procurement activities;
(6) Public relations;
(7) Services related to accounting, litigation, audits, management of property, payroll, and personnel;
(8) Costs for goods and services required for administration of the program such as rental and purchase of equipment, utilities, office supplies, postage, and rental and maintenance of office space;
(9) Travel costs incurred for official business;
(10) Management information systems not related to the tracking and monitoring of TANF requirements (e.g., for a personnel and payroll system for State staff); and
(11) Preparing reports and other documents related to program requirements.

Analysis: The definition of "administrative costs" matters in TANF because there is a 15% limit on use of TANF funds for administration; similarly, not more than 15% of the state funds counting toward the maintenance of effort requirement can be funds expended for administration. There is, however, no definition of "administration" contained in the federal TANF statute. Accordingly, it is up to HHS to decide whether to establish a federal definition, and if so, what that definition should be. The preamble (62 Fed. Reg. 62151) contains an explanation of the considerations that led HHS to conclude that there should be a federal definition, but that the definition "be flexible enough not to unnecessarily constrain State choices on how they deliver services."

The preamble recognizes that, with an increased emphasis on services in connection with eligibility determinations, there may be many instances where individuals are performing both work that is essentially administrative in nature (e.g., traditional eligibility determinations or verifications) and work that should be viewed as a program cost (i.e., case-management functions or delivering services to clients). The preamble envisions that costs should be allocated to respective categories in such circumstances.

The preamble notes: "We have not included specific language in the proposed rule about treatment of costs incurred by subgrantees, contractors, community service providers, and other third parties. Neither the statute nor the proposed regulations make any provision for special treatment of such costs. Thus, the expectation is that administrative costs incurred by these entities would be part of the total administrative cost cap. In other words, it is irrelevant whether costs are incurred by the TANF agency directly or by other parties." Such a provision seems important as a means of ensuring that TANF regulations do not indirectly create an advantage or disadvantage to contracting out of program services in terms of the relationship of those services to the TANF administrative cap.

In our view, it is very important that there be a federal definition of "administrative costs." The federal cap matters because there were two key constraints on administrative costs in AFDC that do not exist in TANF. In AFDC, states were required to pay 50% of the cost of administration, and the requirement for state participation likely constrained state spending; second, for many states, the 50% administrative cost matching requirement was a less favorable matching rate than that available for benefits and services (e.g., child care, JOBS services), which further discouraged excessive spending on administration. Given that these constraints do not operate in TANF, and that there is no requirement to use the TANF block grant to assist all eligible families, one could easily envision excessive spending on program administration without some federal limitation on state conduct. Accordingly, it would not be appropriate for states to be free to develop their own definitions of administrative costs.

As to the actual definition offered by HHS, each of the specified components seems to be appropriately within the sphere of administrative costs. However, the area that may need additional regulatory guidance concerns the allocation of costs between eligibility determinations and program costs. For example, "diversion" is apparently not considered part of eligibility determination, yet in many states, the process of determining if a family qualifies for diversion would also involve determining if the family qualified for assistance. And, how is determining eligibility for supportive services to be treated? Determining whether to impose a sanction? Conciliation? Application (or exceptions) to time limits? Administration of a school attendance or preventive health component? As these examples suggest, the line between administration and program becomes increasingly difficult to draw, but additional guidance is needed to ensure that it is imposed consistently.

> **§273.1 How much State money must a State expend annually to meet the TANF MOE requirement?**
>
> (a)(1) The minimum TANF MOE for a fiscal year is 80 percent of a State's historic State expenditures.
>
> (2) However, if a State meets the minimum work participation rate requirements in a fiscal year, as required under §§ 271.21 and 271.23 of this chapter, then for that fiscal year, the minimum TANF MOE is 75 percent of the State's historic State expenditures.

(b) The TANF MOE level also depends on whether a Tribe or consortium of Tribes residing in a State has received approval to operate its own TANF program. The State's TANF MOE level for a fiscal year will be reduced the same percentage as the SFAG was reduced as the result of any Tribal Family Assistance Grants awarded to Tribal grantees in the State for that year.

Analysis: The above section simply tracks the TANF statute.

§273.2 What kinds of State expenditures count toward meeting a State's annual MOE expenditure requirement?

(a) Expenditures of State funds in TANF or separate State programs may count if they were made for the following types of services:

(1) Cash assistance, including assigned child support collected by the State, distributed to the family, and disregarded in determining eligibility for, and amount of the TANF assistance payment;
(2) Child care assistance (see §273.3);
(3) Education activities designed to increase self-sufficiency, job training, and work (see §273.4);
(4) Any other use of funds allowable under section 404(a)(1) of the Act and consistent with the goals at §270.20 of this chapter; and
(5) Administrative costs for activities listed in paragraphs (a)(1) through (a)(4) of this section, if these costs do not exceed 15 percent of the total amount of countable expenditures. Information technology and computerization needed for tracking or monitoring services are excluded from this determination. "Administrative costs" has the meaning specified at §273.0(b).

Analysis: Subsection (a) simply tracks the TANF statute (except that, as noted above, the TANF statute does not define administrative costs, and the proposed regulation incorporates the proposed regulatory definition.) Some additional guidance is contained in the preamble. Notably, the preamble explains that expenditures under a state's Earned Income Tax Credit program can count toward maintenance of effort only when cash payments are "actually sent to eligible families..." HHS may intend by this that cash payments in excess of amounts that defray a family's tax liability (i.e., the refundable portion of an EITC) are countable, but as worded, the implication is that any amount sent to the family, even if in the nature of a tax refund, may be countable; this needs clarification.
The preamble also draws a distinction between uses of funds allowable under §404(a)(1) and under §404(a)(2); expenditures allowable under §404(a)(1), but not expenditures only allowable under §404(a)(2) are countable. Expenditures under §404(a)(1) are those reasonably calculated to accomplish the purposes of TANF; expenditures under §404(a)(2) are those that were allowable under Title IV-A as of September 30, 1995 or (at state option) August 22, 1996. We agree with HHS' statutory analysis, and that expenditures which only fall within the terms of §404(a)(2) (such as, for example, juvenile justice expenditures in those states authorized to make such expenditures under their former Emergency Assistance programs) are not countable toward maintenance of effort.

(b) The services listed under paragraph (a) of this section may be counted only if they have been provided to or on behalf of eligible families. An "eligible family," as defined by the State, must:

> (1) Be comprised of citizens, qualified aliens (as defined in §270.30 of this chapter), non-immigrants under the Immigration and Nationality Act, aliens paroled into the U.S. for less than one year, or, in the case of aliens not lawfully present in the U.S., provided that the State enacted a law after August 22, 1996, that "affirmatively provides" for such services; and
> (2) Include a child living with a custodial parent or other adult caretaker relative (or consist of a pregnant individual); and
> (3) Be financially eligible according to the TANF income and resource standards established by the State under its TANF plan.

Analysis: regarding subsection (b), The TANF statute provides that expenditures can only count toward maintenance of effort when made on behalf of "eligible families." The statute, however, does not define "eligible families." A close reading of the statutory language supports HHS' conclusion that an "eligible family" is one that would be eligible for either federally-funded or state-funded TANF assistance. This means that an expenditure can count toward maintenance of effort even if made on behalf of a family or individual subject to a federal prohibition (e.g., the restrictions on providing assistance to certain categories of immigrants, the federal five-year time limit, the federal prohibition on assistance to minor parents not in school) so long as there is no prohibition against using state funds to assist the family or individual.

The preamble explains (at 62 Fed. Reg. 62153) that a state is free to define who is a member of a family for TANF and MOE purposes, and may, for example, include a non-custodial parent in the family. Thus, while there is a requirement that the family must have a child residing with a custodial parent or adult caretaker relative (or consist of a pregnant individual), there is apparently not a requirement that an individual be living with the family in order to be part of the family for TANF purposes. This approach raises several questions which need to be clarified in final regulations:

- If "assistance" is provided to a non-custodial parent, does that assistance count against the rest of the family for purposes of time limits?

- Can a state provide assistance or services to a non-custodial parent without providing assistance to the rest of the family?

- Is the implication of HHS' position that a state could use TANF or MOE dollars to provide assistance to other relatives not living in the home, e.g., a child in foster care?

- Could a state define a family to include more distant relatives not living in the home (e.g., grandparents, aunts, cousins) or to include non-relatives not living in the home?

Another cluster of issues are presented by the income and resource standards provisions of the proposed regulations. The proposed regulations state that for a family to be financially eligible, the family must meet the income and resource standards established by the State under its TANF plan. Here, there are several unresolved questions:

C Must the income and resource standards be contained in the TANF plan, or must they just be established under the plan? A number of states did not expressly describe income and resource standards in their initial TANF plan submissions. In our view, it would be preferable for these standards to be expressly specified in a state's plan, and revised as needed to reflect changes in state policies.

C Must a state make use of resource standards? There is no statutory requirement that the state do so. Here, the preferable policy would be for final regulations to clarify the family must satisfy the state's income standards, and resource standards (if applicable).

C Is there any ceiling on the income standards used by a state? Could a state, for example, assert that its TANF income standard was 500% of poverty; that due to limited resources, TANF assistance would be prioritized for families with incomes considerably below that level, but that state expenditures for families with incomes up to 500% of poverty would be counted toward maintenance of effort requirements? As the example suggests, one problem is that since there is no duty to assist eligible families under TANF, there is nothing to prevent a state from specifying a higher income standard simply to generate countable maintenance of effort expenditures. This suggests the need for an income cap on what can count as an "eligible family" for MOE purposes. At the same time, the issue of a ceiling on income standards is problematic, particularly in the context of states wishing to develop innovative strategies and programs to assist working families. Moreover, Congress did not explicitly provide for an income cap.

However, there are two possible implicit income caps suggested in the statute: TANF funds transferred to the Child Care and Development Fund may only be expended for families with incomes below 85% of state median income, and funds transferred to the Social Services Block Grant may only be expended for families with children with incomes below 200% of poverty. One possible approach suggested by these figures could be to provide that MOE expenditures must be for families with incomes below 200% of poverty, provided that child care expenditures for families with incomes up to 85% of state median income are countable. The advantage of using a cap such as this, rather than tieing MOE to TANF income standards, is that it might facilitate broader planning in usage of state resources for a state's anti-poverty approach; at the same time, there is some concern that a cap such as suggested above could result in shifting of resources from the families in deepest poverty to families in relatively less need.

C If a state applies different income standards to different forms of assistance under TANF, what is the applicable income standard for purposes of maintenance of effort calculations? If HHS elects to provide (or allows states to use) a single income cap subject to a ceiling, this issue will not arise. However, if HHS retains the approach in the proposed regulations, the question arises of whether a state with different income limits for different forms of assistance must use

corresponding limits for corresponding state expenditures, or whether the state can simply elect to use the highest TANF income standard for purposes of counting any state expenditures. This problem would again suggest the desirability of an income cap subject to a federal ceiling, but if HHS does not specify such a ceiling, the appropriate policy would seem to be that if a state applies different income standards to different forms of assistance under TANF, then state expenditures for comparable forms of assistance should be countable only when they are for families that would qualify for the comparable TANF assistance.

(c) Services listed under paragraph (a) of this section may also be provided to a family that meets the criteria under paragraphs (b)(1) and (2) of this section, but which became ineligible solely due to the time limitation given under §274.1 of this chapter.

Analysis: Subsection (c) tracks the TANF statute.

(d) Assistance does not have the meaning given in §270.30 of this chapter, but for MOE purposes can be ongoing, short-term or one-time only and may include services.

