Federal Register

Monday
April 12, 1999

Part II

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 260, et al.

Temporary Assistance for Needy Families Program (TANF); Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 260, 261, 262, 263, 264, and 265

RIN 0970–AB77

Temporary Assistance for Needy Families Program (TANF)

AGENCY: Administration for Children and Families, HHS.

ACTION: Final rule.

SUMMARY: The Administration for Children and Families (ACF) issues regulations governing key provisions of the new welfare block grant program enacted in 1996—the Temporary Assistance for Needy Families, or TANF, program. It replaces the national welfare program known as Aid to Families with Dependent Children (AFDC) and the related programs known as the Job Opportunities and Basic Skills Training Program (JOBS) and the Emergency Assistance (EA) program.

These rules reflect new Federal, State, and Tribal relationships in the administration of welfare programs; a new focus on moving recipients into work; and a new emphasis on program information, measurement, and performance. They also reflect the Administration's commitment to regulatory reform.

EFFECTIVE DATES: These regulations are effective October 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mack Storrs, Director, Division of Self-Sufficiency Programs, Office of Family Assistance, Administration for Children and Families (ACF), at 202–401–9289, or Ann Burek, Family Assistance Program Specialist, at 202–401–4528.

Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8 a.m. and 7 p.m. Eastern time.

SUPPLEMENTARY INFORMATION: On November 20, 1997, the Administration for Children and Families published a Notice of Proposed Rulemaking that covered key provisions of the new welfare block grant program, known as Temporary Assistance for Needy Families, or TANF. We provided an extended 90-day comment period, which ended on February 18, 1998. We offered commenters the opportunity to submit comments by mail or electronically via our Web site. A number of commenters took advantage of the electronic access, but a significant portion of the comments we received electronically duplicated comments we received in the mail.

Eight major national organizations (three associations representing State groups, three advocacy groups, and two labor organizations) and one Congressman requested the opportunity to present their comments to us orally. We granted their requests, holding four meetings in Washington in June, July, and August 1998. The national organizations focused largely on those issues that they had identified as priority concerns in their written statements. In a few instances, they modified their suggestions, endorsed comments that had been offered by other commenters, or provided clarifying information. The Congressman expressed his interest in: (1) Providing States more flexibility in operating their programs; (2) collecting data that would be adequate for the effective enforcement and oversight of TANF; and (3) placing sufficient emphasis on ensuring that States met their maintenance-of-effort (MOE) requirements and did not supplant existing State spending.

The discussions did not introduce any new policy concerns or proposals. They are part of the public record, and individuals interested in reviewing notes on these meetings have the same access to that information as they do to other comments that were submitted in written form.

Before discussing the comments in more detail, we want to point out that we changed the part and section references for this TANF rule. One commenter noted that our use of parts 270 through 275 for the TANF rules would likely cause confusion because the major Food Stamp rules used similar section numbers. In response to that comment, we have shifted all our part and section numbers down by ten; thus, for example, the provisions that appeared in part 270 of the NPRM appear in part 260 of this final rule.

To help you make your way through these changes, we include both NPRM and final-rule section references in this preamble discussion.

Comment Overview

After accounting for the duplications, we received nearly 270 comments on the NPRM. The largest number of comments came from State welfare agencies and social services departments, followed by advocacy groups and other State-level organizations. We also heard from a significant number of Governors, national associations, local government offices, Federal legislators, community-based organizations, State legislators, and the general public. We received a lesser number of comments from other Federal agencies and members of the educational, business, child care, research, Tribal, and organized labor communities.

The only policy area that generated a significant number of ''single-issue'' comments was domestic violence. We received about 25 comments from women's, legal, and other groups that focused exclusively on the domestic violence provisions in the NPRM. We also received a handful of comments, mostly from the general public, that focused exclusively on the role of education in promoting self-sufficiency.

A substantial majority of the comments that addressed our regulatory framework were positive. Commenters generally seemed to agree that it was helpful for our rules to provide specific guidance on how we intended to implement the penalty process and make penalty determinations. In fact, based on the detailed questions and comments we received, one could conclude that some commenters were looking for an expansion on the amount of detail contained in the rule.

On the positive side, in addition to support of particular policies, commenters indicated that the rules provided some helpful clarifications of the statute, expressed appreciation for our regulatory development process, noted ''positive steps'' we had taken, and noted numerous places where our proposed rules appropriately reflected the statute.

In general, however, many commenters had mixed views on the policy proposals on the NPRM, supporting some, but opposing others. For example, with respect to the domestic violence policies, most commenters supported the general approach and commended our encouragement of State implementation of the Family Violence Option. However, most also expressed a number of concerns about specific provisions in the proposed rules.

Likewise, many of the States, advocates, and national organizations supported the proposed rule in a number of areas (such as the flexibility afforded States to define work activities and the reduction in penalty liability for States that failed only the two-parent participation rate), but expressed objections to our approach on other major issues.

The policy issues that generated the most consistent negative reactions were separate State programs, child-only cases, and continuation of waivers. Commenters expressed major concerns that: the proposed rules would stifle

innovation; they were overly prescriptive and burdensome; they undermined the partnership between State and Federal governments and contravened Congressional intent; we presumed State guilt without evidence; and these policies could ultimately harm recipients.

We also received numerous negative comments from States and State representatives on the proposed data collection and reporting requirements. However, these same requirements generated a largely favorable reaction from other types of commenters.

In the preamble to the proposed rule, we discussed our general approach on the major cross-cutting issues up front, prior to the section-by-section analysis. Many of the commenters organized their comments in the same way, addressing the issues thematically instead of following the specific structure of the rule. This preamble follows that same basic format, presenting a separate discussion of our policies on the major cross-cutting issues (separate State programs, child-only cases, waiver continuations, and domestic violence) before proceeding to the section-by-section analysis.

We present most of the discussion of data collection and reporting issues in two places—the preamble for part 265 and the preamble discussion entitled the ''Paperwork Reduction Act'' in the ''Regulatory Impact Analyses'' section of the preamble.

We believe that structuring the preamble this way enables us to provide a clearer framework for the specific regulatory provisions and to represent the commenters' concerns most accurately.

For several reasons, we decided not to attempt precise numerical counts of the comments received. Based on the nature of the comments, we did not believe that the number of comments was a particularly meaningful statistic. First, because several of the comments had multiple signatories and some commenters provided general endorsements of the comments of other parties, we would have had to create somewhat arbitrary rules for developing counts. Also, commenters presented their views of the many overlapping and cross-cutting issues in many different ways; for example, some spoke generically about the major provisions of the rule, while others provided very specific suggestions about individual words and phrases. This diversity in the approach of commenters also hampered our ability to create meaningful counts. Nevertheless, we are confident that this preamble accurately conveys the scope and nature of the comments received.

We appreciate the time and attention that commenters gave to reviewing the NPRM and preparing their comments. As a result of their efforts, we have been able to resolve certain technical problems, incorporate numerous regulatory clarifications, and consider some alternative regulatory approaches.

Table of Contents

I. Overview: The Personal Responsibility and Work Opportunity Reconciliation Act

On August 22, 1996, President Clinton signed ''The Personal Responsibility and Work Opportunity Reconciliation Act of 1996''—or PRWORA—into law. This bipartisan welfare plan built upon previous Administration and State efforts to reform welfare. Even before PRWORA was enacted, many States were well on their way to changing their welfare programs into jobs programs. By granting Federal waivers, the Administration allowed 43 States—more than all previous Administrations combined—to require work, time-limit assistance, make work pay, improve child support enforcement, and encourage parental responsibility. The vast majority of States have chosen to continue or build upon these welfare demonstration projects.

PRWORA is dramatically changing the nation's welfare system into one that requires work in exchange for time-limited assistance. The law contains strong work requirements, performance bonuses to reward States for moving welfare recipients into jobs and reducing out-of-wedlock births, State maintenance-of-effort requirements, comprehensive child support enforcement, and supports for moving families from welfare to work—including increased funding for child care. It provides opportunities for State and local governments, working in partnership with communities groups and other agencies, to serve families in new, more creative, and more effective ways.

With the help of the strong economy, and new Federal and State policies, the percentage of welfare recipients working has tripled since 1992 and an estimated 1.5 million people who were on welfare in 1997 were working in 1998. All States met the first overall work participation rates required under TANF, and welfare caseloads have fallen to the lowest levels in 30 years.

The first title of this new law (Pub. L. 104–193) created a program called Temporary Assistance for Needy Families, or TANF, in recognition of its focus on moving recipients into work and time-limiting assistance. It repealed the existing welfare program known as Aid to Families with Dependent Children (AFDC), which provided cash assistance to needy families on an entitlement basis. It also repealed the related programs known as the Job Opportunities and Basic Skills Training program (JOBS) and Emergency Assistance (EA).

The new TANF program went into effect on July 1, 1997, except in States that elected to submit a complete plan and implement the program at an earlier date.

The new law reflects widespread, bipartisan agreement on a number of key principles:

- Welfare reform should help move people from welfare to work.
- Welfare should be a short-term, transitional experience, not a way of life.
- Parents should receive the child care and the health care they need to protect their children as they move from welfare to work.
- Child support programs should become tougher and more effective in securing support from absent parents.

• Because many factors contribute to poverty and dependency, solutions to these problems should not be ''one size fits all.'' The system should allow States, Indian tribes, and localities to develop diverse and creative responses to their own problems.

• The Federal government should focus less attention on eligibility determinations and place more emphasis on program results.

• States should continue to make substantial investments of State funds in addressing the needs of low-income families.

This landmark welfare reform legislation has dramatically affected not only needy families, but also intergovernmental relationships. It challenges Federal, State, Tribal and local agencies to foster positive changes in the culture of the welfare system and to take more responsibility for program results and outcomes. It also challenges them to develop strong interagency collaborations and improve their partnerships with legislators, advocates, businesses, labor, community groups, and other parties that share their interest in helping needy families successfully transition into the mainstream economy.

The new law provides an unparalleled opportunity to achieve true welfare reform. It also presents very significant challenges for families and State and Tribal entities in light of the changing program structure, loss of Federal entitlements, creation of time-limited assistance, and new penalty and bonus provisions.

Most of the resources in the AFDC program went to support mothers raising their children alone. In the early years, the expectation was that these mothers would stay home and care for their children; in fact, in a number of ways, program rules discouraged work. Over time, as social and economic conditions changed, and more women entered the work force, the expectations changed. In 1988, Congress enacted the new JOBS program to provide education, training and employment that would help needy families avoid long-term welfare dependence. By 1994, 20 percent of the nonexempt adult AFDC recipients nationwide were participating in the JOBS program.

In spite of these changes, national sentiment supported more drastic change. Policy-makers, agency officials, and the public expressed frustration about the slow progress being made in moving welfare recipients into work and the continuing decline in family stability. States lobbied for more flexibility to reform their programs. While the Clinton Administration had supported individual reform efforts in almost every State, approving 80 waivers in its first five years, the waiver process was not an ideal way to achieve systemic change. It required separate Federal approval of each individual reform plan, limited the types of reforms that could be implemented, and enabled reforms to take place only one State at a time. Governors joined Congress and the President in declaring that the welfare system was ''broken.''

After more than two years of discussion and negotiation, PRWORA emerged as a bipartisan vehicle for comprehensive welfare reform. As President Clinton stated in his remarks as he signed the bill, ''. . . this legislation provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family.''

The law gives States, and federally recognized Indian tribes, the authority to use Federal welfare funds ''in any manner that is reasonably calculated to accomplish the purpose'' of the new program. It provides them broad flexibility to set eligibility rules and decide what benefits are most appropriate. It also enables States to implement their new programs without getting the ''approval'' of the Federal government. In short, it offers States and Tribes an opportunity to try new, far-reaching changes that can respond more effectively to the needs of families within their own unique environments.

PRWORA redefines the Federal role in administration of the nation's welfare system. It limits Federal regulatory and enforcement authority, but gives the Federal government new responsibilities for tracking State performance. In a select number of areas, it calls for penalties when States fail to comply with program requirements, and it provides bonuses for States that perform well in meeting new program goals.

Under the new statute, program funding and assistance for families both come with new expectations and responsibilities. Adults receiving assistance are expected to engage in work activities and develop the capability to support themselves before their time-limited assistance runs out. States and Tribes are expected to assist recipients making the transition to employment. They are also expected to meet work participation rates and other critical program requirements in order to maintain their Federal funding and avoid penalties.

Some important indicators of the change in expectations are: time limits; higher participation rates; the elimination of numerous exemptions from participation requirements; and the statutory option for States to require individual responsibility plans. Taken together, these provisions signal an expectation that we must broaden participation beyond the ''job-ready.''

In meeting these expectations, States need to examine their caseloads, identify the causes of long-term underemployment and dependency, and work with families, communities, businesses, and other social service agencies in resolving employment barriers. In some cases, States may need to provide intervention services for families in crisis or may need to adapt program models to accommodate individuals with disabilities or other special needs. TANF gives States the flexibility they need to respond to such individual family needs. However, in return, it expects States to move towards a strategy that provides appropriate services for all needy families.

II. Regulatory Framework

A. Pre-NPRM Process

In the spirit of both regulatory reform and PRWORA, we implemented a broad and far-reaching consultation strategy prior to the drafting of the Notice of Proposed Rulemaking (NPRM). In Washington, we set up numerous meetings with outside parties to gain information on the major issues underlying the work, penalty, and data collection provisions of the new law. In our ten regional offices, we used a variety of mechanisms—including meetings, conference calls, and written solicitations—to garner views from ''beyond the Beltway.''

The purpose of these discussions was to gain a variety of informational perspectives about the potential benefits and pitfalls of alternative regulatory approaches. We spoke with a number of different audiences, including: representatives of State, Tribal, and local governments; nonprofit and community organizations; business and labor groups; and experts from the academic, foundation, and advocacy communities. We solicited both written and oral comments, and we worked to ensure that information and concerns raised during this process were shared with both the staff working on individual regulatory issues and key policy-makers.

These consultations were very useful in helping us identify key issues and evaluate policy options, and several commenters commended ACF on this process.

B. Related Regulations Under Development

This rule addresses the work, accountability, and data collection and reporting provisions of the new TANF program. We have also issued NPRM's and program guidance on several related provisions of the new law including: high performance bonuses (TANF–ACF–PI–98–1 and TANF–ACF–PI–98–05); illegitimacy reduction bonuses (63 FR 10263, March 2, 1998); and the Tribal TANF and Native Employment Works (i.e., ''NEW'') programs (63 FR 39365, July 22, 1998).

With a couple of minor exceptions, this rule does not address the provisions of the Welfare-to-Work (WtW) program at section 403(a)(5) of the Act, as created by section 5001(a)(1) of Pub. L. 105–33. The Secretary of Labor issued interim rules on these provisions and the provisions at section 5001(c), regarding WtW grants for Tribes, on November 18, 1997. A copy of the interim rules and other information about this program are available on the Web at http://wtw.doleta.gov.

The WtW provisions in this rule include the amendments to the TANF provisions at sections 5001(d) and 5001(g)(1) of Pub. L. 105–33. Section 5001(d) allows a State to provide WtW assistance to a family that has received 60 months of federally funded TANF assistance and specifies that ''noncash'' assistance under the WtW program is not treated as TANF ''assistance'' for purposes of the TANF time limit. Section 5001(g)(1) provides a new penalty that takes away WtW funds when a State fails to meet the basic MOE requirements.

Also, this rule does not include the provision at section 5001(g)(2), which requires repayment of WtW funds to the Secretary of Labor following a finding by the Secretary of Labor of misuse of funds. Since the Department of Labor is responsible for administering this penalty and receives any repaid funds, it would not be appropriate for us to issue rules on this provision.

Under section 5001(e) of Pub. L. 105–33, we have responsibility for regulating the WtW data reporting requirements, under section 411(a) of the Act, as amended. On October 29, 1998, we issued an interim-final rule that addresses these requirements, following consultation with the Department of Labor, State agencies, Private Industry Councils, and other affected parties (63 FR 57919).

As we pointed out in the NPRM preamble, there is an important relationship between this rulemaking and the rulemaking on Tribal programs. Under section 412 of the Social Security Act, federally recognized Tribes may elect to operate their own TANF programs, and Tribes that operated their own JOBS programs may continue to receive those funds to operate Tribal work programs. We published the NPRM for Tribal TANF programs on July 22, 1998 (see 63 FR 39365).

Tribal decisions on whether to elect the TANF option will depend on a number of factors, including the nature of services and benefits that will be available to Tribal members under the State program. Thus, Tribes have a direct interest in the regulations governing State programs.

Tribes also have an interest in these regulations because some of the rules we develop for State programs could eventually apply to the Tribal programs. In particular, we urge Tribes to note the data collection and reporting requirements at part 265. While the statute allows Tribes to negotiate certain program requirements, such as work participation rates and time limits, it subjects Tribal programs to the same data collection and reporting requirements as States.

We would also like to direct the Tribes to the maintenance-of-effort (MOE) policies discussed at § 263.1. In that section, we provide that State contributions to a Tribal program could count toward a State's MOE. Tribes should be aware of the important implications of this provision for both the funding of Tribal programs and State-Tribal relations.

In order for welfare reform to succeed in Indian country, it is important for State and Tribal governments to work together on a number of key issues, including data exchange and coordination of services. We remind States that Tribes have a right under law to operate their own programs. States should cooperate in providing the information necessary for Tribes to do so.

Likewise, Tribes should cooperate with States in identifying Tribal members and tracking receipt of assistance.

On December, 5, 1997, we issued a final rule to repeal the obsolete regulations for the EA, JOBS, and the IV–A child care programs and a few provisions covering administrative requirements of the AFDC program (see 62 FR 64301, December 5, 1997). This action resulted in the elimination of about 82 pages from the Code of Federal Regulations.

We have yet to issue a more detailed conforming rule that deletes or replaces obsolete AFDC and title IV–A references throughout chapter II. This second rulemaking will take additional time because the AFDC provisions are intertwined with provisions for other programs that are not repealed. Also, it is not clear that we should repeal all the AFDC provisions because Medicaid, foster care, and other programs have linkages to the AFDC rules. Because of these complexities and the nonurgent nature of the conforming changes, this latter rule is not an immediate agency priority.

PRWORA also changed other major programs administered by ACF, the Department, and other Federal agencies that may significantly affect a State's success in implementing welfare reform. For example, title VI of PRWORA repealed the child care programs that were previously authorized under title IV–A of the Social Security Act. In their place, it provided two new sources of child care funding (which we refer to collectively as the Child Care Development Fund). These funds go to the Lead Agency that administers the Child Care and Development Block Grant program. A major purpose of the increases in child care funding provided under PRWORA is to assist low-income families in their efforts to be self-sufficient. We issued final rules covering the Child Care and Development Fund on July 24, 1998 (see 63 FR 39935).

We encourage you to look in the **Federal Register** for actions on these related rules, take the opportunity to comment, and work to understand the important relationships among these programs in developing a comprehensive strategy that can provide support to all families that are working to maintain their family structure and become self-sufficient.

C. Statutory Context

These proposed rules reflect PRWORA, as enacted, and amended by Pub. L. 104–327, Pub. L. 105–33, Pub. L. 105–89, Pub. L. 105–178, and Pub. L. 105–200.

As we indicated in the NPRM preamble, the changes made by Pub. L. 104–327 are fairly limited in scope; we discuss them in the preamble on Contingency Fund MOE requirements at §§ 264.71, 264.72, and 264.77.

Pub. L. 105–33 (also known as The Balanced Budget Act of 1997) created the new Welfare-to Work (WtW) program, made a few substantive changes to the TANF program, and made numerous technical corrections to the TANF statute. We attempted to incorporate those amendments that were in our purview in the NPRM. However, commenters identified a couple of places where we did not fully

or correctly incorporate these amendments. We found a few more. We note these in the preamble discussion that follows and have made appropriate changes in the regulatory text.

We want to note a couple of additional legislative developments since the drafting of the NPRM that might affect a State's liability for penalties and the use of Federal TANF funds. We have made a couple of conforming changes in the rules to reflect these developments.

Under Pub. L. 105–89, known as the Adoption and Safe Families Act of 1997, Congress decreased the amount of money available to States through the ''Contingency Fund'' and increased the amount that States receiving contingency funds must remit, using a proportionate reduction. We discuss this provision in more detail in the preamble for subpart B of part 264, and we have changed the regulatory text to reflect this change.

Under Pub. L. 105–178, known as The Transportation Equity Act for the 21st Century, Congress: (1) (Effective in fiscal year 2001) reduced the cap on the amount that a State could transfer to the Social Services Block Grant from 10 percent to 4.25 percent; (2) created the ''Job Access'' competitive grant program to help communities develop transportation services that will help current and former welfare recipients and other low-income individuals access employment; and (3) specified that States could use their Federal TANF funds as part of the nongovernmental cost-sharing required under a Job Access program. None of these provisions directly affect the TANF rules, but they do change what would be an allowable use of Federal TANF funds. It is important that States understand these provisions if they wish to avoid a penalty for misuse of Federal TANF funds.

Under section 403 of The Child Support Performance and Incentives Act of 1998, Pub. L. 105–200, Congress amended section 404 of the Social Security Act to address the use of Federal TANF funds within the Job Access and Reverse Commute program. It imposed: (1) restrictions on the use of Federal TANF funds for this purpose, including ''new spending'' and ''nonsupplantation'' requirements; (2) a requirement that the preponderance of funds go to TANF recipients, former TANF recipients, certain noncustodial parents, and low-income individuals at risk of qualifying for the TANF program; and (3) a requirement that the services provided support participation in TANF work activities. It also imposed a cap on the total amount of Federal TANF funds that a State could use for this purpose, computed as the difference between 30 percent of the State Family Assistance Grant (SFAG) amount and the amount that a State was transferring that year to the Child Care and Development Block Grant or the Social Services Block Grant.

Consistent with treatment of the other restrictions on the grant at section 404, we have not directly incorporated these restrictions into the TANF rule. However, we note that we would consider expenditures in violation of these new provisions a misuse of funds.

We also point out that these provisions do not conflict with the restrictions at section 409(a)(7)(B)(iv) of the Act or § 263.6(a) and (c) of these rules. The TANF rules deal with the converse situation—the circumstances under which other State expenditures do not qualify under TANF's basic maintenance-of-effort provisions. The new provisions address the circumstances under which Federal TANF funds may count as nongovernmental expenditures under a separate program. They do not give States the authority to use Job Access funds for basic MOE purposes.

Further, the use of Federal TANF funds to support Job Access activities does not constitute a transfer of Federal TANF funds within the meaning of section 404(d)(1). Thus, they do not affect the ''adjusted SFAG'' amount that we use in determining the administrative cost cap and penalty amounts.

The Child Support Performance and Incentives Act also added a ''rule of interpretation'' to section 404(k)(3) of the Social Security Act, which indicates that the provision of transportation benefits to an individual who is not otherwise receiving TANF assistance would not be considered assistance. We have made a conforming change to our definition of assistance at § 260.31 to reflect this policy.

D. Regulatory Reform

In its latest *Document Drafting Handbooks,* the Office of the Federal Register has supported the efforts of the National Partnership for Reinventing Government and encouraged Federal agencies to produce more reader-friendly regulations. In drafting the proposed and final rule, we paid close attention to this guidance and worked to produce a more readable rule. We also provided electronic access to the document and gave readers the option to submit their comments electronically. We received a number of positive comments about how the NPRM was written and the electronic access.

Based in part on the positive reaction to the proposed rule, and in the spirit of facilitating understanding, we decided to retain much of the NPRM preamble discussion. We believe it will be useful for some readers in providing the overall context for the final regulations. However, where we are changing our policy in the final rule, or the context has changed since we issued the NPRM, we have made appropriate changes to the preamble. We also exercised some editorial discretion to make the discussion more succinct or clearer in places. Wherever we made significant changes in policy, the preamble notes and explains those changes.

In the proposed rule, we decided to incorporate a few statutory provisions as a frame of reference even though we did not intend to regulate or enforce State behavior in those areas. We thought the inclusion of this additional preamble discussion and regulatory text would help establish the broader context for other parts of the rulemaking document. These additions were primarily explanatory in nature or restatements of the statutory requirements. We indicated that readers could probably identify these additional provisions based on the language used and the surrounding preamble discussion and noted that subparts A and G of part 271 (which addressed the work provisions other than participation rates and penalties) and § 270.20 (which included the statutory goals of the program) as specific examples.

Commenters identified an additional item that would be helpful to include as a frame of reference—the nondiscrimination provisions found at section 408(d) of the Act. We decided to accept the suggestion and include these provisions in the final rule since commenters had not generally objected to including such material in the regulatory text of the NPRM, the inclusion will have informational value, and the change does not materially alter the scope of the rule. (See the discussion on ''Recipient and Workplace Protections'' for additional information.)

Likewise, based on comments we received on the domestic violence provisions in the proposed rule, we incorporated the statutory provisions on the Family Violence Option at a new § 260.52.

In the spirit of providing access to information, we included draft data collection and reporting forms as appendices to the proposed rules even though we did not intend to publish the forms as part of the final rule. We thought that the inclusion of the draft

forms would expand public access to this information and make it easier to comment on our data collection and reporting plans.

We believe that we succeeded in accomplishing these goals. Commenters responded in large numbers and specific detail to both the Paperwork Reduction Notice and the Proposed Rule. The changes to the final rule and to the companion appendices reflect our consolidated response to both sets of comments.

E. Scope of This Rulemaking

The NPRM and final rule reflect our decision to incorporate the work, data collection, and penalty provisions in a single regulatory package. While this decision resulted in a large rule, we think it enabled us to develop a more coherent regulatory framework and provided readers an opportunity to look at, and comment on, the many interconnected pieces at one time.

One downside of this decision was that the concentration of all these accountability provisions in one rule could have contributed to the perception among some commenters that the tone was punitive and the rule too penalty-focused. It is important to keep our broader regulatory and program agenda in mind as you assess the impact and meaning of this package. The total agenda includes rewards, as well as penalties, and tracks State performance along a variety of different measures, including job entries, success in the workplace, reductions in out-of-wedlock childbearing, and child poverty rates. It also includes annual reports to Congress on State program characteristics, recipient characteristics, and performance.

Our agenda also includes extensive research, evaluation, and technical assistance efforts. Throughout this preamble, you will find examples of how our efforts in these areas respond, in a nonregulatory fashion, to commenter concerns. It would be impractical and inappropriate to use this rulemaking as the vehicle for informing the public about the full agenda, but the ''Promising Practices National Conferences'' held in September 1998 and in Fiscal Year 1999 provide a good example. These meetings, which have the financial support of the Department of Health and Human Services (including both the Administration for Children and Families and the Substance Abuse and Mental Health Services Administration) and the Department of Labor, will provide State and local staff and other practitioners with practical ideas on a range of topics, such as preparing for the difficult task of moving clients with multiple barriers into work, creating jobs in isolated and high-risk communities, increasing support from noncustodial parents, promoting collaboration and achieving seamless delivery of services, changing welfare offices to job centers, promoting success in the workplace, and maintaining the investments in needy families.

F. Applicability of the Rules

As we indicated in policy guidance to the States and the NPRM, a State could operate its program under a reasonable interpretation of the statute prior to our issuance of final rules. Thus, in determining whether a State is subject to a penalty, we would not apply regulatory interpretations retroactively. We retained this basic policy, but modified it to clarify that the ''reasonable interpretation'' standard applies until the effective date of these final rules. You can find additional discussion of this policy at § 260.40 of the preamble.

III. Principles Governing Regulatory Development

A. Restrictions on Our Regulatory Authority

Under the new section 417 of the Act, the Federal government may not regulate State conduct or enforce any TANF provision except to the extent expressly provided by law. This limitation on Federal authority is consistent with the principle of State flexibility and the general State and congressional interest in shifting more responsibility for program policy and procedures to the States.

We interpreted this provision to allow us to regulate in two different kinds of situations: (1) Where Congress has explicitly directed the Secretary to regulate (for example, under the caseload reduction provisions, described below); and (2) where Congress has charged the Department of Health and Human Services (HHS) with enforcing penalties, even if there is no explicit mention of regulation. In this latter case, we believe we have an obligation to States to set out, in regulations, the criteria we will use in carrying out our express authority to enforce certain TANF provisions by assessing penalties.

In the preamble to the proposed rule, we indicated that we endeavored to regulate in a manner that did not impinge on a State's ability to design an effective and responsive program. A large number of commenters felt that our regulations would in fact have such a negative effect. In the subsequent discussion, you will note that we have revised provisions in key program areas that respond to these concerns.

At the same time, however, we remain committed to ensuring that States remain accountable for meeting TANF requirements. Thus, we will continue to monitor program developments so that we can make appropriate adjustments if programs fail to remain focused on TANF's statutory objectives.

B. State Flexibility

In the Conference Report to PRWORA, Congress stated that the best welfare solutions come from those closest to the problems, not from the Federal government. Thus, the legislation creates a broad block grant for each State to reform welfare in ways that work best. It gives States the flexibility to design their own programs, define who will be eligible, establish what benefits and services will be available, and develop their own strategies for achieving program goals, including how to help recipients move into the work force.

Under the law and the proposed rules, we indicated that States could implement innovative and creative strategies for supporting the critical goals of work and responsibility. For example, they could choose to expend funds on refundable earned income tax credits or transportation assistance that would help low-wage workers keep their jobs. They could also extend employment services to noncustodial parents, by including them within the definition of ''eligible families.''