Analysis: Subsection (d) does not track the statute, and should be reworded to avoid confusion. Maintenance of effort expenditures are not limited to expenditures that would constitute "assistance" under TANF. For example, a number of educational services that do not meet the TANF definition of assistance can count toward MOE. Thus, it would be accurate for the regulation to explicitly state that an expenditure may count toward MOE if it meets the requirements of this section, and that such an expenditure may or may not meet the definition of "assistance" contained in 270.30. However, it may cause confusion to suggest that a different definition of "assistance" applies for MOE purposes.

(e) The expenditures for services in separate State programs listed under paragraph (a) of this section only count if they also meet the requirements of §273.5. Expenditures that fall within the prohibitions in §273.6 do not count.

Analysis: Subsection (e) is consistent with the TANF statute.

§273.3 When do child care expenditures count?

(a) State funds expended to meet the requirements of the Matching Fund of the Child Care and Development Fund (i.e., match and MOE amounts) that also count as TANF MOE expenditures are limited to the State's child care MOE amount pursuant to section 418(a)(2)(C) of the Act.

(b) The child care expenditures must be made to or on behalf of eligible families, as defined in §273.2(b).

Analysis: This section tracks the statutory requirements. In essence, it says that certain child care expenditures that count toward CCDF requirements can also count toward TANF maintenance of effort requirements. In particular, in order for a state to qualify for CCDF matching funds, the state must satisfy a CCDF maintenance of effort requirement, which requires the state to have state child

care expenditures reaching the higher of 1994 or 1995 state expenditures for the former IV-A child care programs (AFDC Child Care, Transitional Child Care, and At-Risk Child Care). If a state satisfies this requirement, then additional state spending above this level can qualify for CCDF matching funds. The proposed regulation is intending to explain that a state's expenditures up to the CCDF maintenance of effort level can also count toward TANF maintenance of effort (if for "eligible families"), but expenditures that count toward CCDF matching requirements do not count toward TANF maintenance of effort.

A state might have additional state child care expenditures in excess of the amounts expended for CCDF maintenance of effort and CCDF match. The preamble (at 62 Fed. Reg. 62155-56) explains that such expenditures can count toward TANF maintenance of effort.

The proposed regulation is not inaccurate, but as drafted, it may cause confusion, because it does not clearly explain that state expenditures in excess of CCDF maintenance of effort and match can count toward TANF maintenance of effort. Moreover, it would be more accessible to readers if final regulations were to explain which child care expenditures count, rather than simply cross-referencing the statutory provision.

§273.4 When do educational expenditures count?

(a) Expenditures for educational activities or services count if:

(1) They are targeted to eligible families (as defined in §273.2(b)) to increase self-sufficiency, job training, and work; and
(2) They are not generally available to other residents of the State.

(b) Expenditures on behalf of eligible families for educational services or activities provided through the public education system do not count unless they meet the requirements under paragraph (a) of this section.

Analysis: The proposed regulatory language accurately reflects the statutory provision, but one aspect of the wording needs clarification. The proposed regulation says that for educational activities or services to count, they must be "targeted to" eligible families; the apparent intent is that they must be provided to eligible families, and the regulation should be reworded to say so explicitly. Otherwise, a question might arise as to whether it was sufficient to "target" the expenditures, even if the actual recipients were not members of eligible families.

§273.5 When do expenditures in separate State programs count?

(a) If the expenditures in the separate State program(s) were previously authorized and were allowable under section 403 of prior law, then they may count in their entirety.

(b) If the expenditures under the separate State program(s) had not been previously authorized and allowable under section 403 of prior law, then only the amount expended in excess of money expended on such program(s) in FY 1995 may count.

Analysis: This section is an accurate statement of the TANF statutory requirement, but it is worded in such a way that it may be difficult or impossible for many people to understand.
The TANF statutory provision that this proposed regulation would implement is also not worded very clearly, but the apparent intent was to clarify how to treat expenditures in programs that existed before TANF was enacted. For example, a state might have been running a state general assistance for families program, and Congress did not want maintenance of effort to turn into a process of a state simply trying to identify preexisting programs that were for allowable purposes for eligible families. Thus, in the instance of a general assistance for families program, a state would be permitted to count expenditures in excess of its FY 1995 spending toward maintenance of effort. At the same time, Congress needed to address the situation of, for example, state spending in a state At-Risk child care program, where the level of state spending in that program was part of the base from which the maintenance of effort level was calculated, and continued state spending in that program should be allowed to count toward maintenance of effort (unless the state dollars are now being used to match federal CCDF dollars). Thus, state spending in a state At-Risk Child Care program would be an example of spending which was previously authorized and allowable under former §403.

As noted, the proposed regulation is not inaccurate, but we would recommend that it be reworded to better communicate its content.

§273.6 What kinds of expenditures do not count?

The following kinds of expenditures do not count:

(a) Expenditures of funds that originated with the Federal government;

(b) State funds that are used to match Federal funds (or expenditures of State funds that support claims for Federal matching funds), including State expenditures under the Medicaid program under title XIX of the Act;

(c) Expenditures that States make as a condition of receiving Federal funds under other programs except as provided under §273.3;

(d) Expenditures made in a prior fiscal year;

(e) Expenditures used to match Federal Welfare-to-Work funds provided under section 403(a)(5) of the Act; and

(f) Expenditures made in the TANF program to replace the reductions in the SFAG as a result of penalties pursuant to §274.50 of this chapter.

Analysis: This provision accurately tracks the statutory requirements.

§273.7 How will we determine the level of State expenditures?

(a) Each State must report its expenditures quarterly to us as required under part 275 of this chapter.

(b) Each State must also submit an annual addendum to its TANF Financial Report (or, as applicable, its Territorial Financial Report) on separate State programs for the fourth quarter containing:

(1) A description of the specific State-funded program activities provided to eligible families;
(2) Each program's statement of purpose (how the program serves eligible families);
(3) The definitions of each work activity in which families in the program are participating;
(4) A statement whether the program/activity had been previously authorized and allowable as of August 21, 1996, under section 403 of prior law;
(5) The FY 1995 State expenditures for each program/activity not authorized and allowable as of August 21, 1996 (see §273.5(b));
(6) The total number of eligible families served by each program as of the end of the fiscal year;
(7) The eligibility criteria for the families served under each program/activity; and
(8) A certification that those families served met the State's criteria for "eligible families."

Analysis: This section requires detailed reporting about separate state programs which the state is seeking to count toward maintenance of effort requirements. It is not inappropriate for HHS to require sufficient reporting to ensure that claimed expenditures fall within the allowable expenditures that count toward maintenance of effort. However, several provisions of the proposed reporting need revision or clarification:

- Subsection (b)(3) requires definitions of each work activity in which families in the program are participating. There is no requirement that families in a separate state program be participating in a work activity. This provision should be clarified by noting that there is no requirement that families be in a work activity.

- Subsection (b)(6) requires a total number of families served as of the end of the fiscal year. A state might track monthly rather than annual caseload data, and should be permitted to report either one.

- Subsection (b)(8) requires a certification that families served met the State's criteria for "eligible families." A separate state program might include both eligible families and individuals not meeting the "eligible family" definition. The certification should be that those families for which the State is claiming expenditures counting toward maintenance of effort met the State's criteria for "eligible families."

§273.8 What happens if a State fails to meet the TANF MOE requirement?

(a) If any State fails to meet its TANF MOE requirement for any fiscal year, then we will reduce dollar-for-dollar the amount of the SFAG payable to the State for the following fiscal year.

(b) If a State fails to meet its TANF MOE requirement for any fiscal year, and the State received a Welfare-to-Work formula grant provided under section 403(a)(5)(A) of the Act for the same fiscal year, we will reduce the amount of the SFAG payable to the State for the following fiscal year by the amount of the Welfare-to-Work formula grant paid to the State.

Analysis: This section tracks the statutory requirements.

§273.9 May a State avoid a TANF MOE penalty because of reasonable cause or through corrective compliance?

The reasonable cause and corrective compliance provisions at §§ 272.4, 272.5, and 272.6 of this chapter do not apply.

Analysis: This section tracks the statutory requirements.

§273.10 What actions are to be taken against a State if it uses Federal TANF funds in violation of the Act?

(a) If a State misuses such funds, we will reduce the SFAG payable for the immediately succeeding fiscal year quarter by the amount misused.

(b) If we determine that the misuse was intentional, we will reduce the SFAG payable for the immediately succeeding fiscal year quarter in an amount equal to five percent of the adjusted SFAG.

(c) The reasonable cause and corrective compliance provisions of §§ 272.4 through 272.6 of this chapter apply to penalties under paragraphs (a) and (b) of this section.

Analysis: This provision tracks the statute.

§273.11 What uses of Federal TANF funds are improper?

(a) States may use Federal TANF funds for expenditures that:

(1) Are reasonably related to the purposes of TANF, as specified at §270.20 of this chapter; or
(2) The State was authorized to use IV-A or IV-F funds for under prior law, as in effect on September 30, 1995, or (at the option of the State) August 21, 1996.

(b) We will consider use of funds in violation of paragraph (a) of this section, the provisions of the Act, section 115 of PRWORA, the provisions of part 92 of this title, or OMB Circular A-87 to be misuse of funds.

Analysis: Subsection (a) generally tracks the statutory language, with one exception: the statute says that permissible expenditures include those "reasonably calculated to accomplish" the purposes of TANF, not "reasonably related to" the purposes of TANF. There may be few if any cases where the different language would lead to a different result, but there is nothing gained by using language different from the statutory language. There appears to be no statutory authority for a penalty solely based on violations of Part 92 or A-87.

§273.12 How will we determine if a State intentionally misused Federal TANF funds?

(a) The State must show, to our satisfaction, that it used the funds for purposes that a reasonable person would consider to be within the purposes of the TANF program (as specified at §270.20 of this chapter) and the provisions listed in §273.11.

(b) We will consider funds to be misused intentionally if there is supporting documentation, such as Federal guidance or policy instructions, indicating that Federal TANF funds could not be used for that purpose.

(c) We will also consider funds to be misused intentionally if, after notification that we have determined such use to be improper, the State continues to use the funds in the same or similarly improper manner.

Analysis: This regulatory section specifies the circumstances where an additional 5% penalty would be imposed on a state for intentional misuse of TANF funds. While the guidance is generally reasonable, one modification to subsections (b) and (c) should be considered. As worded, the proposed regulations state that HHS "will" consider funds to be intentionally misused if the state uses them in such a fashion after a federal statement (e.g., guidance, policy instructions, notification) to the state. However, there may be instances where there is a legitimate difference of opinion between HHS and a state as to what is permissible under the federal statute, and in such instances, a state should have some ability to get the matter resolved without risking a 5% penalty. For purposes of regulations, it would probably be sufficient if the wording said that HHS "may" consider funds to be misused intentionally under such circumstances.

§273.13 What types of activities are subject to the administrative cost limit on Federal TANF grants?

(a) Activities that fall within the definition of "administrative costs" at §273.0(b) are subject to this limit.

(b) Information technology and computerization for tracking and monitoring are not administrative costs for this purpose.

Analysis: This section is consistent with the TANF statutory requirements.

§273.20 What definitions apply to Individual Development Accounts (IDAs)?

The following definitions apply with respect to IDAs:

Date of acquisition means the date on which a binding contract to obtain, construct, or reconstruct the new principal residence is entered into.

Eligible educational institution means an institution described in section 481(a)(1) or section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1088(a)(1) or 1141(a)), as such sections were in effect on August 21, 1996. Also, an area vocational education school (as defined in subparagraph (C) or (D) of section 521(4) of the Carl D. Perkins Vocational and Applied

Technology Education Act (20 U.S.C. 2471(4)) that is in any State (as defined in section 521(33) of such Act), as such sections were in effect on August 22, 1996.