To ensure that our rules supported the legislative goals of PRWORA, we indicated our commitment to gather information on how States were responding to the new opportunities available to them. We said that we reserved the right to revisit some issues, either through legislative or regulatory proposals, if we identified situations where State actions were not furthering the objectives of the Act.

A large number of commenters felt we had unduly limited State flexibility to design their programs, particularly with respect to expending funds in separate State programs, providing assistance to child-only cases, and continuing waivers, but also in areas like the definition of administrative costs, restrictions on domestic violence waivers that affected reasonable cause, and the definition of assistance.

We included some restrictions on State flexibility in the NPRM to protect against possible State policies that might undermine TANF goals or divert the Federal share of child support collections. However, in response to

these concerns and in recognition of the positive steps States have been taking to implement welfare reform, we have decided to remove some of the direct and perceived restrictions on State flexibility. We have also provided some important preamble language that helps clarify State flexibility to define needy families and spend both Federal TANF and State MOE funds in ways that support a wide range of families in diverse ways. We provide additional discussion of these changes and clarifications in subsequent sections of the preamble.

C. Accountability for Meeting Program Requirements and Goals

In the NPRM we recognized that States have enormous flexibility to design their TANF programs in ways that strengthen families and promote work, responsibility, and self-sufficiency. At the same time, however, TANF reflects a bipartisan commitment to ensuring that State programs support the goals of welfare reform. To this end, the statutory provisions on data collection, bonuses, and penalties are crucial because they allow us to track what is happening to needy families and children under the new law, measure program outcomes, and promote key program objectives.

Work

As we indicated in the NPRM, we believe the central goal of the new law is to move welfare recipients into work. The law reflects this important goal in a number of ways:

- Work receives prominent mention in the statutory goals at section 401 and the plan provisions in section 402;
- Section 407 establishes specific work participation rates each State must achieve;
- Section 409 provides significant financial penalties against any State that fails to achieve the required participation rates;
- Section 411 provides specific authority for the Secretary to establish data reporting requirements to capture necessary data on work participation rates; and
- Section 413 calls for ranking of States based on the effectiveness of their work programs.

The proposed and final rules reflect a similar, special focus on promoting the work objectives of the Act and ensuring that States meet the statutory requirements at sections 407, 409, and 411 of the Act. You should look at the rules in part 261, and the related preamble discussion, for specific details.

This Administration has repeatedly shown its commitment to promoting the work objectives of this new law. Before and since the legislation was passed, the President and the Administration have worked very hard to ensure that Congress passed strong work provisions and provided adequate child care funding and other program supports to help families making the transition from welfare to work.

These include the new Welfare to Work program (WtW), the Welfare-to-Work Tax Credit enacted in the Balanced Budget Act, Welfare-to-Work housing vouchers included in the Fiscal Year 1999 budget for the Department of Housing and Urban Development, and Job Access transportation grants.

WtW provides grants to States, localities, Indian Tribes, and other grantees to help them move long-term welfare recipients and certain noncustodial parents into lasting, unsubsidized jobs.

The Welfare to Work Tax Credit provides a credit equal to 35 percent of the first $10,000 in wages in the first year of employment, and 50 percent of the first $10,000 in wages in the second year, to encourage the hiring and retention of long-term recipients. (It complements the Work Opportunity Tax Credit, which provides a credit of up to $2,400 for the first year of wages to employers who hire long-term welfare recipients.)

Welfare-to-Work Housing vouchers will help current and former welfare recipients who need housing assistance to get or keep a job. Most of the housing vouchers (50,000 in FY 1999) will go to communities on a competitive grant basis.

The Transportation Equity Act for the 21st Century (TEA–21) authorizes $750 million over five years for competitive grants to communities to develop innovative transportation activities to help welfare recipients and other low-income workers (i.e., those with income up to 150 percent of poverty) get to work. (You can find more information about the Administration's initiatives at http://www.whitehouse/gov/wh/welfare.)

The President has also challenged America's businesses, its large nonprofit sector, and the executive branch of the Federal government to help welfare recipients go to work and succeed in the workplace.

In May 1997, the President helped to launch a new private-sector initiative to promote the hiring of welfare recipients by private-sector employers. The Welfare-to-Work Partnership, which started with 105 participating businesses, now includes over 10,000 businesses that have hired 410,000 welfare recipients. This partnership has produced a variety of materials to support businesses in these efforts, including the ''Blueprint for Business'' hiring manual and ''The Road to Retention,'' a report of companies that have achieved higher retention rates for former welfare recipients. You can find information about the Welfare to Work Partnership at http://www.welfaretowork.org.

The Small Business Administration (SBA) is addressing the unique and vital role of small businesses, which account for over one-half of all private-sector employment. It is helping small businesses make connections to job training organizations and job-ready welfare recipients. It is also providing training and assistance to welfare recipients who wish to start their own businesses. Businesses can receive assistance through SBA's 1–800–U–ASK–SBA and through its network of centers, shops, and district offices. Information on SBA's Welfare to Work initiative (W2W) and other activities are available through the SBA home page at http://www.sba.gov.

In addition, the Vice President has developed a coalition of national civic, service, and faith-based groups committed to helping former welfare recipients succeed in the workforce—by providing mentoring, job training, child care, and other supports.

On March 8, 1997, the President directed all Federal agencies to submit plans describing the efforts they would make to respond to this challenge. Under the Vice President's leadership, Federal agencies committed to hiring at least 10,000 welfare recipients over the next four years. Agencies have already fulfilled this commitment—nearly two years ahead of schedule. (You can find additional information on this effort at http://www.welfaretowork.fed.gov.)

Meeting the Needs of Low-Income Families and Children

In a number of different ways, the new law works to ensure that the needs of low-income children and families are met. First, it provides a guaranteed base level of Federal funding for the TANF programs. Then, in times of special financial need, it makes nearly $2 billion in additional funding available through a Contingency Fund and up to $1.7 billion available for loans to States. It also authorizes several studies to monitor changes in the situations of needy children and families that occur after enactment. For example, it requires us to report on how certain children are affected by the provisions of the new law. It also requires us to track whether a State's child poverty rate increases as the result of the State's TANF program and requires States to initiate corrective actions when such increases occur.

These regulations work to further the objectives of these statutory provisions.

Most importantly, they work to ensure that the use of Federal and State funds is consistent with the provisions and purposes of TANF, that States maintain their investments on needy families, that recipients and other workers have the protections available to them that are intended under Federal law, and that we collect data from States that are necessary to assess program performance.

IV. Discussion of Cross-Cutting Issues

Overview of Comments

As we indicated earlier in the preamble, commenters expressed a number of major concerns with respect to our policies on separate State programs, child-only cases, and waiver continuations. In particular, they said: (1) In part because of the uncertainty they created, the proposed rules would stifle innovation and undermine the States' ability to meet the needs of their families; (2) the proposed rules were overly prescriptive and burdensome, too concerned about accountability and the taking of penalties, and not focused on outcomes; (3) they undermined the partnership between the State and Federal governments, fostered an adversarial relationship, violated the compact between the States and Washington in creating TANF, or contravened Congressional intent (if not the law) in regulating State behavior in these areas; (4) we presumed State guilt when there was no evidence that States were taking advantage of loopholes to evade the TANF provisions; and (5) our strict penalty policies, promotion of ''work first'' strategies, and inattention to recipient protections could ultimately harm recipients (e.g., prevent them from attaining jobs that paid a living wage or accessing appropriate treatment).

We disagree with commenters that claimed that we exceeded our regulatory and statutory authority in the NPRM. However, because of the evidence we have seen about States' commitment to develop programs that are consistent with the goals of TANF, these final rules reflect some significant changes in our policies on these three issues. You will find additional details in the following discussion.

A. Separate State Programs

Background

Section 409(a)(7) of the Social Security Act permits States to assist eligible families by expending maintenance-of-effort funds (MOE) under ''all State programs.'' Thus, we recognize expenditures under the State's TANF program and/or separate State program(s). However, eligible families assisted through a separate State program are not generally subject to TANF requirements, including work participation requirements, child support collection requirements, the time limit on receipt of assistance, and data collection and reporting requirements. In other words, by definition, States operating separate programs avoid TANF requirements; they have more flexibility to use the funds available in these programs to help eligible families.

In the NPRM preamble, in a section entitled ''Maintenance-of-Effort (MOE),'' we stated that one of the most important provisions in the new law designed to protect needy families and children is the basic maintenance-of-effort (basic MOE) requirement in the TANF statute. This provision requires States to maintain a certain level of spending on welfare, based on historic (i.e., fiscal year (FY) 1994) expenditure levels. Because this provision is critical to the successful implementation of the law, Congress gave us the authority to enforce State compliance in meeting this requirement, and it received significant attention in the proposed rule.

We also directed readers to the data collection, work, and penalty provisions of the proposed rule, at parts 271–275, for provisions designed to: (1) ensure that States continue to make the required investments in meeting the needs of low-income children and families; (2) prevent States from either supplanting funds or using their MOE funds to meet extraneous program or fiscal needs; (3) give us adequate information to meet our statutory responsibility to determine what is happening in State programs; and (4) take a broad view of work effort, caseload reduction, and program performance.

We recognized that States have more flexibility in spending their State MOE funds than their Federal TANF funds, especially when they expend their MOE funds in separate State programs. However, at the same time, we reiterated concerns that we had first expressed in our policy guidance of January 1997, TANF–ACF–PA–97–1, that States could design their programs to avoid the work requirements of the new law or to avoid returning a share of their child support collections to the Federal government. Therefore, we proposed four measures to mitigate these potential negative consequences.

First, if we detected a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding either the work participation rates or returning the Federal share of child support collections, we proposed to deny reasonable cause for certain penalties. For avoiding the work participation rates, reasonable cause relief would not be available with respect to penalties for failure to: meet minimum participation rates, implement time limits, maintain assistance to a custodial parent who cannot obtain child care for a child under age 6, and reduce assistance for recipients refusing without good cause to work. For diverting the Federal share of child support collections, reasonable cause would not be available with respect to the penalties for failure to: meet minimum participation rates, implement time limits, reduce assistance for recipients refusing without good cause to work, and cooperate with paternity establishment and child support enforcement requirements.

Second, for the same two diversion situations and penalties that we just discussed, we proposed that a State would not be eligible for a penalty reduction on the basis of making substantial progress during corrective compliance unless it corrected the diversion.

Third, we proposed to deny a State access to two possible reductions in the penalty for failing to meet work participation rates unless it ''demonstrates that it has not diverted cases to a separate State program for the purpose of avoiding the work participation requirements.''

Finally, we proposed to require that a State collect case-record data on participants in separate State programs if it wished to receive a high performance bonus; qualify for work participation caseload reduction credit; or be considered for a reduction in the penalty for failing to meet the work participation requirements.

In making these proposals, we noted that the Secretary has considerable discretion in determining whether to reduce penalties or grant a good cause exception. We argued that work was the most critical component in achieving the purposes of TANF and these limits on the relief on the work penalty were appropriate to prevent circumvention of this purpose.

We went on to say that implementation of the child support provisions was the other key component to achieving self-sufficiency. We spoke about the major Federal role in child support enforcement (particularly with regard to the operation of the New Hire Directory and the Federal Parent Locator Service), the continuing Federal interest in the effectiveness of these programs, and the continued Federal financial

commitment, under TANF, for needy families whose children have been deprived of parental support and care.

We expressed concern not just about the unintended, negative consequences of diverting cases to separate State programs for the Federal budget and the Federal government's ability to ensure an effective child support program, but also about reduced State accountability for ensuring that needy families take appropriate steps towards achieving self-sufficiency. We indicated that, in the interest of protecting the key goals of TANF, it was appropriate for the Secretary to use the discretion available to her to forgive penalties and set penalty amounts so as to ensure that States do not divert cases inappropriately.

We announced plans to monitor States' actions to determine if they constituted 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 the specified types of penalty relief.

We said a State would have 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.

We placed the specific regulatory provisions associated with these policies in §§ 271.51(a), 271.52(b), 272.5(c) and (d), and 272.6(i)(2) of the proposed rule.

We also indicated our intent to propose that States seeking to receive high performance bonuses would be required to report on families served by separate State programs in the coming NPRM on high performance bonuses.

Comment Overview

We received dozens of comments on these proposals related to implementation of separate State programs. The commenters universally opposed the proposals and presented a variety of objections. Most wanted the provisions deleted entirely, but some suggested specific changes that we could make to the regulatory provisions if we did not delete them.

In summarizing these extensive comments, we first address those directed at deleting the provisions. Then we address the comments about possible refinements that we could make.

Commenters objected to both the negative tone of these rules and their effect in undermining State and local flexibility to serve needy families, including those with multiple barriers to employment. They noted that several States have created or were considering separate State programs to serve their most vulnerable families, such as legal noncitizens with poor language and literacy skills; single parents taking care of a disabled child; citizens not disabled enough to qualify for SSI, but unable to work 20 to 30 hours a week; refugees; and victims of domestic violence. They expressed fears that the proposed rules, if not modified, could have a significant chilling effect on the development of innovative approaches to serve working families and the most vulnerable populations. That is, States would be conservative in extending assistance to hard-to-serve or working families out of fear of incurring more and larger penalties. In fact, some commenters argued that, since TANF was not an entitlement program, some States might choose not to give such individuals assistance due to concerns about the penalty consequences.

Some argued that the proposals were contrary to the statute and Congressional intent. Their comments encompassed the following general points: (1) There is no statutory basis for the links between penalty relief and the operation of separate State programs. In deciding penalty relief, we should be looking only at the TANF program. (2) The statute clearly authorizes States to spend their basic MOE funds in separate State programs that are not subject to TANF requirements. Our proposals would punish States that elected to use this authority and preempt State and local authority over their own programs. (3) Our proposals would deny penalty relief where the statute requires such relief. (For example, the statute says that the Secretary ''shall'' reduce work participation penalties based on degree of noncompliance; thus, this reduction is not discretionary. The statute also provides that the Secretary could impose lesser penalties on a State that fails to correct a violation fully under corrective compliance.) Categorically denying penalty relief because of a State's legal and allowable actions on separate State programs is not appropriate.

In lieu of the proposed policies, many commenters recommended that we monitor State actions to determine if a State is pursuing legitimate policy objectives or avoiding TANF-related requirements. They noted the lack of evidence so far that States were abusing the flexibility available under the law; their view was that States have been using separate programs for constructive and appropriate purposes. One noted, if a few States try to take advantage of the flexibility in the law, Congress and the Department can work together to figure out an effective way to stop them.

Commenters also argued that the penalty consequences for operating separate State programs exceeded the magnitude of the purported offense. As a case example, a State could be operating a separate State program that represented only a small percent of its MOE expenditures, it barely missed its participation rate, and it had suffered a catastrophic natural disaster during the course of the year. The argument is that the State should get reasonable cause or penalty reduction because the State's failure could be attributed entirely to the natural disaster, the separate State program was an incidental matter, and, by any objective measure, the State's degree of noncompliance was minimal. Absolute loss of penalty relief in such a case would be arbitrary, at a minimum.

A related comment was that we should limit denial of penalty relief to situations where there is a direct relationship between the penalty at issue and the conduct of the State. Commenters argued that we should not deny penalty relief on four penalties when the State actions at issue were probably only directly connected to one penalty.

One suggestion for making the consequences more proportionate to the ''offense'' would be to not totally preclude eligibility for penalty relief, but to consider State policies on separate State programs as one of several factors affecting how difficult the penalty standard was for a State to achieve.

Others noted that we had not used clear or consistent language when articulating how a separate State program might affect the availability of penalty relief. The lack of clarity would make it difficult for States to predict the effect of these provisions and could produce unfair, arbitrary, and inconsistent outcomes. It could also mean that we unduly deter States from assisting needy families.

Commenters raised the following questions about the meaning of our proposals: (1) What is meant by ''purpose'' and ''effect''? (2) Are the terms meant to define different concepts? (3) Does ''purpose'' refer to ''sole purpose'' or ''one of the purposes''? (4) How would we determine, or a State prove, whether a

separate State program has the specified ''purpose'' or ''effect''? (5) What is meant by a ''significant'' pattern of diversion? and (6) What criteria would we use to judge whether a State adequately demonstrated that it had not diverted cases to avoid penalties or divert child support? Relatedly, they objected to the fact that our proposed rules shifted the burden of proof about intent onto the States and to the difficulties attendant in proving a negative proposition.

Among the suggestions offered for addressing these concerns were: (1) Clarify the circumstances when a State will not face loss of penalty relief (e.g., identify reasonable and legitimate policy bases for separate State programs, using examples); (2) allow an up-front assessment of the acceptability of separate State programs that States could rely upon in deciding what options to pursue under separate State programs; (3) create clear, objective criteria for determining when a separate State program would trigger adverse consequences; and (4) err on the side of flexibility if we cannot make highly accurate determinations that programs are deliberately designed to avoid Federal rules.

Overall Response

When we were developing the proposed rules, obviously we were very concerned that States would use the flexibility available through separate State programs to avoid work participation requirements, divert the Federal share of child support collections, and otherwise undermine the goals or provisions of TANF. Within the authority that we have to make decisions on State penalties and bonuses, we proposed specific regulatory policies with respect to penalties, bonuses, and reporting in response to that concern.

However, as we have seen these programs evolve, our concerns about possible abuses have diminished. As commenters pointed out, States are generally using separate State programs to serve a variety of policy purposes consistent with the goals and provisions of PRWORA. For example: (1) They are supporting work and self-support—through State earned income credits, transportation, child care, or other work-related assistance; (2) they are helping families with special needs who are unable to engage in work activities for the requisite number of hours—e.g., families dealing with substance abuse, incapacity (or caring for a disabled child), literacy or ESL needs; (3) they are working to increase the economic viability of families—by providing financial aid for post-secondary education and support for other education or training activities, including activities for noncustodial parents; and (4) they are assisting individuals ineligible for the TANF program (e.g., using State funds to provide ''Food Stamp'' benefits for legal aliens who lost eligibility for assistance under PRWORA).

In the few cases where separate State programs are serving families that we would normally expect to see in the TANF program, we often see the same or similar level of work activity required under TANF; e.g., Florida's two-parent program and Maine's Parents-as-Scholars program are part of separate State programs, but expect parents to participate at the TANF level of hours, or more.

As commenters pointed out, if we developed policy to force States to provide services to families within the confines of the TANF statute, we would not necessarily achieve that end. An equally possible outcome could be that States would elect not to serve families, especially those hard-to-serve families that would be the most difficult to accommodate under the standard TANF rules.

We considered ways to redraft the NPRM policy so that we would not have the ''chilling'' effect on State innovation that commenters feared. A variety of options were available to us, ranging from wording changes, to clarifications of key terms, to setting up a process for pre-clearance of State proposals, to reducing the potential negative consequences to States if we found inappropriate diversion.

However, we were concerned that: (1) None of these options totally eliminated the potential ''chilling'' effects on State innovation; and (2) existing evidence did not indicate that there was a problem sufficient to justify such a strong policy response.

Thus, the final rules eliminate the proposed link between a State's decisions on implementing a separate State program and its eligibility for penalty relief. In particular, we removed the provisions related to separate State programs that were in the proposed rules at §§ 271.51(a), 271.52(b), 272.5 (c) and (d), and 272.6(i)(2).

However, we remain concerned about the possibility that States could use separate State programs to avoid the TANF work requirements (particularly for two-parent families) and to divert the Federal share of child support collections. Thus, at §§ 261.41(e) and 265.3(d)(1), we retained the NPRM provisions (which were at §§ 271.41(e) and 275.3(d)(1)) that, as a condition for receiving caseload reduction credits or a high performance bonus, States must report data on separate State programs and the recipients in them, through the SSP–MOE Data Report. However, we deleted the language that was in § 275.3(d)(1)(iii) indicating that States needed to submit the SSP–MOE Data Report if they wanted to be considered for a reduction in the penalty for failing to meet the work participation requirements. Also, as we discuss in the next section of the preamble, by changing the definition of assistance, we have limited the types of programs covered by this reporting. We have also reduced the types of data elements that must be reported.

This data collection is part of a broad strategy to monitor the scope and nature of separate State programs. This strategy starts with four data sources: (1) The quarterly TANF Financial Report (Appendix D); (2) the MOE section of the annual report (at § 265.9(c) and Appendix I); (3) the quarterly SSP–MOE Data Report; and (4) quarterly reports on child support collections. We would review data from these sources to identify States that might be using separate State programs either for the purpose of avoiding work or diverting the Federal share of child support collections. We would then make a preliminary assessment whether these States were operating separate State programs that were consistent with TANF goals. If we needed additional information for this assessment, we could supplement the official information with information gathered in single State audits or special studies (such as studies conducted by the Department's Office of the Inspector General).

The data collection on separate State programs will help enable us to: (1) Monitor the nature of these programs; (2) determine the extent to which cases are being shifted to separate State programs; (3) determine whether such shifts are having an adverse effect on the two work participation rates or the Federal share of child support collections; (4) develop a sound policy response in the event of adverse effects; (5) better assess a State's claim for a caseload reduction credit or high performance bonus; and (6) decide if a State's policies with respect to separate State programs should affect its ranking under section 413(d) of the Act.

In the proposed rule, we did not mention that the creation of separate State programs might affect the annual rankings of States based on the success of their work efforts. However, we have concluded that there could be circumstances under which we would

want to alter a State's ranking on this basis. For example, suppose the State with the highest percentage of placements in long-term jobs for its TANF cases achieved its placement rate and ranking by shifting all of its hard-to-serve cases from TANF to separate State programs. Obviously, this State would not merit a ranking as one of the five most successful States. We will consider if a State's separate State program had the effect of avoiding work requirements as one factor in determining the annual ranking of successful State programs.

We will incorporate a full analysis of the information that we have gathered on what has been happening with separate State programs in our annual report to Congress. For example, we intend to address issues such as: (1) What is the basic nature of these programs; (2) have there been changes in their size or scope; (3) who do these programs serve; (4) how do they differ from TANF recipients; (5) what types of benefits do they provide; (6) to what extent do work participation rates apply; (7) what participation rates are being achieved; and (8) is there any evidence of the diversion of Federal child support collections. By looking at this range of issues, we will be better able to assess whether States have diverted individuals from TANF with the apparent purpose of avoiding TANF program requirements.

In the High Performance Bonus guidance that we issued on March 17, 1998 (TANF–ACF–PI–98–01), we noted that a State's success in meeting TANF performance goals could be affected by its decision to fund a separate State program with its maintenance-of-effort (MOE) dollars and that such actions might advantage one State over another. For example, if a State had a separate State program similar to TANF in which it put recipients who were more difficult to employ, its TANF performance results could be unfairly inflated. In such cases, we would need to consider including outcomes for the caseload in separate State programs in the performance measures. We said we would analyze separate State program data, as well as other information we receive on the characteristics of the caseload and the nature of benefits provided in separate State programs, in assessing how and whether to adjust a State's TANF performance data.

On the issue of child support collections more specifically, while States have new flexibility in the way that they administer their TANF programs, they must continue to share a portion of child support collections with the Federal government. The need to share TANF-related collections could serve as a possible disincentive for States to pass through the full amount of child support to families and could create an incentive for States to serve needy families through separate State programs. State spending in these separate State programs continues to count under the basic MOE requirements, but States do not need to share the child support collected on behalf of families served by these programs.

At this point, we have no evidence that States are diverting child support collections. For example, we are not seeing dramatic decreases in the Federal share of collections or changes in the average collection per case. In the meantime, the Administration is engaged in a dialogue with stakeholders on child support program financing issues to look at ways to address these and other related concerns. We will work with these stakeholders and with Congress to develop any necessary legislation.

As a number of commenters suggested, under these final rules, we have adopted a strategy that includes gathering information, monitoring developments, and keeping our options open regarding future actions. Through our data collection, we will obtain substantial information on the characteristics of separate State programs, the families they serve, and the benefits they provide. This information will help us assess their potential impact on the achievement of TANF goals. We will consider proposing appropriate legislative or regulatory remedies, consistent with our legal authority, if we find that States are using the flexibility available under these rules to avoid work requirements, divert child support collections, or otherwise undermine the goals of TANF. However, we will not put any significant policy change into effect without appropriate prior consultation with States, Congress, and other interested parties.

Separate State Program Reporting

Comment: Commenters also argued that the stringent reporting requirements and the potential loss of caseload reduction credits, eligibility for high performance bonuses, and certain penalty relief for States that failed to comply with the reporting requirements also discouraged States from implementing innovative separate State programs.

Response: As we discuss in the preamble for § 260.31, we have made significant changes to the proposed definition of assistance. These changes have a significant effect on the scope of the disaggregated and aggregate reporting for both TANF and separate State programs. Like the TANF Data Report, the SSP–MOE Data Report only captures information on families receiving ''assistance.'' Therefore, States do not have to provide detailed program and family characteristics data for families receiving other kinds of benefits and work supports. Thus, the data collection in the final rules responds to the commenters' concerns about the problems that would be inherent in requiring detailed reporting of case-record information from programs that bore little or no relationship, in substance or administration, to those providing traditional welfare benefits.

However, information on separate State programs is still very important under the final rule. Thus, we still expect States to submit SSP–MOE Data Reports containing data on separate State programs that are similar to the TANF program data as a condition of receiving caseload reduction credits or high performance bonuses. Also, we have strengthened the information we will collect on SSP–MOE spending by expanding reporting under the TANF Financial Report and expanding information on all MOE programs in the annual report (as discussed in § 265.9 and presented in Appendix I). Taken in combination, these data will help us ensure that each State has met its basic MOE requirement, properly evaluate State reports on caseload reduction credits, assess overall State performance, and report on program characteristics to the public, to the Department, and to Congress. We could also use the information to identify areas in which regulatory or legislative changes may be necessary.

Under the final rule, we do not require that States submit the SSP–MOE Data Report in order to qualify for penalty relief because the information in the report is not germane to the determination of its penalty amount.

The information in the SSP–MOE Data Report is germane to determining if States have achieved creditable caseload reductions and to assessing a State's overall performance under TANF. Thus, as stated previously, the final rule does require that a State submit an SSP–MOE Data Report if it wants to receive either a High Performance Bonus or a caseload reduction credit (though with reduced data elements).

Failure of a State to submit the MOE information required in either the TANF Financial Report or the annual report could affect a State's liability for a

reporting penalty or an MOE penalty, depending upon the nature of the failure.

You should review the preamble discussion at § 265.9 and Appendix I for information on annual aggregate reporting for MOE programs and the regulation at § 265.3(b) and (d) and appendices E, F, and G for more detailed information on the data collection for separate State programs in the SSP–MOE Data Report.

Finally, in the policy announcement and proposed rule, we advised States to think carefully about the risks to the long-term viability of their TANF programs if they relied too extensively on separate State programs to meet their MOE requirements. States cannot receive contingency funds unless their expenditures within the TANF program are at 100 percent of historic State expenditures. Thus, excessive State reliance on expenditures outside the TANF program to meet MOE requirements could make access to contingency funds difficult during economic downturns.

This restriction on Contingency Fund MOE raised some concerns on the part of commenters. However, it represents a clear reading of the statutory language. Thus, we have made no change in this final rule.

B. Waivers

Background

We have no direct interest in regulating section 415 of the Act; however, the continuation of waivers by a State might affect our application of certain of the penalty provisions within a State, specifically those regarding work and time-limit requirements. Thus, in order to administer the penalty provisions, we are providing notice concerning the rules that we will use in applying the penalties.

To improve access to, and understanding of, the regulations on waivers, we have moved all the waiver provisions to a new subpart C of part 260 of the final regulation and consolidated our preamble discussion in this section of the preamble. First, we summarize the NPRM provisions that appeared in various places in the NPRM and provide an overall summary of the comments. Then we discuss each provision in the final regulation, section by section, as well as the related comments.

Summary of NPRM Waiver Provisions

Under section 415, States that received approval for welfare reform waivers under section 1115 before enactment of PRWORA (August 22, 1996) have the option to operate their TANF programs under some or all of these waivers. For States electing this option, provisions of TANF that are inconsistent with the waivers do not take effect until applicable waivers expire.

Section 415 also provides for delaying the effect of provisions of TANF related to waivers approved after enactment, but prior to July 1, 1997. However, we do not address this specific provision in these rules because we approved no section 1115 waivers after enactment.

The meaning of the term ''waiver'' is important because it governs the scope of section 415. The NPRM defined waiver as consisting of both the specific technical provisions in the approved waiver list and the AFDC and JOBS requirements under prior law that did not need to be waived, but were integral and necessary to achieve the policy objective of the waived provision. Thus, the proposed definition of waiver depended on determining a State's intent.

The meaning of the term ''inconsistent'' is important because it governs the extent to which a State may delay the implementation of certain TANF requirements under section 415. The NPRM defined inconsistent to mean that complying with a TANF requirement would require a State to change a policy reflected in an approved waiver.

The proposed rule applied these definitions to determine when a State's waivers were inconsistent with the TANF work and time-limited assistance requirements under sections 407 and 408(a)(7) of the Act, respectively. To the extent that we determined inconsistencies existed, we would have based the work participation rates and time-limit exceptions on the waiver provisions rather than the requirements of sections 407 and 408(a)(7).