Individual Development Account (IDA) means an account established by or for an individual who is eligible for TANF assistance to allow the individual to accumulate funds for specific purposes.

Post-secondary educational expenses means a student's tuition and fees required for the enrollment or attendance at an eligible educational institution, and required course fees, books, supplies, and equipment required at an eligible educational institution.

Qualified acquisition costs means the cost of obtaining, constructing, or reconstructing a residence. The term includes any usual or reasonable settlement, financing, or other closing costs.

Qualified business means any business that does not contravene State law or public policy.

Qualified business capitalization expenses means business expenses pursuant to a qualified plan.

Qualified entity means a non-profit, tax-exempt organization, or a State or local government agency that works cooperatively with a non-profit, tax-exempt organization.

Qualified expenditures means expenses entailed in a qualified plan, including capital, plant equipment, working capital, and inventory expenses.

Qualified first-time home buyer means a taxpayer (and, if married, the taxpayer's spouse) who has not owned a principal residence during the three-year period ending on the date of acquisition of the new principal residence.

Qualified plan means a business plan that is approved by a financial institution, or by a nonprofit loan fund having demonstrated fiduciary integrity. It includes a description of services or goods to be sold, a marketing plan, and projected financial statements, and it may require the eligible recipient to obtain the assistance of an experienced entrepreneurial advisor.

Qualified principal residence means the place a qualified first-time home buyer will reside in in accordance with the meaning of section 1034 of the Internal Revenue Code of 1986 (26 U.S.C. 1034). The qualified acquisition cost of the residence cannot exceed the average purchase price of similar residences in the area.

Analysis: Most of the above definitions are either directly drawn from the TANF statute or are otherwise reasonable interpretations of the law. However, one modification in the definition of an Individual Development Account (IDA) would be helpful. The definition of IDA refers to an individual who is eligible for TANF assistance. The statute refers to individuals "eligible for assistance under the State program operated under this part..." Therefore, individuals assisted in TANF, whether with federal TANF funds or segregated state funds, could be beneficiaries of the IDA provision. This should be clarified in final regulations.

Either in the definitions or in another section, the federal regulations ought to expressly explain the statutory requirements of funds being in an IDA: under the PRWORA, funds in an IDA meeting the statutory requirements are to be disregarded for purposes of determining eligibility to receive, or the

amount of assistance under federal means tested programs (other than under the Internal Revenue Code). For readers of the federal regulations, a restatement of this provision would foster better understanding of the IDA provisions.

§273.21 May a State use the TANF grant to fund IDAs?

States may use TANF grants to fund IDAs for individuals who are eligible for TANF assistance.

Analysis: This provision is consistent with the statutory requirements, but as noted in discussion of §273.20, should be reworded to make explicit that state funds may also be used to fund IDAs for individuals eligible for state-funded TANF assistance.

§273.22 Are there any restrictions on IDA funds?

(a) A recipient may deposit only earned income into an IDA.

(b) A recipient's contributions to an IDA may be matched only by a qualified entity.

(c) A recipient may withdraw funds only for the following reasons:

(1) To cover post-secondary education expenses, if the amount is paid directly to an eligible educational institution;
(2) For the recipient to purchase a first home, if the amount is paid directly to the person to whom the amounts are due and it is a qualified acquisition cost for a qualified principal residence by a qualified first-time home buyer; or
(3) For business capitalization, if the amounts are paid directly to a business capitalization account in a federally-insured financial institution and used for a qualified business capitalization expense.

Analysis: This section is consistent with the TANF statutory requirements.

§273.23 How does a State prevent a recipient from using the IDA account for unqualified purposes?

To prevent recipients from using the IDA account improperly, States may do the following:

(a) Count withdrawals as earned income in the month of withdrawal (unless already counted as income);

(b) Count withdrawals as resources in determining eligibility; or

(c) Take such other steps as the State has established in its State plan or written State policies to deter inappropriate use.

Analysis: This section is proposed based on the Secretary's statutory authority to establish such regulations as may be necessary to ensure that funds in an IDA are only withdrawn for qualified

purposes. The approach taken by the Secretary -- identifying possible State procedures, but not mandating a single one -- seems reasonable.

PART 274 -- OTHER ACCOUNTABILITY PROVISIONS

§274.0 What definitions apply to this part?

The general TANF definitions at §270.30 of this chapter apply to this part.

Analysis: None needed.

§274.1 What restrictions apply to the length of time Federal TANF assistance may be provided?

(a)(1) Subject to the exceptions in this section, no State may use any of its Federal TANF funds to provide assistance (as defined in §270.30 of this chapter) to a family that includes an adult who has received assistance for a total of five years (60 cumulative months, whether or not consecutive).

(2) Assistance provided under section 403(a)(5) of the Act (WTW) is not subject to the time limit in paragraph (a)(1) of this section.

(3) States may define "a family that includes an adult," but may not exclude families from their definition solely for the purpose of avoiding penalties under §274.2.

(i) States shall report to us annually on the number of families excluded because of the State's definition and the circumstances underlying each exclusion.

(ii) Where we find that a State has excluded families for the purpose of avoiding a penalty for the five-year time limit, we shall include those families in the calculation under paragraph (c) of this section in determining whether a State has complied with time-limit extension rules and is subject to the penalty described in §274.2.

(b) States must not count towards the five-year limit:

(1) Any month of receipt of assistance by an individual when she was a minor who was not the head-of- household or married to the head-of-household;

(2) Any month in which an adult lived in Indian country (as defined in section 1151 of title 18, United States Code) or Native Alaskan Village and at least 50 percent of the adults were not employed; and

(3) Non-cash assistance provided under section 403(a)(5) of the Act (WTW).

(c) States have the option to extend assistance from Federal TANF funds beyond the five-year limit for up to 20 percent of their cases. This provision requires computation of an average monthly percentage for each fiscal year, with the numerator for each month equal to the number of families that includes an adult receiving assistance beyond the five-year limit and the denominator equal to the average monthly number of families that includes an adult receiving assistance during the fiscal year or the immediately preceding fiscal year, whichever the State elects. States are permitted to extend assistance to a family only on the basis of:

(1) Hardship, as defined by the State; or

(2) The fact that the family includes someone who has been battered, or subject to extreme cruelty based on the fact that the individual has been subjected to:

(i) Physical acts that resulted in, or threatened to result in, physical injury to the individual;

(ii) Sexual abuse;

(iii) Sexual activity involving a dependent child;

(iv) Being forced as the caretaker relative of a dependent child to engage in non-consensual sexual acts or activities;

(v) Threats of, or attempts at, physical or sexual abuse;

(vi) Mental abuse; or

(vii) Neglect or deprivation of medical care.

(d) If a State opts to extend assistance to part of its caseload as permitted under paragraph (c) of this section, it only determines whether or not the extension applies to a specific family once an adult in the family has received 60 cumulative months of assistance.

(e) If the five-year limit is inconsistent with a State's waiver granted under section 1115 of the Act, which was submitted before August 22, 1996, and was approved by July 1, 1997, the State need not comply with the inconsistent provisions of the five-year limit until the waiver expires.

(1) The five-year limit would be inconsistent with the State's waiver:

(i) If the State has an approved waiver that provides for terminating cash assistance to individuals or families because of the receipt of assistance for a period of time, specified by the approved waiver; and

(ii) The State would have to change its waiver policy in order to comply with the five-year limit.

(2)(i) Generally, under an approved waiver, a State will count, toward the five-year limit, all months for which the adult subject to a State waiver time limit receives assistance with Federal TANF funds, just as it would if it did not have an approved waiver.

(ii) The State need not count, toward the five-year limit, any months for which an adult receives assistance with Federal TANF funds while the adult is exempt from the State's time limit under the terms of the State's approved waiver.

(3) The State may continue to provide assistance with Federal TANF funds for more than 60 cumulative months, without a numerical limit, to families provided extensions to the time limit, under the provisions of the terms and conditions of its approved waiver, as long as the State's waiver authority has not expired.

> (4) The five-year limit would also be inconsistent with a State's waiver to the extent that the State needs to maintain prior law policies for control group or experimental treatment cases in order to continue an experimental research design for the purpose of completing an impact evaluation of the waiver policies.
>
> (5) The additional requirements at §272.8 of this chapter apply to the use of continuing waivers with alternative time-limit requirements in the calculation of the time limit penalty.

Analysis: As reflected in Subsection (a)(1), the federal TANF statute provides that a state may not use federal TANF funds to provide assistance to a "family that includes an adult" who has received federally-funded TANF assistance for sixty months, subject to the exceptions noted below. When enacting TANF, in express contrast with AFDC, Congress did not seek to define the "assistance unit" or "household" for TANF purposes. This would suggest that Congress intended that the definition of "family that includes an adult" be left to each state. The proposed regulation purports to leave the definition to each state, but state discretion is seriously undercut by HHS's regulatory pronouncement that a state may not exclude families from its definition "solely for the purpose of" avoiding the penalty for exceeding the sixty-month limit.

In developing its approach, HHS faced competing considerations: on the one hand, Congress had expressly considered whether to allow states to use TANF funds to provide assistance to children after the five year limit, and rejected proposals to do so. This would suggest that Congress had not envisioned that a state could evade the five-year limit simply by defining the family to not include the adult. At the same time, the best evidence of what Congress intended is what it said, and Congress chose to say that the time limit applied to a "family that includes an adult" rather than a "family," and Congress did not choose to define "family that includes an adult."

At minimum, it is clear that HHS was not compelled to take the approach it has taken in the proposed regulations, and that the effect of the HHS approach would be to extend the application of the federal time limit to more families. An alternative approach was, and is, readily available: HHS could simply require that states provide their definitions of "family that includes an adult," make the information available to Congress and the public, and allow Congress to decide whether further legislation is needed (or alternatively, allow HHS to decide whether to regulate further).

There are two principal difficulties with the approach taken by HHS: first, the effect will be to increase the number of families that are faced with denial or termination of assistance due to time limits; and second, states will be uncertain which policies place a state at risk of penalties, which may result in a chilling effect for states. For example, in AFDC, states typically allowed non-parent caretakers an option to decide whether to be included in the AFDC assistance unit, so that, for example, a grandparent could choose whether to be part of the AFDC grant. A state might wish to continue such a policy in TANF, at least in part because the state does not think that families in which a grandparent is caring for grandchildren should be subject to time limits. Has the state acted "solely" for the purpose of avoiding penalties. Or, as in AFDC, a state might wish to exclude from the assistance unit a parent

who is receiving SSI disability benefits; again, a motivating factor might be the state's belief that a time limit should not be imposed against a disabled caretaker. But if the state elects this policy, is it at risk of penalty. Or, if a state extends the policy of excluding disabled parents to parents receiving Social Security disabilities, or state disability benefits, is the state at risk? Finally, under AFDC several states adopted reduction time limits under which after a time limit, the adult is removed from the grant, effectively creating a child-only case. These policies were viewed as legitimate policy innovations and had nothing to do with any effort to avoid the TANF time limit which had not been adopted. If states adopt such policies in the future, are they at risk?

In each of the above examples, the state's policy may, at least in part, be based on a policy judgment that time limits should not apply in a particular situation, or that a different type of time limit ought to apply. In such an instance, must the state come up with some additional, non-time-limits related rationale in order to avoid being at risk of penalty?