In particular, the NPRM allowed inconsistencies in two areas covered by section 407 (i.e., related to work). The first related to the types of activities that could count as work activities. Under the proposed definition, in addition to the expanded or revised activities specifically included in the technical waiver list (such as increased hours of job search), a waiver would have included the JOBS work activities that did not require waivers in order to be part of the State's program. The NPRM recognized that: (1) States had asked for waivers of the statutorily prescribed JOBS activities in order to provide what they considered to be the right mix of work activities; and (2) part of that mix included activities that did not require waivers under prior law. Thus, we would have considered such activities to be part of the waiver.

The second work inconsistency recognized in the NPRM related to the hours of participation necessary for a recipient to be counted as engaged in work for the purpose of calculating the participation rates. To the extent that the mandated hours of work in the waiver reflected the individual circumstances of the participant, either due to criteria in the waiver itself or under an individual self-sufficiency plan, we would have recognized an inconsistency with the fixed hours required by section 407.

The NPRM did not recognize, as inconsistent, waivers that served to increase the mandated hours of work for classes of recipients. The NPRM reasoned that there was no inconsistency in this case because TANF required those classes of recipients to participate for a greater number of hours than prior law required.

Further, the NPRM did not recognize any inconsistencies for exemptions that the State had had for work participation under AFDC. Under the demonstrations, States had obtained waivers to change the exemptions of individuals from participation in JOBS. We had assumed that the purpose for changing the exemptions was to require more individuals to participate. Since we believed the State's purpose was increasing participation, we reasoned that maintaining the AFDC statutory exemptions was not necessary or integral to achieving the waiver's purpose. Therefore, the NPRM did not recognize the AFDC statutory exemptions as part of the waiver for determining inconsistency with TANF.

In applying the definitions of ''waiver'' and ''inconsistent'' to time limits, the proposed rule recognized only those waivers that provided for terminating cash assistance because of the passage of time. We said that if a State would have to change its waiver policy on terminating assistance, due to the TANF time limit at section 408(a)(7), it could apply its waiver time limit instead of the TANF time limit. In general, individuals subject to a State time limit would concurrently be subject to the TANF time limit. Those individuals who were exempt from the State waiver time limit would not be subject to the TANF time limit until the State's waiver expired. In addition, if the extensions of the receipt of assistance under the State waiver limit exceeded the 20-percent limit on extensions allowed under TANF, the State's extensions would govern.

The NPRM did not recognize inconsistencies for States with waivers that: (1) had time limits that triggered work requirements, but did not result in the termination of assistance; or (2) had implemented comprehensive welfare reform initiatives under waivers that consciously chose not to include policies time-limiting assistance. Thus, in either of these situations, the State would have had to comply with the TANF time-limit requirements.

The NPRM also recognized one other type of inconsistency. TANF cases that were part of a research group, whose treatment policies were being maintained for the purpose of continuing an impact evaluation, could continue to be fully subject to prior law policies, except as modified by waivers. Further, the NPRM allowed for exclusion of such cases from the numerator and denominator of the work participation rates. Maintaining different requirements for these groups was necessary to avoid compromising the evaluation. Information on the research group would be the primary basis for impact and cost-benefit analyses of the effects of demonstration provisions and would be essential to all major components of an evaluation.

In the interest of balancing State flexibility with accountability and preserving the purposes of TANF (particularly those of encouraging work and focusing TANF on the provision of temporary support to families as they move to self-sufficiency), the NPRM also proposed certain other requirements. Specifically it: (1) Required Governors to certify waiver inconsistencies that a State believed apply in order to have the waiver rules apply in the penalty determinations; (2) denied certain forms of penalty relief to States continuing waivers that were inconsistent with TANF if States failed to meet work participation rates or time-limit requirements; and (3) proposed that we would publish information related to a State's success in meeting work participation rates and time-limit restrictions, as measured against both TANF and waiver requirements.

Because States operating under alternative waiver requirements could have an advantage compared to other States, we proposed that States continuing inconsistent waivers would not be eligible for a reasonable cause exception from a related work participation or time-limit penalty. Nor would they be eligible for a work participation rate penalty reduction based on severity of the failure or under our discretionary authority, as otherwise allowed in accordance with § 271.51(b)(3) or (c) of the NPRM. Further, in developing a corrective compliance plan, the NPRM proposed that a State would have to consider modifying its alternative waiver requirements as part of that plan. If a State then continued its waivers and failed to correct the violation, the NPRM proposed that it would not be eligible for a reduced penalty for noncompliance regardless of whether the State made significant progress towards achieving compliance or if the State's failure to comply was attributable to natural disaster or regional recession.

Overview of Comments

With few exceptions, the comments from States, organizations representing States, other organizations, and Congress relating to the proposed rules governing waiver inconsistencies strongly opposed our proposals.

Specifically, most commenters argued that our application of the proposed rule violated the spirit of the law and Congressional intent to encourage waivers. To support this argument, they cited the language at section 415(c), which directs the Secretary to encourage States to continue operating their waivers. They argued that our narrow interpretation of waiver inconsistencies, along with our decision to deny penalty relief, would discourage continuation of waivers and violated the principle of State flexibility in PRWORA. They asserted that the proposed policies would force States to abandon their waiver programs.

Finally, a number of commenters indicated that they found the definitions of ''waiver'' and ''inconsistent'' difficult to understand and apply to specific factual situations.

Overall Response

In response to the many comments we received, the final rules take a different approach to the relationship between the continuation of AFDC waivers and the TANF requirements. While the definition of ''inconsistent'' remains substantially the same, we have modified the definition of ''waiver'' to eliminate the proposed focus on intent. The new definition reflects the common use of the term, which refers to the policies that implement a particular area of reform in the demonstration. The revised definition allows the waiver to include a cluster of AFDC provisions with regard to work participation. Thus, it modifies how we would determine when work waivers are inconsistent.

We also made one change in the application of the term ''inconsistent'' to time limits; after further review, we believe that the NPRM did not adequately recognize a certain type of inconsistency.

Generally, the revised definition of ''waiver'' continues to reflect the philosophy that a narrow, technical definition would be inappropriate. Rather, as reflected in common usage, the term should recognize that States rarely implemented the technical waivers of the former section 402 of the Act in isolation. Instead, technical waivers were generally part of a cluster of policies and requirements related to administering a component of a State's welfare program. For example, States implemented components related to time limits, family caps, work activities and requirements, treatment of teen parents, income and resource eligibility, and treatment of two-parent families. Although the substantive policies making up the components and the combination of components differed from demonstration to demonstration, these component areas were the core elements of the reform efforts in various State demonstrations and were commonly referred to as waivers.

In the discussion that follows, the term ''waiver'' could have two distinct meanings; it could refer to either the technical waiver that was explicitly approved or the component of the demonstration. To avoid confusion, when we mean the technical use of the term (i.e., the waiver of an actual provision of former section 402 as reflected in the waiver list in the demonstration's terms and conditions), we will use the term ''technical waiver.'' When we simply use the term ''waiver,'' we are using it (as defined in these regulations at § 260.71) to mean the cluster of demonstration policies that the State implemented under its technical waiver. It is this broader definition that we will use to determine inconsistencies. The requirements and policies making up a waiver begin with one or more technical waivers, but could also include one or more related provisions of prior law.

The NPRM recognized this concept of including prior law provisions as part of its definition of waiver, but it depended on the State's intent in seeking the technical waiver to determine which AFDC provisions should be included. Many commenters objected to this reliance on the State's intent to operationalize a broader waiver definition. The final rule contains a simpler and more objective definition based on the demonstration component of which the technical waiver is a part.

Since our penalty authority that might be affected by waiver inconsistencies is related to work requirements at section 407 and time limits at section 408(a)(7),

we use those two sections to define the waiver components of work and time limits. We also limit our regulatory consideration of waivers to whether the waiver components that relate to work requirements and time limits are inconsistent with the respective provisions of the Act (i.e., section 407 for the work participation component and sanctions and section 408(a)(7) for the time-limit component). To the extent that a State's policies in the component area differ from the TANF policies, we will follow the waiver policies in making penalty determinations. You can find further discussion of the application of this definition in the section-by-section discussion that follows.

Although some commenters objected to our attempt to balance State flexibility and accountability, accountability to the purposes of TANF remains important under the final rule. We believe our modified approach will ensure accountability while allowing waiver policies to continue. We recognize that States, whether continuing waivers or not, have generally made serious and concerted efforts to promote the TANF objectives as they have implemented their programs. Further, as more and more States reach or approach the end of their waivers, our concerns about delays in the implementation of the TANF provisions have diminished. By the effective date of these rules, waiver authority will have expired for 14 States, and it will expire for the remaining 32 demonstration States within a few years. Moreover, for some of the remaining demonstration States, the limited scope of their waivers (e.g., limited to pilot sites or limited classes of recipients) means that the TANF provisions will be implemented broadly within the State, in spite of continuing waivers. Also, some of the remaining demonstration States have chosen to terminate waivers or to adopt modified policies that are more consistent with TANF than the original waivers.

Discussion of Specific Comments and Responses, by Section

(a) Section 260.70—What Is the Purpose of This Subpart?

We added this section to the regulation to clarify that the Department's authority and interest in identifying waiver inconsistencies is limited to the determination of penalties in three areas: (1) Failing to meet the work participation requirement; (2) failing to impose sanctions on nonparticipants; and (3) failing to meet the time-limit requirement.

Comment: A number of commenters asserted that we had totally exceeded our authority in regulating in this area. Some cited section 417 and said its provisions prohibited us from defining waiver inconsistencies at all, leaving authority for reasonable interpretation to individual States. Also, some commenters believed we should give States full authority to determine the extent to which waiver inconsistencies apply.

Response: We added this section to the final rule to clarify our interest in promulgating regulations on State waiver policies. In neither the NPRM nor the final rule have we shown any direct interest in regulating section 415, per se; however, continuation of waivers might affect the application of certain of the penalty provisions for a State, specifically those regarding work and time-limit requirements (under sections 407 and 408(a)(7) of the Act). Thus, we have the authority and responsibility to regulate in this area. In order to administer the penalty provisions on work and time limits fairly, we need to provide notice concerning the rules that we will use in applying these penalties. We limit our regulatory consideration of waivers to whether the waiver components relating to sections 407 and 408(a)(7) are inconsistent with the respective provision. To the extent that a State's policies in the component area are inconsistent with TANF policies, we will follow the waiver policies in making penalty determinations.

Comment: A few commenters specifically questioned the legitimacy of our stated objective for regulating in this area—to try to balance State flexibility to continue and test innovations begun under welfare reform waivers with accountability to the purposes of the TANF, particularly related to work and time-limit requirements. As some commenters noted, section 415 does not ''ask HHS to balance State policies against the virtue of the law.''

Response: Section 415 contains ambiguity in using the terms ''waiver'' and ''inconsistent'' without defining them. The Department's exercise of its work and time-limit penalty authority in a rational manner requires that we define those terms. As they are ambiguous on their face, we must look at Congressional intent. In this case, we find it necessary to try to balance the two potentially conflicting purposes of accountability and State flexibility to determine the meaning of the terms.

(b) Section 260.71—What Definitions Apply to This Subpart? (§ 270.30 of the NPRM)

In the final rule, we retain the definition of ''inconsistent'' given in the NPRM. We define inconsistent to mean that complying with the TANF work participation rates or sanction requirements at section 407 of the Act or the time-limit requirement at section 408(a)(7) of the Act would necessitate that a State change a policy reflected in an approved waiver.

However, as previously discussed, we have revised and simplified the definition of waiver. In the final rule, we define a waiver as consisting of the work participation or time-limit component of the State's demonstration project under section 1115 of the Act. The component includes the revised AFDC requirements indicated in the State's technical waiver list, as approved by the Secretary under the authority of section 1115, and the associated AFDC provisions that did not need to be waived.

Thus, the final rules for determining whether an inconsistency related to work exists depend on the existence of a technical waiver corresponding to any of the cluster of provisions included in section 407. These provisions include: allowable work activities; mandated hours of, and exemptions from, work participation; and applicable sanctions for noncompliance with work requirements. Under the modified definition of waiver, if a State has any single technical waiver enumerated in its list of approved waivers that corresponds to any provision of section 407, it may incorporate prior AFDC (and the related JOBS) work participation rules that were part of the cluster of policies implemented under the waivers. Under the final rule, the inclusion of prior law as part of the waiver does not depend on the original purpose or objective of the State in seeking approval of the waiver.

Finally, we have added definitions for ''control group'' and ''experimental group'' that recognize the definitions included in the terms and conditions of the State's demonstration. The NPRM had special rules for research, control, and experimental groups in States that were continuing evaluations to avoid tainting the evaluations. However, it did not define any of those terms. The final rule retains the basic policies that were in the proposed rules, but refers only to ''control'' and ''experimental'' groups. The revisions have the effect of making the policy clearer and addressing the concern of one commenter that the original terminology was not consistent

with its waiver approval and could undermine its ability to continue its evaluation.

Comment: Commenters generally supported certain inherent concepts of the proposed definitions for ''waiver'' and ''inconsistent.'' In particular, they agreed that ''waiver'' should not include only the technical provisions listed in the documents approving the State's waivers, but should also encompass related and integral provisions of prior law. Similarly, they generally agreed that the term ''inconsistent'' should apply where a State would need to change its waiver policies in order to comply with TANF.

However, many commenters asserted that the proposed rules did not sufficiently recognize prior law as being integral to specific waivers. Thus, they argued the NPRM provisions would compel States to abandon policies they had implemented under waivers.

Many also objected that we presupposed State objectives in obtaining work and time-limit waivers and thus arbitrarily narrowed the breadth of applicable inconsistencies. In particular, they disagreed with our characterizations of the purpose of the waivers that eliminated exemptions from JOBS participation requirements under AFDC law and that increased the number of hours of mandatory work participation for certain classes of recipients, believing they were too limited. (Under the proposed rules, we would have disallowed inconsistencies applicable to these types of waivers based on the rationale that TANF itself eliminated prior law work exemptions and expanded hours of required work participation for these affected classes of recipients, and thus TANF requirements were consistent with the purpose of State waivers.) In effect, the commenters argued that States increased their work requirements to establish the appropriate universe of recipients who should be required to work and the appropriate level of work participation. They noted that these stated purposes were analogous to the purpose we had already recognized in the NPRM for accepting AFDC work activities as part of the waiver, i.e., to find the appropriate mix of participation activities.

A number of commenters further argued that section 415 did not confer on the Secretary the authority to judge a State's objectives.

Response: The final rules reflect our continued belief that regulating on how a State's waiver policies would affect the application of certain penalty provisions is well within our statutory authority. However, we recognize that the NPRM's reliance on our ability to judge the State's purpose in seeking a specific technical waiver was problematic, given the limited documentation available on the specific purposes of particular waivers. Therefore, we have recast the definition in terms of an objective demonstration component. Components were commonly recognized as parts of the demonstration and are readily identifiable for penalty determination purpose; one merely has to associate a technical waiver relating to work requirements or time limits with the corresponding TANF provision that is subject to penalty. Thus, while maintaining the concept that ''waiver'' includes both the technical waiver and some portion of the former AFDC provisions, we have revised the definition to remove its reliance on the State's purpose.