As suggested above, the best resolution would be to simply require states to provide reporting on the policies they develop in relation to "families that include an adult." To the extent that HHS determines that the final rule will include a provision allowing the Department to ignore a state's definition of a family as a child-only case, the provision should make clear that: any reasonable policy basis for the state's definition will be acceptable; and that at a minimum, any definition of a child-only case available to a state under the former AFDC program or under AFDC waivers will be acceptable, whether or not the state had previously adopted the definition.

If HHS opts for a policy similar to the proposed rule, the policy should also be modified in two other respects:

- First, as drafted, the proposed rules, at 274.1(a)(3)(i) would require annual reporting of the number of families excluded because of a state's definition and "the circumstances underlying each exclusion." It is unclear whether this wording envisions aggregate reporting (e.g., x grandparent caretaker families) or individualized descriptions of each exclusion. Surely, aggregate reporting should be sufficient.

- Second, HHS apparently envisions that no determination would be made about how to categorize a state's policies until it became time to determine whether the state had exceeded the allowable 20% exceptions to the five-year limit. But if a state submits a description of its policies in 1998, it seems inappropriate that HHS would then wait until, e.g., 2002 to indicate whether the state policies were considered to be "solely" for the purpose of avoiding penalties, and therefore impermissible. Rather, HHS ought to so advise a state within a reasonable period of time after the proposed policy is submitted.

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Subsection (b) is consistent with the TANF statutory requirements.

Subsections (c) and (d) both include potentially misleading references to the fact that, subject to the 20% cap, states can provide assistance with federal TANF funds to a family after it has already received assistance for 60 months. Both subsections describe the option available to the states as allowing them to "..extend..." assistance after the 60 month time limit is reached. This might be read as suggesting that the only appropriate basis for providing assistance after 60 months would be in cases where the assistance was continued when the family reached the 60 month point. However, the statute also permits the resumption of assistance to a family after benefits have been terminated due to the 60 month time limit. That is, based on hardship circumstances or on a situation involving domestic violence, a state might wish to restore assistance to a family that had previously reached the 60 month time limit. In such cases, a family whose benefits are restored should be treated the same as a family whose benefits were continued when they reached the 60 month time limit. The final regulation should be modified to ensure that no confusion results from the wording in either of these two subsections.

As discussed more fully in Section II of the Introduction, subsection (e) of the proposed regulation reflects an arbitrary and inappropriately restrictive view of the circumstances in which a state waiver policy should be considered "inconsistent" with TANF requirements. In the context of time limits, HHS is seeking to draw distinctions which have no basis in the statutory language of the PRWORA, and which are inconsistent with the basic premise that states which had waivers should be allowed to continue their waiver policies until the completion of their waivers.

The applicable provision, §415(a), states that if a state has a waiver in effect which "relates to the provision of assistance" at the time of enactment of the PRWORA, the amendments made by the PRWORA shall not apply with respect to the state before the expiration of the waiver "to the extent such amendments are inconsistent with the waiver." While Congress did not define what makes a PRWORA amendment "inconsistent" with the waiver, the most appropriate definition ought to be a real-life, functional definition: there is an inconsistency between the two if a state would have to alter the approach taken under its waiver in order to comply with a PRWORA requirement.

In the context of time limits, one can identify at least four categories of state approaches that existed in the waiver process:

- Some states had received approval for **termination time limits**, in which all cash assistance to a family would be terminated after some period of time;

- Some states had received approval for **reduction time limits** in which either an individual was removed from the assistance unit, or the assistance available to the unit was otherwise reduced after some period of time;

- Some states had received approval for **work program time limits** in which there was a requirement that a parent or caretaker participate in a work program as a condition of further assistance for the family after the family reached a time limit;

- Some states had made a conscious choice to develop a comprehensive welfare reform plan that involved **no time limit**, but rather focused on other means to foster work and responsibility.

Any one of the above approaches could turn out to be inconsistent with the TANF five-year limit if enactment of the five-year limit would compel the state to alter its approach. In the proposed regulations, HHS only acknowledges termination and reduction time limits as within the group that could have an inconsistency, but there is no explanation provided (and none apparent) for why the first two categories could be inconsistent with the five-year limit, but not the second two categories. For a number of years, the term "time limit" was broadly understood to include both termination/reduction and work program time limits. In fact, the Administration's own welfare reform proposal in 1993 and 1994, which was routinely categorized as a time limits proposal, involved a work requirement rather than termination of assistance for those who reached a time limit; it is difficult to see how the same Administration can now possibly take the position that a program requiring participation in a work program after a time limit is not a time-limited program.

It is also difficult to see the rationale for allowing inconsistencies based on termination/reduction time limits, but not for those states who had expressly designed reform efforts without time limits. In effect, the result of the HHS posture is that states with small inconsistencies (i.e., a state with a similar but slightly different time limit) may continue their policies, but states with large inconsistencies may not. This is directly contrary to the point of Section 415, which was to allow those states who had taken inconsistent approaches to continue their approaches until expiration of their waivers.

Even within the treatment of termination/reduction time limits, the approach taken by HHS needs clarification. The wording of the proposed regulations and preamble is not completely clear, but the intended policy appears to be as follows: Suppose a state has a two year termination time limit under its approved waiver, with various categories of exemptions and extensions:

- During the time that a family is **exempt** from the state time limit, months receiving federal TANF assistance will not count against the federal TANF time limit;

- After a family reaches the state time limit, the family may qualify for an **extension**. Months in which the family receives federal TANF assistance under its extension count against the federal TANF time limit. If, however, the family reaches and exceeds the 60-month point, the family may continue to receive federal TANF assistance during the pendency of the waiver, without counting against the state's 20% exceptions to the 60-month limit.

- Once the waiver expires, families who were exempt under the state time limit become subject to the federal TANF time limit (and months of assistance begin counting against the TANF time limit); moreover, families who were receiving extensions of assistance and not counting against the 20% limit begin to count against the 20% limit.

While the above treatment of exemptions is reasonable, the treatment of extensions could cause serious transition problems for a state. If, for example, a substantial number of cases were not counted against the 20% cap in a fiscal year, and suddenly counted in the next fiscal year, the result could be disruptive to program administration and to affected families. While it is difficult to envision all contingencies, HHS might, for example provide that "reasonable cause" to avoid a penalty may include a reasonable transition time in the case of a state that had been implementing an inconsistent policy under an approved waiver.

The other scenario envisioned by HHS under the proposed regulations concerns reduction time limits, i.e., the elimination of assistance to an adult after the family reaches a time limit. Here, the apparently intended policy is that a state that had such a policy through the waiver process may continue the policy until expiration, and that:

- months in which the family (exclusive of the adult) receives reduced assistance after reaching the time limit will not count against the TANF time limit, notwithstanding the HHS regulatory restrictions on defining "family that includes an adult" in a manner that excludes adults from the assistance unit to avoid the application of time limits;

- if the adult receives an extension of assistance, and the family reaches and exceeds the 60-month limit as a result, the family may continue to receive assistance without counting against the 20% cap.

This policy is a reasonable way of treating the reduction time-limit states, though (as noted above) the HHS restriction on a state's discretion to define a "family that includes an adult" needs revision.

§274.2 What happens if a State does not comply with the five-year limit?

If we determine that a State has not complied with the requirements of §274.1, we will reduce the SFAG payable to the State for the immediately succeeding fiscal year by five percent of the adjusted SFAG unless the State demonstrates to our satisfaction that it had reasonable cause or we approve a corrective compliance plan.

Analysis: This section is consistent with TANF statutory requirements.

§274.3 How can a State avoid a penalty for failure to comply with the five-year limit?

(a) We will not impose the penalty if the State demonstrates to our satisfaction that it had reasonable cause for failing to meet the five-year limit or it completes a corrective compliance plan pursuant to §§272.5 and 272.6 of this chapter.

> (b)(1) In addition, we will determine a State has reasonable cause if it demonstrates that it exceeded the 20 percent limitation on exceptions to the time limit because of good cause waivers provided to victims of domestic violence.
>
> > (2)(i) To demonstrate reasonable cause under paragraph (b)(1) of this section, a State must provide evidence that, when individuals with active good cause waivers and their families are excluded from the calculation, the percentage of families receiving federally-funded assistance for more than 60 months did not exceed 20 percent of the total.
> >
> > > (ii) To qualify for exclusion, such families must have good cause domestic violence waivers that:
> > >
> > > > (A) Reflect the State's assessment that an individual in the family was, at the time the waiver was granted, temporarily unable to work because of domestic violence;
> > > >
> > > > (B) Were in effect after the family had received a hardship exemption from the limit on receiving federally-funded assistance for 60 or more months; and
> > > >
> > > > (C) Were granted appropriately, in accordance with the criteria specified at §270.30 of this chapter.
> > >
> > > (iii) If a State fails to meet the criteria specified for "good cause domestic violence waivers" at §270.30 of this chapter or any of the other conditions in paragraph (b)(2)(ii) of this section, the Secretary will not grant reasonable cause under paragraph (b)(1) of this section.

This provision provides for reasonable cause criteria for waiving a penalty for failure to comply with the TANF time limit, which are in addition to the generally applicable reasonable cause provisions described in §272.5, which will also be considered. Subsection (a) tracks the statutory provision.

Subsection (b) provides that a state will be found to have reasonable cause if after excluding families with active good cause waivers, the state would not have been out of compliance with the 20% cap on extensions. This provision fails to give adequate scope to §402(a)(7). That provision is designed not only to protect individuals and families who are currently at risk, or in need of compensatory services based on current or past abuse, but also to assure that an individual is not "unfairly penalized" if she "...was victimized by such violence." Consider an individual who had previously received a good cause waiver for 12 months, but who does not have a waiver at the time she reaches the 60 month time limit. When she reaches the 60 month time limit, she will in fact only have had 48 months to take advantage of other services designed to help her prepare for and find adequate employment. She will thus have been unfairly penalized in comparison with another individual who had the full 60 months to achieve that end. Subsection (b)(2) should be modified so that if a state provides an extension commensurate with the amount of time an individual was previously covered by a waiver, such extensions will be treated in

the same manner as extensions provided to individuals who have waivers when they reach the time limit. See also analysis of the definition of "good cause domestic violence waiver," §270.30.

This subsection should be modified to include other possible grounds for determining reasonable cause including unusual or distinctive caseload characteristics that indicate the state has a larger share of its caseload with severe barriers to employment, or unusual economic circumstances that make the extension of assistance to families that have reached the time limit appropriate.

§274.10 Must States do computer matching of data records under IEVS to verify recipient information?

(a) States must meet the requirements of IEVS pursuant to section 1137 of the Act and request the following information from the Internal Revenue Service (IRS), the State Wage Information Collections Agencies (SWICA), the Social Security Administration (SSA), and the Immigration and Naturalization Service (INS):

(1) IRS unearned income;
(2) SWICA employer quarterly reports of income and unemployment insurance benefit payments;
(3) IRS earned income maintained by SSA; and
(4) Immigration status information maintained by the INS. (States may request a waiver of this match under the authority of 42 U.S.C. 1320 through 1327, note.)

(b) The requirements at §§205.51 through 205.62 of this chapter also apply to the TANF IEVS requirement.

Analysis: This section is consistent with TANF statutory requirements.

§274.11 How much is the penalty for not participating in IEVS?

If we determine that the State has not complied with the requirements of §274.10, we will reduce the SFAG payable for the immediately succeeding fiscal year by two percent of the adjusted SFAG unless the State demonstrates to our satisfaction that it had reasonable cause or we approve a corrective compliance plan pursuant to §§ 272.5 and 272.6 of this chapter.

Analysis: This section is consistent with TANF statutory requirements.

§274.20 What happens if a State sanctions a single parent of a child under six who cannot get needed child care?

(a) If we determine that a State has not complied with the requirements of §271.15 of this chapter, we will reduce the SFAG payable to the State by no more than five percent for the immediately succeeding fiscal year unless the State demonstrates to our satisfaction that it had reasonable cause or we approve a corrective action plan pursuant to §§ 272.5 and 272.6 of this chapter.

(b) We will impose the maximum penalty if:

(1) The State does not have a statewide process in place that enables families to demonstrate that they have been unable to obtain child care; or
(2) There is a pattern of substantiated complaints from parents or organizations verifying that a State has reduced or terminated assistance in violation of this requirement.

(c) We will impose a reduced penalty if the State demonstrates that the violations were isolated or that they affected a minimal number of families.

Analysis: In this proposed regulation, HHS is exercising its regulatory authority to specify the circumstances that will lead to the maximum or to a reduced penalty for a state's failure to comply with the TANF child care protection. Generally, the protection establishes that a state may not reduce or terminate TANF assistance to the family of a single parent of a child under age six if the parent refuses to comply with work requirements due to the unavailability of child care. The statute authorizes a penalty of up to five percent of the state's TANF grant, but does not specify the circumstances that would lead to the most severe or a lesser penalty. While it is appropriate to provide additional guidance to states in this instance, we would propose that the criteria be further clarified as follows:

- as drafted, a state is at risk of a maximum penalty if the state does not have a statewide process in place that enables families to demonstrate that they have been unable to obtain child care; this provision should be broadened to also apply if the state does not have a statewide process in place that ensures that families are informed of the extent and nature of the child care protection;

- as drafted, the proposed rule states that HHS "will" impose a reduced penalty if the state demonstrates that the violations were isolated or that they affected a minimal number of families. This provision should be modified to provide that HHS "may" impose a reduced penalty under such circumstances, but only if the state demonstrates that it had a statewide process in place that enables families to demonstrate that they have been unable to obtain care and that the statewide process informs families of the extent and nature of the child care protection.

The preamble, at 62 Fed. Reg. 62164, contains a discussion of factors that HHS would consider in determining whether a state violated the provision, and includes the state's failure to inform families about the provision and relevant definitions among the factors. However, these factors should not just affect the determination of whether there has been a violation; they should also affect the severity of the penalty imposed on a state.

§274.30 What procedures exist to ensure cooperation with the child support enforcement requirements?

(a) The State (the IV-A agency) must refer all appropriate individuals in the family of a child, for whom paternity has not been established or for whom a child support order needs to be established, modified or enforced, to the child support enforcement agency (the IV-D agency). Those individuals must cooperate in establishing paternity and in establishing, modifying, or enforcing a support order with respect to the child.

(b) If the IV-D agency determines that an individual is not cooperating, and the individual does not qualify for a good cause or other exception established by the State in accordance with section 454(29) of the Act, then the IV-D agency must notify the IV-A agency promptly.

(c) The IV-A agency must then take appropriate action by:

(1) Deducting from the assistance that would otherwise be provided to the family of the individual an amount equal to not less than 25 percent of the amount of such assistance; or

(2) Denying the family any assistance under the program.

Analysis: Parents in families applying for or receiving TANF-funded assistance must cooperate in good faith with the state in establishing paternity (if necessary) and pursuing child support. States can provide "good cause" and "other exceptions" to this cooperation requirement in cases where an exception would be "in the best interests of the child." §654(29) If a parent applying for or receiving TANF-funded assistance fails to cooperate, the family must be sanctioned. At a minimum, the penalty must be a 25 percent reduction in the family's assistance. §608(a)(2). If a state does not sanction those who have been found to be non-cooperative, it can be penalized in an amount worth up to 5 percent of its basic TANF block grant. §609(a)(5).

Within certain federal parameters, the statute allows the states to define "cooperation" and "good cause." It allows the states to set the penalty for non-cooperation so long as the minimum 25 percent penalty is applied. The law also allows the states to determine whether the TANF agency or the child support agency will make the "good cause" determination. The "cooperation" determination, however, must be made by the child support agency. §654(29)

There are two significant areas in which the proposed regulation needs to be modified. The first concerns the use of the term “appropriate individual” in subsection (a). As noted above, the federal statute only requires child support cooperation by individuals applying for or receiving TANF assistance in regard to paternity and child support *for their own children*. It does not impose cooperation requirements on individuals who apply for or receive TANF assistance on behalf of other children in their care (e.g., grandchildren, nieces, nephews). Use of the term “appropriate individual” suggests that cooperation by non-parents is required under federal law, and that if a state chooses to require cooperation by a non-parent, the federally prescribed penalty described in the provision must be applied to such a non-parent in the event of non-cooperation without good cause. Neither of these results is required.

While it is true that individual states could choose to go beyond federal law and impose cooperation obligations on non-parents, this is an individual state choice and a policy option that ought to be carefully considered. For example, states may decide that maternal grandparents who have custody of their grandchildren and may have no knowledge of who the children's father is should not be subject to a strict cooperation requirement. Or states may feel that they do not want to force reluctant grandparents to pursue their own children for child support. These states may feel that it is better public

policy to offer child support services to grandparents, encourage them to use these services, but not force them to do so on pain of losing TANF assistance. States should not be led to believe that they do not have a choice in this area. In addition, to the extent a state might choose to require cooperation by a non-parent caretaker, the minimum penalty mandated by §408(a)(2) is similarly inapplicable as that provision addresses the minimum penalty to be imposed in the event of non-cooperation "...with respect to a child of the individual..."

This provision should be modified to clarify that federal law mandates cooperation, and a minimum penalty in the event of non-cooperation, only with respect to the individual's own children.

The second significant area of concern regarding this provision is the failure to mandate a set of notice and procedural requirements that need to be included in state systems. These due process rights include: that the IV-A agency inform TANF applicants and recipients about the cooperation requirement and the good cause and other exceptions; that there be a mechanism by which an individual who has been referred to IV-D for child support services can make a claim for an exemption from the cooperation requirement if it appears that one is needed; that there be an interface between IV-A and IV-D when the state has set up a system in which the IV-A agency makes "good cause" determinations and the IV-D agency makes cooperation decisions; and that an individual be informed about a non-cooperation decision and how to appeal from such a decision.

Due Process Concerns: The federal statute requires TANF applicants and recipients to cooperate in obtaining child support unless they have "good cause" for failing to do so. The "good cause" determination may be made by either the IV-A or the IV-D agency. The noncooperation determination is made by the IV-D agency while the IV-A agency levies the penalty. Due process[14] requires that TANF applicants/recipients be: 1) advised of this obligation; 2) told how to claim "good cause" if they believe it is applicable, 3) informed of the process to be followed by the agency in making its decision; and 4) notified of the decision when it is made. Since both the IV-A and the IV-D agencies are involved in this process it is important that responsibility for making sure this happens is clearly delineated in federal regulations. Failing to address the issues in the regulations creates the possibility that neither IV-A nor IV-D will assume responsibility for these functions. The result will be a system in which TANF applicants/recipients are denied fundamental due process.

HHS has long recognized the importance of assuring that due process is given in the administration of the cooperation requirement and the good cause exception. Under prior law, it promulgated

[14] See, e.g. *Mullane v. Central Hanover Bank and Trust Co*., 339 U.S. 306 (1950)(a fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action); *Mathews v. Eldridge*, 424 U.S. 319 (1976)(some form of hearing is required before an individual is finally deprived of a property interest) See, *also, Snaidach v. Family Finance Co.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1969); *Bell v. Burson,* 402 U.S. 535 (1971); *Memphis Light, Gas and Water v. Craft,* 436 U.S. 1 (1978).

regulations which explicitly dealt with the obligation to notify IV-A recipients of their obligations and the "good cause" exception, 45 CFR §232.40(b)(1); detailed the explicit notice requirements 45 CFR §232.40(b)(2); delineated the procedures for making a claim, 45 CFR §232.43; and required written notice of any decision, 45 CFR §232.41(b). Indeed, federal regulations have played an historic role in this process and states have come to expect guidance from the federal government in sorting out the IV-A and IV-D obligations.

In addition to its obligation to protect the rights of program participants under the Constitution, HHS has two other reasons for issuing regulations. First, it is required to levy fiscal penalties on states which fail to sanction TANF participants who do not meet their cooperation obligations. §609(a)(5). Yet, if a IV-A agency receives recommendations for sanctions which it knows have not been reached in conformity with fundamental due process, it will face a dilemma. If it imposes the sanction, it will be acting unconstitutionally. If it does not impose the sanction, it will face a federal fiscal penalty. HHS has a stake in helping states avoid this dilemma by issuing regulations which ensure that the recommendations made by IV-D to IV-A comport with constitutional standards and should be implemented by the IV-A agency.[15]

Second, HHS is required to levy fiscal penalties on states which fail to operate their child support programs in substantial compliance with Title IV-D. §609(a)(8) One of the IV-D requirements is that states have a system which requires TANF participants to cooperate in child support enforcement unless they have good cause for failing to do so. §654(29) This section of the law specifically requires that determinations and periodic redetermination of cooperation be made, and that individuals subject to the cooperation requirement be notified "of each determination and, if non-cooperation is determined, the basis therefor." Thus, HHS has a statutory obligation to make sure that this process is followed and that states which are not in substantial compliance with their obligations under the statute are sanctioned.

With this in mind, the following issues need to be considered.

Notifying applicants/recipients of the cooperation obligation and the "good cause" exception. The proposed regulation makes no provision for informing applicants/recipients about the cooperation obligation or the good cause/other exceptions and how to claim them. It may be that the intention is to retain 45 CFR §232.40.which contains specific, detailed requirements (including a model form) relating

[15] In this regard, it is worth noting, the HHS relies on its penalty authority to issue guidance in the child care area for a similar set of concerns. Single custodial parents with a child under age 6 are not to be sanctioned for failing to participate in work requirements if they do not have suitable child care. If a state does not provide this protection to children, it faces fiscal sanction. Based on this authority, HHS has indicated that states which do not inform parents of this exception to the penalty for refusing to work, have a process for adjudicating claims , and notify parents when a decision is made will face the maximum federal penalties. 62 Fed Reg. 62164.

to the IV-A agency's responsibility to inform applicants and recipients about these provisions of the law. However, this seems unlikely since the federal law now allows states to define "cooperation," "good cause," and "other exceptions" and provides state flexibility in setting up the procedures for addressing these issues. Existing 45 CFR §232.40 does not reflect these PRWORA changes. Since HHS has taken the position that regulations which are inconsistent with PRWORA are no longer in effect, it may be that this regulation is not even operative.

Moreover, even if 45 CFR 232.40 is operative in some form, 45 CFR §274.30 should reference it so that it is clear that referral from IV-A to IV-D can occur only after the applicant/recipient has been informed about her rights and responsibilities.

Based on these considerations, if HHS considers that 45 CFR §232.40 is no longer operative, then §274.30 should be amended to add the phrase "After notice to affected applicants and recipients about their obligation to cooperate in the establishment of paternity and the pursuit of child support as well as the State's criteria for granting a good cause or other exemption from this requirement and the procedure for making such a claim" at the beginning of the first sentence of subsection (a).

Alternatively, if HHS considers 45 CFR §232.40 to be operative (or it intends to issue a new version more consistent with PRWORA but clearly stating that the IV-A agency is responsible for providing cooperation and good cause/other exception information to TANF participants) then the phrase: "After meeting the requirements of 45 CFR §232.40" should be added to the beginning of subsection (a).

It would then be clear that 1) the IV-A agency has an obligation to make sure that individuals applying for or receiving TANF are informed about the cooperation and good cause/other exception provisions and 2) the "appropriate individuals" for IV-A to referred to IV-D are those who know of their cooperation obligation and who have not claimed a "good cause" exemption.