You can find a further discussion of the application of the new definition for work and time-limit policies at §§ 260.73 and 260.74.

Comment: Some of these commenters offered the perspective that a waiver should encompass the whole of prior AFDC law as part of the State's welfare reform strategy, not just specific individual waivers and limited related extensions of prior law.

Response: We disagree with the commenters that Congress intended waivers to cover the whole of prior AFDC law. Section 415 allows States to continue ''one or more waivers to the extent they are inconsistent.'' The fact that it refers to one or more waivers and does not use the broader term, demonstration, in describing what is to be compared for inconsistency, indicates that Congress intended the determination of inconsistencies to be made on a more specific basis.

Comment: A number of commenters recommended that we modify the definition of ''inconsistent'' to include any prior law policy in effect under its demonstration that, if continued, but not recognized as inconsistent, would give the State reason to believe that it was at risk of being subject to a TANF penalty.

Response: We addressed this concern to some degree in the final rule by changing the definition of ''waiver.'' A State may continue prior law policy that is part of a demonstration component area (e.g., work requirements) for which the State has a waiver. Continuation of prior law policy that is not in a policy area that is subject to penalties under TANF (i.e., not related to sections 407 or 408(a)(7)) is outside the scope of this final rule and is left to State discretion.

We declined to change the definition of ''inconsistent'' to mean a situation in which the State believes that continuing the policy would put it at risk of a penalty. Congress did not intend to eliminate penalties for States with waivers. Rather, it intended that we judge the conduct of such a State based on the requirements in the waiver, rather than in those in TANF, in determining whether a penalty is appropriate. If the State has waivers that are inconsistent with TANF, then the State may be subject to penalties if it fails to submit the required certification, fails to take the appropriate sanctions, fails to achieve the required participation rates under its own waiver policies, or otherwise violates its own waiver policies (e.g., exempts from time limits individuals subject to the State's demonstration time limit).

(c) Section 260.72—What Basic Requirements Must State Demonstration Components Meet for the Purpose of Determining If Inconsistencies Exist With Respect to Work Requirements or Time Limits? (§ 272.8 of the NPRM)

In the final rules, we have eliminated those NPRM provisions that would have denied penalty relief to States that continued waivers that were inconsistent with TANF, but failed to meet work participation rates or time-limit requirements. Specifically, the NPRM had proposed that waiver States ought not be eligible for: (1) A reasonable cause exception from any of four related work participation or time-limit penalties; or (2) a reduction of work penalty amounts based on severity of the failure or under our discretionary authority, as otherwise allowed in accordance with § 271.51(b)(3) or (c). We have also eliminated proposed rules that would have required a State, in developing a corrective compliance plan to address work or time-limit requirement failures, to consider modifying its alternative waiver requirements as part of its corrective compliance plan. Finally, we have decided not to deny a State that continues its waivers eligibility for a reduced penalty based on making significant progress towards achieving compliance with the work or time-limit requirements (as we had proposed and described in subparts B and C of part 271 and §§ 274.1 and 274.2 of the NPRM).

We had proposed imposing these rules on the basis that States operating under alternative waiver requirements were at an advantage compared to other States in being able to meet participation rates and comply with time-limit requirements. However, a

large number of commenters questioned whether the advantage that a waiver State had over other States in complying with specific TANF requirements was so great as to warrant such absolute restrictions; some noted the proposed rule was arbitrary in that we did not consider the degree of any advantage vis-a-vis other legitimate factors and situations that might result in noncompliance. Based on our assessment that our proposals might discourage States from continuing successful demonstration efforts, we have removed these restrictions on penalty relief.

In the final rules, at § 260.73(d), we retain the regulatory expectation to publish information about a State's success in meeting work participation rates, as measured against both TANF and waiver requirements. We do not expect to publish dual time-limit figures for States that have waivers of time limits that are inconsistent with the TANF requirements. Upon further review, for such States, we do not believe that it will be possible to compute the percentage of cases with an adult recipient that received more than 60 months of Federal TANF benefits under the standard TANF rules. Data reported in accordance with section 411(a) will not be sufficient to allow this calculation. We do not have the authority under section 411(a) to require waiver States to report the data that this calculation would require, and they are not germane to our penalty determinations. Therefore, we have deleted this specific regulatory expectation. However, we will be able to calculate dual work rates, and the final rules indicate our commitment to follow through on that proposal.

The final rules also clarify other necessary conditions that apply if a State wants us to use its inconsistent waiver policies and requirements in the penalty determination process.

First, the inconsistencies claimed must be within the scope of the approved waivers, both in terms of geographical coverage and coverage of the types of cases specified in the waiver approval package. For example, a State could not claim a statewide inconsistency if we approved its waiver policies for an eight-county pilot. Similarly, a State could not extend waivers to all adults when the approved waivers applied only to teen parents. Nor could waivers applicable only to two-parent families apply to other types of cases. However, a State that is no longer maintaining control group cases for the purpose of completing an impact evaluation may choose to apply approved waiver policies to cases formerly assigned to a control group.

Second, the State must have applied its waiver policies on a continuous basis from the date that it implemented its TANF program. Section 415(d) allows the State to ''continue'' one or more individual waivers (which, under the definitions enumerated in these final rules, means one or more individual demonstration components). Section 415(c) requires the Secretary to encourage States to ''continue'' their waivers. Implicit in both these provisions is that continuation of the waivers is necessary for a finding of inconsistency.

This ''continuation'' requirement does not prevent a State from modifying policies begun under waivers. TANF clearly provides States with the authority to modify waiver policies inconsistent with prior law, but consistent with TANF (e.g., related to eligibility rules such as income and resource standards). These rules clarify that a State may modify waiver provisions that are inconsistent with TANF, provided that, in doing so, it makes its policies more consistent with TANF. For example, a State could choose to reduce the geographical scope of waivers, applying waivers approved for statewide implementation in only certain parts of the State, or a State could choose to eliminate some exemptions applicable to work participation or time-limited assistance, retaining other exemptions that are still inconsistent with TANF.

We recognize that the issue of whether a State has continued waivers since the advent of TANF may be difficult to determine. Although ACF requested voluntary information on continuation, absent a final regulation, it never indicated a formal process or requirement for the States to submit such information about the continuation of the waiver policies. And, since States need not conduct evaluations as a condition of operating waivers, some States may have indicated that they were discontinuing their waivers, when in fact they intended only to notify us that they were discontinuing evaluations of the demonstration, not their waiver policies. Further, in the absence of final rules, some States may not have clearly understood how they should identify and report inconsistencies under their TANF plans. Also, although some may have indicated that they were continuing waivers with policies inconsistent with TANF, they may not have identified subsequent modifications in their operating policies.

Under these final rules, to determine if a State has continued its work participation or time-limit waiver component and, therefore, may claim applicable inconsistencies, we will accept the certification of the Governor regarding the actual practice of the State. Many of the former waiver policies (for example, variations in the counting of income and resources for eligibility purposes) are unrelated to work and time limits and need not be addressed in the certification. A State need address only the inconsistencies related to work provisions in section 407 and time limits in section 408(a)(7), as explained further below.

However, we wish to note that if a State has abandoned a policy provision that is inconsistent with TANF, the State has voided its waiver authority. Thus, it has lost its right to claim an inconsistency related to that provision. For example, a State that had technical waivers that allowed it to exempt all adult caretakers from work may have changed its policy to require participation of adult caretakers after it implemented TANF. While the State always had the flexibility subsequently to reinstate a policy exempting adult caretakers, we would not recognize this policy as an inconsistency in determining the work participation rates because the State had discontinued the prior technical waiver.

We treat each technical waiver separately for continuation purposes. If a State discontinues one technical waiver, we will continue to recognize other continuing technical waivers related to work (for example, when a State discontinues an exemption waiver, but continues unlimited job search as a work activity). However, there is no authority in section 415 to restore discontinued policies; the statute allows for consideration only of continued inconsistent policies.

Similarly, if a State had modified its implementation of the technical waiver to be more consistent with TANF, we would recognize only the modified policy as a continuation of the waiver.

Third, the Governor must certify the waiver inconsistencies that the State is claiming, including an affirmation that the State has not expanded the scope of its policies and has continued the policies under section 415 in the interim period since implementing TANF, as discussed above. This requirement continues a provision of the proposed rules, but provides new detail about the expected content of the certification, particularly as it pertains to claiming specific inconsistencies related to work and time-limit requirements. See §§ 260.73 and 260.74

for a more detailed discussion of work and time-limit inconsistencies.

Finally, these final rules clarify that, despite broadening the scope of inconsistencies that a State may claim compared to the NPRM, inconsistencies with sections 407 or 408(a)(7) do not create inconsistencies with the penalty provisions at section 409. Thus, they do not have the general effect of delaying the application of the work participation rate or time-limit penalties at §§ 261.50, 261.54, 264.1, and 264.2 or the data collection requirements at part 265.

We came to this decision because we never approved any waivers eliminating compliance with JOBS work participation rates (while they were operable) or voiding their applicability should they become operable. Our work component waivers only changed the substance of the work requirement. As for applicable data requirements, we never approved waivers that relieved States of data reporting requirements; thus, we approved no waivers that would be inconsistent with section 411 of the Act. The work and time-limit components affected by sections 407 and 408(a)(7) do not, of themselves, create inconsistencies because neither encompasses data collection requirements.

Comment: One commenter noted that when the waiver expires for a State providing extensions of assistance in excess of the 60-month Federal time limit, a State would need to comply fully with the 20-percent limit on extensions and that this could cause serious transition problems. The commenter recommended that we provide that ''reasonable cause'' include a reasonable transition time in the case of a State that had been implementing an inconsistent policy under an approved waiver.

Response: The ''waiver terms and conditions'' for demonstration projects affected by these regulations generally included a requirement that the State provide, and the Department approve, a plan to phase down and end the demonstration on the date the waiver approval expires. We did not authorize any waiver-related activities or costs to extend beyond the project period. Given that the project period for a waiver demonstration already includes a phase-down period, States should not require an additional transition period. In addition, we would remind States that they may fund cases above the 20-percent cap with State MOE dollars.

(d) Section 260.73—How Do Existing Welfare Reform Waivers Affect the Participation Rates and Work Rules? (§ 271.60 of the NPRM)

If a State is implementing a work participation component under a waiver as defined in this subpart, the requirements of section 407 of the Act will not apply in determining whether a penalty should be imposed, to the extent that they are inconsistent with the State's waiver work demonstration component.

To determine that the State's demonstration has a work component, the waiver list for the demonstration work participation component must include one or more specific provisions that directly correspond to provisions enumerated in section 407 (i.e., that cover allowable work activities, exemptions from participation, required hours of participation or sanctions for noncompliance with participation). In other words, the State's waiver list must include at least one technical waiver that changed the allowable JOBS activities, exemptions from JOBS participation, hours of required JOBS participation, or sanctions for noncompliance with JOBS participation.

After the Governor has certified the inconsistencies with section 407, we will calculate the State's work participation rates, if applicable, by: (1) Excluding cases exempted from participation under the demonstration and experimental and control group cases and not otherwise exempted; (2) defining work activities as defined in the demonstration in calculating the numerators of the rates; (3) including cases meeting the required number of hours of participation in work activities in accordance with waiver policy in calculating the numerators of the rates; and (4) excluding other cases exempt from participation under the waiver in calculating the denominators of the rates.

We will also determine whether a State is taking appropriate sanctions when an individual refuses to work based on the State's certified waiver policies. These final rules explicitly recognize waiver inconsistencies related to sanctions for noncompliance with work requirements; the proposed rules were silent on this matter. They also recognize exemptions from work and changes to the required hours of work. Finally, they continue to recognize inconsistencies related to allowable work activities, as we proposed in the NPRM.

It is important to stress that a State need not have a technical waiver in a particular part of the work component (e.g., work activities or exemptions) to claim that the *related* AFDC provisions for that part of the component are part of its waiver. Rather, the State needs one or more technical waivers related to a provision of section 407 to claim applicable prior law in all areas that are part of section 407.

Thus, a State with a waiver work component may delay implementing TANF requirements for work participation for individuals exempt from JOBS if such exemptions have been part of the State's continuing demonstration policies. A State with a demonstration work component, but without a technical waiver modifying JOBS exemptions, may still include all prior law exemptions (or a modification of these exemptions that is more consistent with TANF), if such exemptions have been part of the State's continuing policies for work participation. For States with waivers that eliminated some (but not all) JOBS exemptions, the remaining exemptions would apply, if they have been part of the State's continuing demonstration policy. However, because all States will need to conform to all TANF rules once their waivers expire, we urge States to plan accordingly.

Under these final rules, a State may claim inconsistencies applicable to hours of work if it has technical waivers related to section 407 and could, in an audit, provide written evidence (e.g., terms and conditions or policy manuals) to document that its waiver policies, as implemented, expressly provided for alternative rules with respect to the hours of work required of nonexempt individuals.

The ability to provide such written evidence is necessary because prior law did not generally have requirements for the number of hours an individual must work to be considered participating. Rather, prior law had a calculation methodology that included any JOBS participants as long as including them did not reduce average hours below 20 hours per week. If no written policy was in effect, we would hold the State to the TANF hours-of-work requirements.

Finally, a State may also choose to exempt, from the participation rate calculation, experimental and/or control group cases that are not otherwise exempt. It may remove experimental group cases as a class, control group cases as a class, or both experimental and control group cases on a class basis. However, it may not exclude such cases on an individual basis.

Comment: All those commenting on the subject supported counting towards the work participation rate calculation those work activities allowed under

waiver authority without regard to TANF restrictions, as we proposed in the NPRM. However, many commenters asserted that the rules should not restrict inconsistencies related to prior law exemptions from work participation, where those policies were part of a State's welfare reform program. In support of their position, several organizations and States argued that, because section 415(a)(2)(B) specifies that waivers approved after enactment may not affect the applicability of section 407 (concerning compliance with work participation rates), Congress fully intended the inverse to apply to waivers approved before enactment. Therefore, we should recognize all continued policies related to compliance with TANF work requirements as inconsistencies.

Response: Our revised waiver definition would allow the States with waiver work components to include all prior law exemptions, and other AFDC (and JOBS) work policies, as part of the waiver, if such policies were part of the welfare reform demonstration that the State implemented under its technical waiver(s).

Comment: A number of commenters asserted that hours of mandated work that were related to waivers and increased the JOBS requirements for a class of individuals should be claimable as an inconsistency.