Subsequent Opportunities to Make a "Good Cause" Claim. Sometimes an applicant or recipient will assert a "good cause" claim at the time of application for TANF benefits. However, particularly when the "good cause" claim is based on domestic violence, it is frequently the case that a claim will not initially be made. It may take some time before the individual is comfortable discussing the problem. Or it may be that the individual does not anticipate a problem but when she pursues paternity/support, the non-custodial parent becomes violent. In these cases, the individual needs to be able to assert a "good cause" claim to stop cooperation and protect herself and her children. For this reason, TANF participants should receive periodic reminders of the existence of exceptions to the cooperation requirement and information about how to apply for such exceptions.

The regulation should be modified to include provision for periodically providing information to TANF participants about good cause and other exceptions to the cooperation requirement and the process for requesting such an exception.

Moreover, the opportunity to claim an exemption from the cooperation requirement should be available *before* the individual has to engage in non-cooperative behavior. No provision is made for this in the proposed regulation. Rather, what seems to be contemplated in proposed subsection (b) is that an individual would first engage in non-cooperative behavior. The IV-D agency would then make a determination of non-cooperation in the process of which it would also determine that the individual did not qualify for a "good cause" or other exemption from the cooperation determination. However, even this is not entirely clear.

This section needs to be redrafted to include provision for individuals to make "good cause" or "other exception" claims at any time in the child support process it seems appropriate to do so. In addition, the implicit requirement that someone addresses the "good cause" possibility before making a finding of non-cooperation needs to be made more explicit. Because this involves issues relating to the interface between the IV-A and IV-D agencies, the precise language is addressed below.

Interface Between the IV-A Agency and the IV-D Agency in the Good Cause/Other Exception Process. The federal statute delegates the cooperation determination to the IV-D agency. The "good cause" determination, however, can be made by either the IV-D agency or the IV-A agency. To date, most states have opted for a bifurcated system in which IV-A makes the "good cause" determination and IV-D makes the cooperation determination.

This system would work reasonably well if all exemption claims were made at the time of application for TANF. The IV-A agency could grant an exemption in appropriate cases and simply not refer those cases to IV-D. As a result, IV-D would never be asked to make a cooperation determination. However, if a case is referred to IV-D and the custodial parent then makes an exemption claim, the bifurcated system can be problematic unless there is proper interface between IV-A and IV-D. Subsection (b) does not recognize this. In fact, it appears to contemplate a state system in which IV-D is making both the cooperation and "good cause" determinations. Since this is not the case in most states, the regulation needs redrafting.

Subsection (b) should be divided into two parts. Subsection (b)(1) could read as it now does with the phrase: "If the IV-D agency is responsible for both the cooperation and the good cause determinations, and after offering the individual an opportunity to claim a good cause exception" inserted at the beginning. The initial "If" would also need to be omitted.

New subsection (b)(2) would read: "If the IV-D agency is responsible for making the cooperation determination and the IV-A agency is responsible for making the good cause determination, then upon evidence of non-cooperation, the IV-D agency shall inform the individual of the alleged non-cooperation and provide information about the good cause exemption. If the individual indicates a desire to assert a good cause claim, then the IV-D agency will send the case to the IV-A agency for processing of the claim. If the claim is accepted by the IV-A agency, the IV-D agency shall take no further action. If the claim is denied, the IV-A agency shall inform the IV-D agency and the affected

individual of the denial. The IV-D agency will then process the non-cooperation determination and, if it finds non-cooperation has occurred and the individual does not qualify for any other exception under state law or policy, then the IV-D agency must promptly notify the IV-A agency of its finding of non-cooperation."

Notice to the Participant When a Claim for an Exemption From the Cooperation Requirement Has Been Denied: The federal statute requires the IV-D agency to promptly notify the affected individual as well as the IV-A agency of its decision on the non-cooperation issue. Further, if it finds no-cooperation to have occurred, the IV-D agency must inform the participant of the basis for that decision. 42 USC §654(29)(E). The proposed regulation requires notification to the IV-A agency, but not the participant. The regulation needs to be amended to include this responsibility.

A new subsection (b)(3) should be added as follows: Whenever the IV-D agency makes a determination that an individual has not cooperated and that the individual does not qualify for a good cause or other exception, it shall promptly notify the individual of its decision and the basis thereof.

> **§274.31 What happens if a State does not comply with the IV-D sanction requirement?**
>
> (a)(1) If we find, for a fiscal year, that the State IV-A agency did not enforce the penalties against recipients required under §274.30(c), we will reduce the SFAG payable for the next fiscal year by one percent of the adjusted SFAG.
>
> (2) Upon a finding for a second fiscal year, we will reduce the SFAG by two percent of the adjusted SFAG for the following year.
>
> (3) A third or subsequent finding will result in the maximum penalty of five percent.
>
> (b) We will not impose a penalty if the State demonstrates to our satisfaction that it had reasonable cause or we approve a corrective compliance plan pursuant to §§272.5 and 272.6 of this chapter.

Analysis: This provision is consistent with the TANF statute. By providing for a graduated penalty -- and the possibility of avoiding the fiscal sanction altogether if there is an explanation and/or a corrective action plan -- the regulation makes it possible for states to work out the new IV-A/IV-D interface issues and develop workable protocols. States will not need to "sanction first and ask questions later" for fear that they will face a heavy TANF fiscal penalty if they err on the side of due process.

It would, however, be reasonable to add a further criterion to subsection (b) to specify that no penalty will be imposed if the violations were *de minimus*. This would make the penalty provision parallel to the provision for sanctions for isolated violations of the requirement to exempt families with young children from sanctions for failing to work if child care is not available.

§274.40 What happens if a State does not repay a Federal loan?

(a) If a State fails to repay the amount of principal and interest due at any point under a loan agreement:

(1) The entire outstanding loan balance, plus all accumulated interest, becomes due and payable immediately; and

(2) We will reduce the SFAG payable for the immediately succeeding fiscal year quarter by the outstanding loan amount plus interest.

(b) Neither the reasonable cause provisions at §272.5 of this chapter nor the corrective compliance plan provisions at §272.6 of this chapter apply when a State fails to repay a Federal loan.

Analysis: This provision is consistent with the TANF statutory requirements.

§274.50 What happens if, in a fiscal year, a State does not expend, with its own funds, an amount equal to the reduction to the adjusted SFAG resulting from a penalty?

(a) We will assess a penalty of no more than two percent of the adjusted SFAG plus the amount equal to the difference between the amount the State was required to expend and the amount it actually expended in the fiscal year.

(1) We will take the full two percent of the adjusted SFAG plus the amount the State was required to expend if the State made no additional expenditures to compensate for reductions to its adjusted SFAG resulting from penalties.

(2) We will reduce the percentage portion of the penalty if the State has expended some of the amount required. In such case, we will calculate the applicable percent by multiplying the percentage of the required expenditures actually made in the fiscal year by two percent.

(b) The reasonable cause and corrective compliance plan provisions at §§ 272.4, 272.5, and 272.6 of this chapter do not apply to this penalty.

(c) State expenditures that are used to replace reductions to the SFAG as the result of TANF penalties must be used for expenditures made under the State TANF program, not under "separate State programs."

Analysis: The TANF statute provides that if a fiscal penalty is imposed on a state, and the state does not use state funds to substitute for the reduction in TANF funding, a further penalty will be imposed on the state; the amount of the additional penalty is to be up to 2% of the state's TANF grant, along with the amount required to be spent that was not spent. In this proposed regulation, HHS specifies its approach to determining whether to impose the full 2% penalty or a lesser amount. The full 2% penalty will be imposed if the state contributes no additional state funds; a pro rata reduction of the 2% penalty will be imposed if the state contributes some, but not all, of the additional state funds required. This appears to be reasonable.

§274.70 What funding restrictions apply to the use of contingency funds?

(a) Contingency funds are available to a State only if expenditures by the State, excluding all Federal funds but the contingency funds, exceed the State's historic State expenditures.

(b) The maximum amount payable to a State in a fiscal year may not exceed an amount equal to 1/12 times 20 percent of that State's SFAG for that fiscal year, multiplied by the number of eligible months for which the State has requested contingency funds.

Analysis: This section is consistent with TANF statutory requirements.

§274.71 How will we determine 100 percent of historic State expenditures, the MOE level, for the annual reconciliation?

(a)(1) The State historic State expenditures, the MOE level, include the State share of expenditures for AFDC benefit payments, administration, FAMIS, EA, and the JOBS programs for FY 1994.

(2) We will use the same data sources and date, i.e., April 28, 1995, that we used to determine the TANF MOE levels for FY 1994. We will exclude the State share of expenditures from the former IV-A child care programs (AFDC/JOBS, Transitional and At-Risk child care) in the calculation.

(b) We will reduce a State's MOE level for the Contingency Fund by the same percentage that we reduce the TANF MOE level for any fiscal year in which the State's SFAG annual allocation is reduced to provide funding to Tribal grantees operating a Tribal TANF program.

Analysis: This section is consistent with TANF statutory requirements.

§274.72 For the annual reconciliation requirement, what restrictions apply in determining qualifying State expenditures?

Qualifying State expenditures are expenditures of State funds made in the State TANF program, excluding child care expenditures.

Analysis: This section is consistent with TANF statutory requirements.

§274.73 What other requirements apply to qualifying State expenditures?

The regulations at §§273.2 (except for §§273.2(a)(2)), 273.4, and 273.6 of this chapter apply.

Analysis: This section cross-references the expenditures which are and are not allowable in counting toward qualifying state expenditures for the contingency fund. While generally accurate, there is a technical drafting problem, because the proposed regulation says that §273.2 (except §273.2(a)(2)) applies, while §273.2 (which generally relates to allowable state spending counting toward TANF maintenance of effort) permits the counting of spending in separate state programs. HHS does state, in §274.72, that spending in separate state programs is not countable toward contingency fund requirements, but §274.73 should be clarified to avoid any confusion on this point.

§274.74 When must a State remit contingency funds under the annual reconciliation?

(a) A State may retain its contingency funds only if it matches them with the expenditure of State funds above a specified MOE level. If the amount of contingency funds paid to a State for a fiscal year exceeds the amount equal to qualifying State expenditures (as defined at §274.72), plus contingency funds, minus the MOE level, multiplied by the Federal Medical Assistance Percentage (FMAP), then multiplied by 1/12 times the number of months the State received contingency funds, then such excess amount must be remitted.

(b) If a State does not meet its MOE requirement, all contingency funds paid to a State for a fiscal year must be remitted.

(c) If required to remit funds, the State must remit all (or a portion) of the funds paid to it for a fiscal year within one year after it has failed to meet either the Food Stamp trigger or the Unemployment trigger for three consecutive months.

Analysis: This section is consistent with TANF statutory requirements.

§274.75 What action will we take if a State fails to remit funds as required?

(a) If a State fails to remit funds as required, we will reduce the SFAG payable for the next fiscal year by the amount of funds not remitted.

(b) A State may appeal this decision as provided in §272.7 of this chapter.

(c) The reasonable cause exceptions and corrective compliance regulations at §§ 272.5 and 272.6 of this chapter do not apply to this penalty.

Analysis: This section is consistent with TANF statutory requirements.

§274.76 How will we determine if a State has met its Contingency Fund reconciliation MOE level requirement and made expenditures that exceed its MOE requirement?

(a) States receiving contingency funds for a fiscal year must complete the quarterly TANF Financial Report (or, as applicable, the Territorial Financial Report). As part of the fourth quarter's report, a State must complete its annual reconciliation.

(b) The TANF Financial Report and State reporting on expenditures are subject to our review.

Analysis: The TANF statute does not specify how HHS will receive needed information to administer the contingency fund requirements, but the proposed approach appears reasonable.

§274.77 Are contingency funds subject to the same restrictions that apply to other Federal TANF funds?

As Federal TANF funds, contingency funds are subject to the restrictions and prohibitions in effect for Federal TANF funds. The provisions of §273.11 of this chapter apply.

Analysis: This section is consistent with TANF statutory requirements.

§274.80 If a Territory receives Matching Grant funds, what funds must it expend?

(a) If a Territory receives Matching Grant funds under section 1108(b) of the Act, it must:

(1) Contribute 25 percent of expenditures funded under the Matching Grant for title IV-A or title IV-E expenditures;

(2) Expend up to 100 percent of the amount of historic expenditures for FY 1995 for the AFDC program (including administrative costs and FAMIS), the EA program, and the JOBS program; and

(3) Expend up to 100 percent of the amount of the Family Assistance Grant annual allocation using Federal TANF, title IV-E funds and/or Territory-only funds.

(b) Territories may not use the same Territorial expenditures to satisfy the requirements of paragraph (a) of this section.

§274.81 What expenditures qualify for Territories to meet the Matching Grant MOE requirement?

To meet the Matching Grant MOE requirements, Territories may count:
(a) Territorial expenditures made pursuant to §§273.2, 273.3, 273.4, and 273.6 of this chapter that are commingled with Federal TANF funds or made under a segregated TANF program; and

(b) Territorial expenditures made pursuant to the regulations at 45 CFR parts 1355 and 1356 for the Foster Care and Adoption Assistance programs and section 477 of the Act for the Independent Living program.

§274.82 What expenditures qualify for meeting the Matching Grant FAG amount requirement?

To meet the Matching Grant FAG amount requirement, Territories may count:

(a) Expenditures made with Federal TANF funds pursuant to §273.11 of this chapter;

(b) Expenditures made pursuant to §§273.2, 273.3, 273.4, and 273.6 of this chapter that are commingled with Federal TANF funds or made under a segregated TANF program;

(c) Amounts transferred from TANF funds pursuant to section 404(d) of the Act; and

(d) The Federal and Territorial shares of expenditures made pursuant to the regulations at 45 CFR parts 1355 and 1356 for the Foster Care and Adoption Assistance programs and section 477 of the Act for the Independent Living program.

§274.83 How will we know if a Territory failed to meet the Matching Grant funding requirements at §274.80?

We will require the Territories to report the expenditures required by §274.80(a)(2) and (a)(3) on the quarterly Territorial Financial Report.

§274.84 What will we do if a Territory fails to meet the Matching Grant funding requirements at §274.80?

If a Territory does not meet the requirements at either or both of §274.80(a)(2) and (a)(3), we will disallow all Matching Grant funds received for the fiscal year.

§274.85 What rights of appeal are available to the Territories?

The Territories may appeal our decisions to the Departmental Appeals Board in accordance with our regulations at part 16 of this title if we decide to take disallowances under 1108(b).

Analysis: §410 of the PRWORA (concerning appeals of adverse actions to the Departmental Appeals Board) does not refer to disallowances against territories under §1108(b), and so HHS has opted to make the disallowance procedures under 45 C.F.R. Part 16 applicable. This appears to be a reasonable decision.

PART 275 -- DATA COLLECTION AND REPORTING REQUIREMENTS

§275.1 What does this part cover?

(a) This part explains how we will collect the information required by section 411(a) of the Act (data collection and reporting); the information required to implement section 407 of the Act (work participation requirements), as authorized by section 411(a)(1)(A)(xii); the information required to implement section 409 (penalties), section 403 (grants to States), section 405 (administrative provisions), section 411(b) (report to Congress), and section 413 (research and annual rankings); and the data necessary to carry out our financial management and oversight responsibilities.

(b) This part describes the information in the quarterly and annual reports that each State must file, as follows:

(1) The case record information (disaggregated and aggregated) on individuals and families in the quarterly TANF Data Report;

(2) The expenditure data in the quarterly TANF Financial Report (or, as applicable, the Territorial Financial Report);

(3) The annual information related to definitions and expenditures that must be filed with the fourth quarter Financial Report; and

(4) The annual information on State programs and performance for the report to Congress.

(c) If a State claims MOE expenditures under a separate State program, this part specifies the circumstances under which the State must collect and report case-record information on individuals and families served by the separate State program.

(d) This part describes when reports are due, how we will determine if reporting requirements have been met, and how we will apply the statutory penalty for failure to file a timely report. It also specifies electronic filing and sampling requirements.

§275.2 What definitions apply to this part?

(a) Except as provided in paragraph (b) of this section, the general TANF definitions at §270.30 of this chapter apply to this part.

(b) For data collection and reporting purposes only, TANF family means:

(1) All individuals receiving assistance as part of a family under the State's TANF or separate State program; and

(2) The following additional persons living in the household, if not included under paragraph (b)(1) of this section:

(i) Parent(s) or caretaker relative(s) of any minor child receiving assistance;

(ii) Minor siblings of any child receiving assistance; and

(iii) Any person whose income or resources would be counted in determining the family's eligibility for or amount of assistance.

Analysis: In the preamble, HHS explains its basis for establishing a definition of "TANF family" for reporting purposes. HHS notes that there is no definition of "family" under the statute, that each state will develop its own definition, and that "[w]e do not expect coverage and family eligibility definitions to be comparable across States. Therefore, we have proposed a definition that will enable us to better understand the different State programs and their effects." The HHS definition will in some cases require information from states concerning individuals not in the assistance unit. However, HHS explains: "We believe information on these additional individuals is critical to understanding the effects of TANF on families and the variability among State caseloads, e.g., to what extent are differences due to, or artifacts of, State eligibility rules." 62 Fed. Reg. 62171.

HHS proceeds to explain why it believes that valuable information would emerge from this reporting:

- We need information on the parent(s) or caretaker relative(s) (i.e., an adult relative, living in the household but not receiving assistance, and caring for a minor child) to understand the circumstances that exist in no-parent (e.g., child-only) cases not covered by key program requirements, such as time limits and work requirements.

- We need information on minor siblings in order to understand the impact of "family cap" provisions.

- We also need information on other persons whose income or resources are considered in order to understand the paths by which families avoid dependence.

The preamble also indicates that any non-custodial parents participating in work activities will be included as a person receiving assistance in an "eligible family" since States may only serve non-custodial parents on that basis. 62 Fed. Reg. 62171.

Finally, HHS notes: "we want to emphasize that we have proposed this definition of "TANF family" for reporting purposes only. Our aim is to obtain data that will be as comparable as possible under the statute, and, to the extent possible, over time. Some comparability in data collection is necessary for assessing program performance; understanding the impact of program changes on families and children; and informing the States, the Congress, and the public of the progress of welfare reform." 62 Fed. Reg. 62171-72.

The proposal to require information about other persons (other than parents, caretaker relatives, and children) whose income and resources are being considered does not appear to be supported by the statute, or appropriate.

§275.3 What reports must the State file on a quarterly basis?

(a) Quarterly reports. Each State must collect on a monthly basis, and file on a quarterly basis, the data specified in the TANF Data Report and the TANF Financial Report (or, as applicable, the Territorial Financial Report). Under the circumstances described in paragraph (d)(1) of this section, the State must collect and file the data specified in the TANF-MOE Data Report.

(b) TANF Data Report. The TANF Data Report consists of three sections. Two sections contain disaggregated data elements and one section contains aggregated data elements.

> (1) TANF Data Report: Disaggregated Data - Sections one and two. Each State must file disaggregated information on families receiving TANF assistance (section one) and families no longer receiving TANF assistance (section two). These two sections specify identifying and demographic data such as the individual's Social Security Number; and information such as the type and amount of assistance received, educational level, employment status, work participation activities, citizenship status, and earned and unearned income. These reports also specify items pertaining to child care and child support. The data requested cover adults (including non-custodial parents who are participating in work activities) and children.
>
> (2) TANF Data Report: Aggregated Data - Section three. Each State must file aggregated information on families receiving, applying for, and no longer receiving TANF assistance. This section of the Report asks for aggregate figures in the following areas: the total number of applications and their disposition; the total number of recipient families, adult recipients, and child recipients; the total number of births, out-of-wedlock births, and minor child heads-of-households; the total number of non-custodial parents participating in work activities; and the total amount of TANF assistance provided.

(c) The TANF Financial Report (or Territorial Financial Report).

> (1) Each State must file quarterly expenditure data on the State's use of Federal TANF funds, State TANF expenditures, and State expenditures of MOE funds in separate State programs.
>
> (2) In addition, each State must file annually with the fourth quarter TANF Financial Report (or, as applicable, the Territorial Financial Report) definitions and descriptive information on the TANF program and descriptive and expenditure-related information on the State's separate MOE program as specified in §275.9.
>
> (3) If a State makes a substantive change in its definition of work activities, its description of transitional services provided to families no longer receiving assistance due to employment under the TANF program, or how it reduces the amount of assistance when an individual refuses to engage in work, as specified in §275.9, it must file a copy of the changed definition or description with the next quarterly report. The State must also indicate the effective date of the change.
>
> (4) If a State is expending TANF funds received in prior fiscal years, it must file a separate quarterly TANF Financial Report (or, as applicable, Territorial Financial Report) for each fiscal year that provides information on the expenditures of that year's TANF funds.

(5) Territories must report their expenditure and other fiscal data on the Territorial Financial Report, as provided at §274.85 of this chapter, in lieu of the TANF Financial Report.

(d) TANF - MOE Data Report.

(1) If a State claims MOE expenditures under a separate State program, it must collect and file similar disaggregated and aggregated information on families receiving and families no longer receiving assistance under the separate State program if it wishes to:

(i) Receive a high performance bonus;

(ii) Qualify for work participation caseload reduction credit; or

(iii) Be considered for a reduction in the penalty for failing to meet the work participation requirements.

(2) The TANF-MOE Data Report consists of three sections. Two sections contain disaggregated data elements and one contains aggregated data elements. Except for data elements that do not apply to individuals and families under the MOE program, such as time limits, the data elements in the TANF-MOE Data Report are the same as those in the TANF Data Report as described in paragraph (b) of this section.

Analysis: This section describes, in overview terms, the nature of the required and (in the case of the TANF-MOE Data Report) optional reporting. While there may be disputes about HHS' definition of "family" and particular data elements, HHS has the statutory authority to require the described reporting for families receiving TANF assistance. However, the TANF-MOE Data Report raises a separate set of issues, and aspects of this reporting need to be reconsidered.

Technically, the TANF-MOE Data Report is not required, but will be necessary if the state wishes to be considered for the high performance bonus, to qualify for a caseload reduction credit, or to be considered for a penalty reduction if the state fails to meet the work participation requirements. It can be argued that HHS lacks the statutory authority to require such detailed reporting about separate state programs, and only has the authority to require reporting sufficient to determine whether expenditures in a separate state program count toward TANF MOE. Presumably, this is why HHS has structured the TANF-MOE Data Report as optional, and only needed if the state wishes to qualify for a high performance bonus, a caseload reduction credit, or a work participation rate penalty reduction. As a practical matter, all or virtually all states with separate state programs will conclude that they need to comply with the reporting requirements.

The problem that will arise is that many of the envisioned data elements are ones that might not otherwise be collected in the separate state program. Presumably, in fashioning the reporting framework for separate state programs, HHS had an image of programs that looked very similar to a state's TANF program. While that is one possibility, it is only one, and in instances where the program

is designed and organized on different principles, it will often be inappropriate to impose TANF-style data reporting.