Response: These comments addressed a problem with the reference to a State's intent in our proposed definition of waiver (an issue that we addressed earlier). Since the final rules rely on the existence of waiver work components, rather than intent, they recognize increased hours as part of the waiver. If the amount of the required hours under the waiver is inconsistent with the required hours under section 407, the Governor can certify the inconsistency.

Comment: Some commenters asserted that we could not even hold States operating under waivers to a work participation rate requirement—i.e., that we should delay the effect of section 407 in its entirety until State waiver authority expires.

Response: Under section 1115, there were limits on what we approved as part of a demonstration project. The Secretary only had authority to waive provisions of the AFDC program that were included in former section 402. That section contained the provisions regarding the determination of eligibility, the amount of assistance, and required procedures for State administration of the plan. The Secretary could, and did, grant waivers concerning the content of the JOBS program (the AFDC work program), which was included at section 402(a)(19). However, the required work participation rate associated with JOBS was at the former section 403(l). Since the Secretary had no authority to waive this provision, we never approved any requests from States to waive it.

Thus, no State has a waiver of participation rates that would conflict with the work participation rate penalty provision at the former section 409(a)(3). For a State to argue that the work penalty does not apply, it would have to show a technical waiver that is inconsistent with any application of the work penalty. However, waivers that create the content or substance of a State's demonstration work program are just that—definitions of the content of a work program. As such, they may be inconsistent with the content of the TANF work program at section 407 and may allow the State to substitute the substance of the work program in its demonstration for the program specified in section 407, to the extent that the State determines there is an inconsistency. However, there would be no inconsistency in applying the section 409(a)(3) work participation penalty as long as participation was determined under the State's demonstration work program.

Since the final rule bases the penalty under section 409(a)(3) on what was required participation under the State's demonstration work program, there is no inconsistency. Delay of the work participation penalty itself in these circumstances would fall outside any reasonable definition of waiver or inconsistency.

(e) Section 260.74—How Do Existing Welfare Reform Waivers Affect the Application of the Federal Time-Limit Provisions? (§ 274.1(e) of the NPRM)

If a State is implementing a time-limit component under a waiver, until the waiver expires, the provisions of section 408(a)(7) of the Act will not apply in determining whether to impose a penalty, to the extent that they are inconsistent with the waiver.

To determine that the State's demonstration has a time-limit component, the waiver list for a demonstration time-limit component must include provisions that directly correspond to the time-limit policies enumerated in section 408(a)(7) (i.e., that address which individuals or families are subject to, or exempt from, terminations of assistance based solely on the passage of time, or who qualifies for extensions to the time limit).

In general, the final rule requires a State with a waiver time-limit component to count, toward the Federal five-year limit, all months for which the adult who is subject to the State time limit receives assistance with Federal TANF funds, just as it would if it did not have an approved waiver.

The State need not count, toward the Federal 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 State's approved waiver. Nor need the State count, toward the Federal five-year limit, months for which an adult subject to an adult-only State time limit under the State's waiver receives assistance with Federal TANF funds.

The State may continue to provide assistance with Federal TANF funds for more than 60 months, without a numerical limit, to families provided extensions to the State time limit, under the provisions of the terms and conditions of the approved waiver.

After the Governor certifies time-limit inconsistencies, we calculate the State's time-limit exceptions by: (1) Excluding, from the determination of the number of months of Federal assistance received by a family, any month in which the adult(s) (or children where a waiver only terminated assistance to adults) were exempt from State's time limit under the terms of the State's approved waiver; and (2) applying the State's waiver policies with respect to the availability of extensions to the time limit.

The changes that we have made to the framework of how we define waiver inconsistencies have less effect on inconsistencies related to time-limiting assistance than to work. The main reason for this difference is that no prior law policies existed governing time-limited assistance. All time limits were the result of waivers. Thus, there are fewer issues about what a time-limit waiver includes. However, there are significant issues about what is allowable as an inconsistency; under these rules, the constraining factor is whether a State's demonstration project has a time-limit component related to the provisions in section 408(a)(7).

Prior to the passage of PRWORA, a ''time limit'' could take any number of forms. However, under TANF, the penalty relates to the time limit in section 408(a)(7), which recognizes only time limits that terminate assistance with the passage of time (i.e., that terminate assistance to families with adults who received Federal TANF assistance for 60 months). Other parts of TANF address time limits in different contexts, such as those that trigger work requirements. However, these latter types of provisions are not subject to the penalty provision under section

408(a)(7), and we do not address them in this regulation.

Therefore, as we proposed under the NPRM, we are allowing time-limit inconsistencies only for those States with waiver policies that terminate assistance solely as the result of the duration of receipt. Under these rules, if a State has a technical waiver meeting this requisite, we compare its provisions with those at section 408(a)(7) to determine whether there are inconsistencies.

As with work participation, States may also choose to exempt experimental and/or control group cases that are not otherwise exempt from time limits. However, a State may exclude such experimental and control group cases only on a group basis, not on an individual basis.

Comment: Commenters generally agreed that inconsistencies should be recognized that allowed a State to: (1) exempt certain cases from having months counted toward the 60-month time limit; and (2) provide extensions to more than 20 percent of the caseload after reaching the limit.

Response: We have retained these policies in the final rule.

Comment: Some commenters argued that section 415 was designed to allow States to continue their welfare reform initiatives as a whole. On this basis, they maintained that any State that consciously chose not to include time-limited assistance provisions in the comprehensive welfare reform initiatives that it implemented under waivers should be able to claim a time-limit inconsistency.

Response: Section 415 was not designed to carry over prior law in its entirety, nor to delay TANF requirements where waivers did not exist prior to implementation. Rather, it allows delay in implementing new TANF provisions ''to the extent such amendments are inconsistent with the waiver.'' Thus, we find no statutory basis for allowing inconsistencies to be claimed in this particular situation because no waiver exists.

Comment: Some commenters argued that we should also allow time-limit inconsistencies to apply where a State has implemented time limits that serve to trigger work requirements.

Response: We do not recognize other waiver provisions, such as those where States used ''time limits'' to trigger work requirements, as inconsistent with time limits. The purpose of this section of the regulation is to determine the applicability of the time-limit penalty at section 409(a)(9). This penalty applies to any failure to meet the time-limit requirements at section 408(a)(7). Time limits triggering work requirements are found in sections 402 and 407, not section 408(a)(7). Therefore, such policies do not fit within the definition of a waiver related to the time-limit component associated with 408(a)(7).

Comment: One commenter recommended that, if we retained the proposed rules related to time-limit waiver inconsistencies, the preamble discussion should clarify that ''reduction waivers'' (adult-only time limits) represent an inconsistency.

Response: We have incorporated this change in the final rule. States with waivers terminating assistance for adults only may choose to delay counting months toward the Federal 60-month time limit for as long as they continue to apply adult-only policies under their State time limit. While the proposed rules had required that time against the Federal time clock be counted for any month in which an adult was subject to the State time limit (i.e., that the Federal and State clocks would run concurrently), this policy would have had an effect that was inconsistent with the waiver policy. Because time charged against an adult would have ultimately resulted in the termination of benefits to the whole family under TANF, the proposed policy would have resulted in time being counted against child recipients. While children are protected from termination of benefits while the waiver is operable, counting time against adults in the case would have, in effect, counted time against the family's (and children's) length of receipt of assistance. This result would have been contrary to the purpose of the adult-only time-limit waivers, which was to exempt children from any effect of the time limit. Thus, in submitting a Governor's certification of continuing waiver inconsistencies, the State may claim a time-limit inconsistency for its adult-only time limit.

Comment: Another commenter said that we should allow all cases subject to a time limit adequate prior notice before a clock begins to count against them. Thus, States that have applied a reasonable statutory interpretation of section 415 to exempt cases from the Federal time limit should not have to count time retroactively against these cases (i.e., count time accrued prior to the effective date of the final rules).

Response: As we have previously stated, these rules apply only prospectively; until they are effective, the State's reasonable interpretation of the statute applies. An individual who was considered exempt from the Federal time limit under the State's reasonable interpretation of its waiver would only have the Federal limit apply prospectively, beginning October of 1999. This policy will allow States time to provide the recipient with adequate notice.

(f) Section 260.75—If a State Is Claiming a Waiver Inconsistency for Work or Time Limits, What Must the Governor Certify? (§ 272.8(a) of the NPRM)

If a State is claiming waiver inconsistencies, the Governor must certify that the State has continuously maintained applicable policies in operating its TANF program and that the inconsistencies claimed by the State do not expand the scope of the approved waivers. Further, the certification must identify the specific inconsistencies that the State chooses to continue with respect to work and time limits.

If the waiver inconsistency claim includes work provisions, the certification must specify the standards that will apply in lieu of the provisions in section 407. Specifically, it must include, as applicable: (1) Descriptions of two-parent and other cases that are exempt from participation, if any, for the purpose of determining the denominators of the work participation rates; (2) the rules for determining whether nonexempt two-parent and other cases are ''engaged in work'' for the purpose of calculating the numerators of the work participation rates, including descriptions of the countable work activities and minimum required hours; and (3) the penalty against an individual or family when an individual refuses to work. Again, the certification may include a claim of inconsistency with respect to hours of required participation in work activities only if the State has written evidence that, when implemented, the waiver policies established specific requirements related to hours of work for nonexempt individuals.

If the waiver inconsistency claim includes time-limit provisions, the Governor's certification must include the standards that will apply in lieu of the provisions at section 408(a)(7). It must specify the standards that will apply in determining: (1) Which families are not counted towards the Federal time limit; and (2) whether a family is eligible for an extension of its time limit on federally funded assistance.

If the State is continuing policies for evaluation purposes, the certification must specify any special work or time-limit standards that apply to the experimental and control group cases. The State may choose to exclude cases assigned to the experimental and

control groups that are not otherwise exempt, for the purpose of calculating the work participation rates or determining State compliance related to limiting assistance to families including adults who have received 60 months of TANF assistance. Thus, the State may exclude all experimental and control group cases, not otherwise exempt. However, it may not exclude such cases on an individual, case-by-case basis.

A State must provide the initial Governor's certification by October 1, 1999. It would be very helpful to receive the certification by July 1, 1999, in order to assess how inconsistencies will apply for data collection and reporting efforts before the effective date of the new requirements. We would like to resolve any issues about the treatment of waiver cases before the reporting requirements take effect, because it is much easier to code information correctly the first time than to modify the codes retroactively. In light of the number of States continuing waivers and some of the detailed, case-specific questions that we anticipate might arise, we want to build in ample time to resolve all issues by October 1, 1999. It will certainly be in a State's interest if we can resolve all questions by the effective date of the new requirements.

Also, we would point out that, until a State has submitted its Governor's certification, we will treat the State as a nonwaiver State in determining its compliance with work participation rate and time-limit standards. Likewise, if we determine that a Governor's certification does not comply with the requirements of this subpart, we will advise the State of the inconsistency and give it an opportunity to revise the certification. We will accept alternative rules for determining penalties related to work participation rates and time-limit exceptions only to the extent that they comply with the requirements of this part.

If a State modifies its waiver policies, after it provides the certification, in a way that has a substantive effect on the calculation of its work participation rates, time-limit exceptions, or sanctions, it must submit an amended certification by the end of the fiscal quarter in which the modifications take effect.

Comment: A few commenters questioned whether we had the authority specifically to require that Governors certify which waivers States were continuing. Some of these saw this requirement as an added burden that duplicated information already submitted in their State TANF plans or documented as part of their waiver approval.

Response: We disagree that we have no authority to require the certification. As discussed, the Department has had no formal process for determining a State's decisions on the continuation of waivers. The information that has been provided has been sporadic and is not necessarily current or complete. Since we will be relying on the State's determination that it has continued an inconsistent waiver component in making penalty determinations, we must have accurate, up-to-date information on the State's decision to continue its inconsistent work and time-limit components in order to make those penalty determinations correctly and on a timely basis. As such information is necessary to our implementation of the penalty provisions, we have authority under those provisions to collect it.

(g) Section 260.76—What Special Rules Apply to States That Are Continuing Evaluations of Their Waiver Demonstrations? (§ 271.60(c) and (d) and § 274.1(e)(4) of the NPRM))

If a State is continuing policies that employ an experimental design in order to complete an impact evaluation of a waiver demonstration, the experimental and control groups may be subject to prior law, except as modified by the waiver.

We have added definitions for experimental and control groups at § 260.71 (and cross-references at § 260.30). These definitions reference the terms and conditions in the State's demonstration.

Comment: One commenter suggested that we should allow any State in which more than half of its families are subject to waiver policies as part of a research group to apply the same waiver policies to the rest of the families in the State, as long as the State does not expand the geographical scope of the waiver authority. The same rule would apply to a county operating a waiver demonstration in a county-administered State. Another commenter indicated that States may be less likely to continue an evaluation if we do not allow a State to apply policies permitted for the research group to a broader set of families.

Response: While we sympathize with the commenters' desire to reduce administrative complexity, we do not see why the complexity is any greater when a majority of the caseload is in the experimental and control groups than when a minority is. Furthermore, implementing this policy would introduce complexities of its own in terms of the measurement required to determine what rules apply in a given jurisdiction. Since both the number of families in the experimental and control groups currently on assistance and the total number of families currently on assistance vary from month to month, rules could vary month to month. In contrast, the experimental and control groups are well-defined; a family is either assigned to them or not. Therefore, under the final rule, determining when and to which families to apply the pre-TANF policies is relatively simple.

C. Child-Only Cases

Background

The calculations for work participation rate and time-limit penalties center around the concept of ''family.'' Under the proposed rules, we indicated that a State could develop its own definition of ''family,'' with the proviso that States could not create definitions that excluded adults from cases solely for the purpose of avoiding penalties. To monitor that restriction, we proposed that States report annually on the number of cases excluded from penalty calculations, and the reasons for each exclusion. We said we would add families back into the calculation if we found they were excluded for the purpose of avoiding penalties. You may find the specific proposals in §§ 271.22(b)(2), 271.24(b)(2), and 274.1(a)(3) of the proposed rule.

These provisions reflected our concern that States might convert cases to child-only cases to avoid the statutory work participation and time-limit requirements. In part, our concern was a reaction to public comments that States and advocates made shortly after PRWORA's enactment suggesting that States might take such actions. It also reflected our view that such conversions would seriously undermine critical provisions of welfare reform.

Overview of Comments

Several commenters supported our decision to recognize that States had the primary authority to define ''family.'' However, a large number of commenters, from a diversity of groups, opposed or expressed concerns about our specific proposals in this area. The comments generally objected to our distrust of States and the pre-emption of State decisions to define families as they deemed appropriate.

Several commenters challenged the statutory basis for our proposal. Some did not directly challenge our authority, but questioned the practicality of our proposed approach. Commenters pointed out inconsistencies in the language that we had used in different parts of the regulation and noted that

the determination of whether States created definitions for the sole purpose of avoiding penalties would involve subjective determinations of motive. To minimize these problems, they offered several suggestions about how we might clarify what types of cases might be subject to recalculation.