For example, consider a state that funds a refundable state earned income tax credit through a separate state program. The proposed regulation indicates that the "optional" reporting would need to include information such as the type and amount of assistance received, educational level, employment status, work participation activities, citizenship status, and earned and unearned income, and information pertaining to child care and child support on all families in the program. Much of this information would not normally be collected; in the example of a state earned income tax credit, it would be so infeasible to collect this information that the state might conclude that it was not feasible to fund its earned income credit with MOE dollars, even though that is clearly a permissible use of MOE dollars.

As a second example, some states have elected to fund programs of food assistance for immigrant families that no longer qualify for food stamps. Those programs may look more like a food stamp than a TANF program, and much of the data being collected in TANF is data that would not normally be collected in a food stamp context.

It would be troubling and inappropriate for federal TANF data collection provisions to drive state decisions about what is and isn't a sound use of state maintenance of effort dollars. However, that is a possible result if the data reporting requirements are not modified.

There is no simple resolution to this problem. At this point, it is unclear whether there will be a limited or a large number of separate state programs. If the number was limited, it might be possible to structure a framework in which a state could apply for a waiver of particular data reporting requirements for a separate state program, based on a showing of inappropriateness. Or, HHS might be able to formulate reporting standards for particular categories, e.g., one standard for tax-based assistance, one for food assistance programs, etc. At this point, it is impossible to define the universe of possible state programs, and any initial requirements may need to be modified with experience. Accordingly, for purposes of federal regulations, HHS should not specify the content of TANF-MOE Data Reporting so specifically that it would be necessary to amend federal regulations in order to modify the reporting.

One other aspect of reporting on separate state programs needs to be considered. In some instances, a state might have a large separate state program, of which only a limited portion is being claimed for TANF MOE purposes. For example, if a state does implement a state earned income tax credit, it is entirely possible that only a fraction of the state EITC costs might be needed to reach the MOE threshold. If, for example, only 20% of the spending in a separate state program is needed to satisfy MOE requirements, must the state report on everyone in the program, or only 20%? If the latter, which 20% should the state report about?

§275.4 When are quarterly reports due?

(a) Each State must file the TANF Data Report and the TANF Financial Report (or, as applicable, the Territorial Financial Report), including the addendum to the fourth quarter Financial Report, within 45 days following the end of the quarter.

(b) The State may collect and submit its TANF-MOE Data Report quarterly at the same time as it submits its TANF Data Report, or the State may submit this report at the time it seeks to be considered for a high performance bonus, a caseload reduction credit, or a reduction in the work participation rate penalty as long as the data submitted are for the full period for which these decisions will be made.

(c) The effective date for filing these reports depends on when the State implemented the TANF program as follows:

(1) If a State implemented the TANF program by January 1, 1997, the first reports cover the July-September 1997 quarter and are due November 14, 1997.

(2) If a State implemented its TANF program between January 1, 1997, and July 1, 1997, the first reports cover the period that begins six months after the date of implementation and are due 45 days following the end of the applicable quarter.

§275.5 May States use sampling?

(a) Each State may report the disaggregated data in the TANF Data Report and in the TANF-MOE Data Report on all recipient families or on a sample of families selected through the use of a scientifically acceptable sampling method that we have approved. States may not use a sample to generate the aggregated data.

(b) "Scientifically acceptable sampling method" means a probability sampling method in which every sampling unit in the population has a known, non-zero chance to be included in the sample and our sample size requirements are met.

Analysis: The use of sampling for disaggregated case record data is expressly authorized by §411(a)(1)(B).

§275.6 Must States file reports electronically?

Each State must file all quarterly reports (i.e., the TANF Data Report, the TANF Financial Report (or, as applicable, the Territorial Financial Report), and the TANF-MOE Data Report) electronically, based on format specifications that we will provide.

Analysis: The TANF statute does not expressly require electronic reporting, but it will greatly facilitate analysis of the data.

§275.7 How will we determine if the State is meeting the quarterly reporting requirements?

(a) Each State's quarterly reports (the TANF Data Report, the TANF Financial Report (or Territorial Financial Report), and the TANF-MOE Data Report) must be complete and accurate and filed by the due date.

(b) For a disaggregated data report, "a complete and accurate report" means that:

(1) The reported data accurately reflect information available to the State in its case records, financial records, and automated data systems;

(2) The data are free from computational errors and are internally consistent (e.g., items that should add to totals do so);

(3) The data are reported for all elements (i.e., no data are missing);

(4)(i) The data are provided for all families; or

(ii) If the State opts to use sampling, the data are provided for all families selected in a sample that meets the minimum sample size requirements (except for families listed in error); and

(5) Where estimates are necessary (e.g., some types of assistance may require cost estimates), the State uses reasonable methods to develop these estimates.

(c) For an aggregated data report, "a complete and accurate report" means that:

(1) The reported data accurately reflect information available to the State in its case records, financial records, and automated data systems;

(2) The data are free from computational errors and are internally consistent (e.g., items that should add to totals do so);

(3) The data are reported for all applicable elements; and

(4) Monthly totals are unduplicated counts for all families (e.g., the number of families and the number of out-of-wedlock births are unduplicated counts).

(d) For the TANF Financial Report (or, as applicable, the Territorial Financial Report), "a complete and accurate report" means that:

(1) The reported data accurately reflect information available to the State in its case records, financial records, and automated data systems;

(2) The data are free from computational errors and are internally consistent (e.g., items that should add to totals do so);

(3) The data are reported for all applicable elements; and

(4) All expenditures have been made in accordance with §92.20(a) of this title.

(e) We will review the data filed in the quarterly reports to determine if they meet these standards. In addition, we will use audits and reviews to verify the accuracy of the data filed by the States.

(f) States must maintain records to adequately support any report in accordance with §92.42 of this title.

Analysis: This section defines what constitutes "complete and accurate" reporting. The HHS definition is not unreasonable, but (as discussed below) either the definition should be modified, or the consequences of reporting being less than "complete and accurate" should be reframed.

§275.8 Under what circumstances will a State be subject to a reporting penalty for failure to submit quarterly reports?

(a) We will impose a reporting penalty under §272.1(a)(3) of this chapter if:

(1) A State fails to file the TANF Data Report and the TANF Financial Report (or, as applicable, the Territorial Financial Report) on a timely basis;

(2) The disaggregated data in the TANF Data Report is not accurate or does not include all the data required by section 411(a) of the Act (other than section 411(a)(1)(A)(xii) of the Act) or those nine additional elements necessary to carry out the data collection system requirements;

(3) The aggregated data in the TANF Data Report does not include complete and accurate information on the data elements required by section 411(a) of the Act and the data elements necessary to carry out the data collection system requirements and verify and validate disaggregated data;

(4) The TANF Financial Report (or, as applicable, the Territorial Financial Report) does not contain complete and accurate information on total expenditures and expenditures on administrative costs and transitional services; or

(5) The addendum to the fourth quarter TANF Financial Report (or, as applicable, the Territorial Financial Report) does not contain the information required under §§ 271.22, 271.24, and 274.1 of this chapter on families excluded from the calculations in those sections because of the State's definition of families receiving assistance; the definition of work activities; and the description of transitional services provided by a State to families no longer receiving assistance due to employment.

(b) We will not apply the reporting penalty to the TANF-MOE Data Report, the annual program and performance report specified in §275.9, or other information on individuals and families required by section 411(b) of the Act.

(c) If we determine that a State meets one or more of the conditions set forth in paragraph (a) of this section, we will notify the State that we intend to reduce the SFAG payable for the immediately succeeding fiscal year.

(d) We will not impose the penalty at §272.1(a)(3) of this chapter if the State files the complete and accurate reports before the end of the fiscal quarter that immediately succeeds the fiscal quarter for which the reports were required.

(e) If the State does not file all reports as required by the end of the immediately succeeding fiscal quarter, the penalty provisions of §§ 272.4 through 272.6 of this chapter will apply.

(f) For each quarter for which the State fails to meet a reporting requirement, we will reduce the SFAG payable by an amount equal to four percent of the adjusted SFAG.

Analysis: The TANF statute, at §409(a)(2), requires HHS to impose a penalty of 4% of the state's family assistance grant (subject to reasonable cause and corrective compliance provisions of the law) if the state fails to timely submit a required report; the statute also provides for rescission of the penalty if the report is submitted before the end of the fiscal quarter that immediately follows the fiscal quarter for which the report was required. The proposed regulations generally reflect these statutory requirements; note however, that HHS has interpreted the statutory penalty of 4% of the grant for the fiscal year as a penalty of 4% of the grant for each quarter for which the state fails to meet the requirement.

The proposed regulations provide that even if a report is timely filed, the state will face a penalty if the report is not complete and accurate. HHS explains:

> We cannot over-emphasize how seriously we look upon the matter of complete, accurate, and timely reporting. As noted earlier, the data collected will serve many functions -- for States, the Congress, the public, and for us. Adequate data will be critical to many policy and administrative implementation activities.
>
> For example, a State's failure to file complete, accurate, and timely TANF Financial Reports may jeopardize the timely payment of TANF grants to the State and will raise questions as to whether a State is subject to a penalty for misuse of funds, intentional misuse of funds, or failure to make sufficient "qualified State expenditures" for TANF MOE or Contingency Fund MOE purposes.

62 Fed. Reg. 62177. We share HHS' concern about the importance of complete and accurate reporting. At the same time, some number of errors are foreseeable and perhaps inevitable with reporting of this magnitude; however §275.7 and 275.8 could be read as saying that a state that has any errors whatsoever is at risk of penalties. Final regulations should modify the language of either §275.7 or §275.8 to make clear that some reasonable margin of error will be allowed before a state will be considered at risk of a reporting penalty.

> **§275.9 What information must the State file annually?**
>
> (a) Each State must file annually, as an addendum to the fourth quarter TANF Financial Report (or, as applicable, the Territorial Financial Report), the following definitions and information with respect to the TANF program for that year:
>
> > (1) The number of families excluded from the calculations at §§ 271.22, 271.24, and 274.1 of this chapter because of the State's definition of families receiving assistance, together with the basis for such exclusions;
> >
> > (2) The State's definition of each work activity;
> >
> > (3) A description of the transitional services provided to families no longer receiving assistance due to employment; and

(4) A description of how a State will reduce the amount of assistance payable to a family when an individual refuses to engage in work without good cause.

(b) Each State must also file with the fourth quarter TANF Financial Report (or, as applicable, the Territorial Financial Report) the information on separate State MOE programs for that year specified at §273.7 of this chapter.

(c) Each State must file an annual program and performance report that provides information about the characteristics and achievements of each State program; the design and operation of the program; the services, benefits, assistance provided; the eligibility criteria; and the extent to which the State has met its goals and objectives for the program. Each State may also include a description of any unique features, accomplishments, innovations, or additional information appropriate for the Department's annual report to Congress.

Analysis: See §271.22 and §274.1 for our discussion of HHS' approach to the definition of "families with adults receiving assistance" for purposes of participation rates and time limits; see the discussion of §273.7 for discussion of the information being required concerning separate state programs.

§275.10 When are annual reports due?

(a) The annual report of State definitions and expenditures required by §275.9(a) and (b) is due at the same time as the fourth quarter TANF Financial Report (or, as applicable, the Territorial Financial Report).

(b) The annual program and performance report to meet the requirements of section 411(b) of the Act (report to Congress) is due 90 days after the end of the fiscal year. The first report, covering FY 1997, is due December 30, 1997.

Analysis: No analysis needed.