Under one proposal, States would describe their child-only cases in the State plan or procedures. We could then discuss beforehand with States the appropriateness of these cases. Other commenters offered a related suggestion that we set up a process for States to get approval of reasons for conversions up-front, but did not identify a specific format for the State submissions.

Another suggestion was that State definitions would automatically prevail, but that HHS would inform Congress if distortions of legislative intent seemed to result. In other words, in the absence of any documented abuses, we would simply gather information on what States are doing and permit States to use any definition of family that has a reasonable policy basis. Then, if we discover evidence that States were trying to subvert the TANF provisions, we could work with Congress in developing solutions.

Some commenters noted that child-only cases existed under AFDC and enumerated examples of child-only cases that we should acknowledge as acceptable, including: cases in which the adults have no legal liability for the care of the children, cases with recipients of SSI or other disability payments, cases with adults not receiving assistance because they exhausted shorter State-imposed time limits, cases with noncitizen parents or adults ineligible for other reasons (e.g., SSI receipt or a drug felony conviction), cases that were previously converted under approved waiver policies, and cases with elderly caretakers.

We also received suggestions that we should explicitly permit States to continue to provide assistance to children: (1) once the parent/relative loses eligibility due to the expiration of the five-year time limit; (2) whose parent/relative was sanctioned for failure to participate in work or cooperate with child support enforcement requirements; and (3) whose parent or caretaker would be better served by some other State program, such as if she is disabled.

In addition to specific objections or questions, many commenters expressed the overall concern that our proposal to control for inappropriate child-only cases may inhibit the State flexibility essential to TANF. State anxiety about Federal recalculation of penalty liability could create a ''chilling effect'' that caused States to limit child-only cases unnecessarily and inappropriately. In the words of one commenter, ''the uncertainty of knowing whether their policy basis will be considered legitimate and how work participation rates and time-limit compliance will be measured by HHS could simply lead States to avoid serving children as child-only cases even if the result is not to serve the children at all.''

Commenters did not want to see assistance to valid child-only cases undermined by our rules. Of particular concern was the effect of our proposals on State efforts to keep children in the homes of relatives, in lieu of foster care placements.

Others noted that, up to this point, we do not have evidence that States are converting cases to child-only cases for the purpose of avoiding TANF requirements; we have not observed significant changes in State policy or practice to create new child-only cases. Only if such changes actually occur should HHS develop corrective procedures.

Overall Response

When we were developing the proposed rules, we were very concerned that States would use the flexibility available in defining families to avoid work participation requirements, time limits, and other TANF requirements. Within the authority that we have to collect participation rate information and make decisions on State penalties, we proposed specific regulatory policies with respect to penalties and reporting in response to that concern. However, as we have seen the TANF programs evolve, our concerns about possible abuses have diminished.

While the number of child-only cases has been increasing over time, commenters correctly observed that the increases began well prior to TANF and that there is little indication so far that States are converting cases merely to avoid penalties. In fact, a couple of internal State analyses (i.e., in Florida and South Carolina) have found no evidence of conversion of cases to child-only cases from other statuses.

Also, commenters correctly noted that there were numerous child-only cases that were considered valid under prior law. Their existence under TANF therefore does not suggest that States are working to subvert TANF requirements in this manner. Over the past several years, there were a number of social and demographic changes underway that could have contributed to much of the growth in child-only cases. For example: (1) Because of the ''crack'' epidemic, some infants moved from the care of their mothers to the care of their grandmothers or other adult relatives (who may or may not have been needy); (2) in some places, immigration changes could have caused a growth in the number of eligible children with ineligible alien parents; and (3) in other places, States have made an effort to establish eligibility for SSI. (If parents became SSI-eligible, the children normally received assistance as child-only cases.)

Recently, we have seen a reduction in the total number of child-only cases. However, because the number of other types of cases has been declining faster, the proportion of child-only cases has not gone down. Thus, State success in moving more families to work may actually be causing an increase in the proportion of child-only cases.

At the same time, we disagree with the suggestion that it would be appropriate to provide federally funded assistance to children in child-only cases when their parents reach the 60-month limit on Federal assistance. Such a result would be consistent with an adult-only time limit, but does not seem consistent with the intent of the specific provision in the law. For example, the provisions on transfers to the Social Services Block Grant program suggest that children in families whose adults reached their 60-month limit were not expected to continue receiving federally funded TANF assistance.

While we disagree with the commenters' suggestion that we did not have legal authority to regulate in this area, we understand commenters' concern that the provisions in the proposed rules may do more harm than good. In the absence of clear evidence that States are converting cases to avoid the TANF rules, we have decided that the most appropriate response at this point is to give States leeway to define families in ways that they think are most appropriate while gathering better information on how child-only policies might be affecting the achievement of TANF goals.

However, the possible conversion of cases to child-only status to avoid TANF requirements remains a major policy concern. For example, such conversions could effectively eliminate restrictions on the amount of time that any family could receive federally funded TANF assistance or could undermine the statutory provisions on the treatment of sanction cases in the participation rate calculations. We therefore intend to track it closely. To that end, we have added one data element to the disaggregated case-record reporting that will identify cases that have been

converted to child-only status since the past month. We will use the quarterly TANF Data Report to monitor trends both in the aggregate number and type of child-only cases and the number of conversions. By monitoring these trends, we should be able to identify changes in State practice or caseload characteristics that would merit further investigation. If we saw a significant number of conversions to child-only status in a particular State (i.e., a number that was out of line with prior State numbers or the numbers for other States), we would look more closely at that State.

We have a variety of investigative tools available to us, including detailed analysis of the case-record information reported to us, the Single State Audit, supplemental reviews, and targeted studies (like the current ASPE study mentioned below).

We will incorporate a full analysis of the information we have gathered on what has been happening with child-only cases in our annual report to Congress.

As a number of commenters suggested, under these final rules, we have adopted a strategy that includes gathering information, monitoring developments, and keeping our options open regarding future actions. Through our data collection, we will obtain substantial information on the characteristics of child-only cases, trends in their number and type, and conversions. This information will help us assess the possible effect of such cases on the achievement of TANF goals. We will consider proposing appropriate legislative or regulatory remedies if we find that States are using the flexibility available under these rules to define families to avoid work requirements or time limits or otherwise undermine the goals of TANF. However, we will not put any significant policy change into effect without appropriate prior consultation with States, Congress, and other interested parties.

Tracking of Child-Only Cases

Comment: A significant number of commenters also objected to our proposals at §§ 271.22(b)(2)(i), 271.24(b)(2)(i), 274.1(a)(3)(i), and 275.9(a)(1) that States annually report to us on their child-only cases and advise us of the specific nature of each of the cases. Commenters generally felt it was an unjustified additional burden for States. Some objected to the specific wording of the requirement because it suggested that we expected case-by-case reporting of such cases rather than aggregated reporting.

Response: We have removed the requirement for annual reports on families excluded from work-rate and time-limit calculations and the reasons for their exclusion. The proposed language was not consistent in different parts of the NPRM package and caused some confusion.

Monitoring trends in the number and type of such cases remains an important issue. However, we decided that a different type of data would be more helpful in helping us track conversions. Thus, we have added a new data element to the TANF Data Report that will identify the specific cases that have become child-only cases. These new data will supplement other data on child-only cases available through the TANF and MOE–SSP data reports and give us a solid basis of information for assessing national and State trends in the number and nature of child-only cases. From other data elements in those reports, we will get disaggregated, case-level data on parents and other individuals who are in the household, but not in the family receiving assistance. We will get information on whether there are parents who are ineligible for receipt of Federal benefits, whether the cases are under sanction, and whether cases have no parent in the home. To provide still further supplemental information, the Office of the Assistant Secretary for Planning and Evaluation is undertaking a study in three States to explore the circumstances of child-only cases in more detail.

Together, these information sources will provide valuable insight into the nature of child-only cases and the types of services and assistance States are providing them. We will be able to track any significant changes in the number and types of such cases and be in a better position to determine if we need to pursue further action. Depending on what specifically is happening, an appropriate response could be information-sharing, consultations, technical assistance, or regulatory or legislative proposals.

To reflect our other decisions on child-only cases, we deleted the provisions at §§ 271.22(b)(2), 271.24(b)(2), and 274.1(a)(3) of the proposed rule that prohibited conversion of child-only cases for the purpose of avoiding penalties, indicated that we would add cases back into the work participation rate and time-limit calculations if we found that they had, and required separate annual reporting on child-only cases. We also deleted comparable annual reporting language at § 275.9(a)(1). We believe that we will have sufficient information through the TANF Data Report to monitor child-only cases; we determined that the separate annual reporting requirements were redundant.

D. Treatment of Domestic Violence Victims

Background

The Administration has shown a strong commitment to reducing domestic violence and helping victims of domestic violence access the safety and supportive services that they need to make transitions to self-sufficiency. In the proposed rule, we showed this commitment by promoting implementation of the Family Violence Option (FVO), a TANF State plan provision that provides a specific method for addressing the needs of domestic violence victims receiving welfare.

Under section 402(a)(7) of the Act, States may elect the FVO. This State plan option provides for identification and screening of domestic violence victims, referral to services, and waivers of program requirements for good cause. In the NPRM, we proposed to grant ''reasonable cause'' to States that either failed to meet the work participation rates or exceeded the limit on exceptions to the five-year time limit because of program waivers granted under this provision. To be considered for this purpose, a ''good cause domestic violence waiver'' would need to incorporate three components: (1) Individualized responses and service strategies, consistent with the needs of individual victims; (2) waivers of program requirements that were temporary in nature (not to exceed 6 months); and (3) in lieu of program requirements, alternative services for victims, consistent with individualized safety and service plans.

In addition, to be considered in determining reasonable cause for exceeding the time-limit exceptions, such waivers had to be in effect after an individual had received assistance for 60 months, and the individual needed to be temporarily unable to work.

Our proposed rules attempted to remain true to the statutory provisions on work and time limits and to ensure that election of the FVO was an authentic choice for States. In deciding to address these waiver cases under ''reasonable cause'' rather than through direct changes in the penalty calculations, we tried to both reflect the statutory language and maintain the focus on moving families to self-sufficiency. At the same time, we were giving States some protection from penalties when their failures to meet the

standard rates were attributable to the granting of good cause domestic violence waivers that were based on individual assessments, were temporary, and included individualized service and safety plans. We hoped our proposal would alleviate concern among States that attention to the needs of victims of domestic violence might place them at special risk of a financial penalty.

We welcomed comments on whether our proposed approach and language achieved the balance we were seeking.

Also, to ensure that these policies have the desired effect, we proposed to limit the availability of ''reasonable cause'' to States that have adopted the FVO. We indicated that we reserved the right to audit States claiming ''reasonable cause'' to ensure that good cause domestic violence waivers that States include in their ''reasonable cause'' documentation met the specified criteria. And we said we intended to monitor the number of good cause waivers granted by States and their effect on work and time limits. We wanted to ensure that States identify victims of domestic violence so that they may be appropriately served, rather than be exempted and denied services that could lead to independence. We also wanted to ensure that the provision of good cause waivers did not affect a State's overall effort in moving families towards self-sufficiency. Thus, we said we would be looking at information on program expenditures and participation levels to see if States granting good cause waivers were making commitments to assist all families in moving toward work.

If we found that good cause waivers were not having the desired effects, we said we might propose regulatory or legislative remedies to address the problems that we identified.

For additional discussion of our proposals, we referred readers to §§ 270.30, 271.52 and 274.3 of the preamble and proposed rule.

In the final rule, we have consolidated the provisions in a new subpart in order to make our policies more coherent. We have also made some changes to align the regulatory text more closely with the statutory language. For example, we modified the six-month time limit placed on good cause domestic violence waivers. Recognizing that the statute authorizes waivers for ''as long as necessary,'' we have incorporated similar language in the rule, but called for six-month redeterminations. We have also incorporated statutory language describing the Family Violence Option, including its reference to confidentiality.

Comments and Responses

(a) General Approach

Most commenters generally approved of the way that the proposed rule attempted to protect victims of domestic violence. A significant number commended DHHS for recognizing the significance of domestic violence as a national problem and acknowledging the link between domestic violence and poverty. Many expressed the view that the approach we took was reasonable and provided States with the penalty protection that they needed. However, a few disagreed with the basic approach we took, and a substantial number of commenters raised concerns about specific aspects of the proposed rule.

Response: Our rules do not limit a State's authority to grant ''good cause'' waivers under the Family Violence Option, but they do limit the circumstances under which we will provide special penalty relief to States granting such waivers. In other words, if a State's waivers do not comply with the standards in these rules, the State does not get special consideration in our penalty determinations if it fails to meet the work participation requirements or exceeds the limit on Federal time-limit exceptions.

To emphasize this distinction, in the final rules, we created a new term ''federally recognized good cause domestic violence waivers'' at § 260.51. A ''good cause domestic violence waiver'' refers to any waiver granted by a State consistent with the FVO. A ''federally recognized good cause domestic violence waiver'' refers to a waiver that also meets the standards that we have established for special consideration in our penalty determinations.

As we discuss in more detail below, we made some additional changes to the proposed rule in response to the comments that we received. We also moved the provisions on domestic violence (including the definition provisions that were in § 270.30 of the proposed rule) to a new subpart B of part 260. In addition, we revised the language at § 264.30(b). The revised language explicitly recognizes that individuals may receive waivers of child support cooperation requirements under the FVO and that our rules would treat such waivers like good cause exceptions granted under the child support statute (at section 454(29) of the Act).

In summary, the final rule retains the same basic approach as the proposed rule—i.e., it gives States penalty relief if their failure to comply with the work participation rate or time-limit standards is attributable to the granting of good cause domestic violence waivers that meet certain Federal standards. It retains a requirement for service and safety plans, but makes important modifications related to policies on the duration of the waivers that we would recognize, confidentiality protections, work expectations, information that the State must provide with respect to its service strategies, and the standards for time-limit waivers. In addition, the preamble clarifies the flexibility available to States in delivering services to victims of domestic violence and the mechanisms in place for protecting victims from unfair penalties.

Comment: A minority of the commenters argued that we should exclude individuals granted waivers of work requirements under the FVO from the calculation that determines a State's overall work participation rates for each month in the fiscal year.

Response: We chose to address this as a State penalty-relief issue, in large part because we believe that keeping victims of domestic violence in the denominator of the work participation rates represents a better reading of the statute. Section 407 makes no reference to domestic violence cases or to a State's good cause waiver of work requirements under the Family Violence Option. In the statutory provisions on calculating work participation rates (at section 407(b)), there are only two explicit exemptions from the calculation: one for a single custodial parent of a child under 12 months old and the other for a recipient who is being sanctioned. There is no mention of the victims of domestic violence or cross-reference to the waivers granted under the FVO.

We believe that victims of domestic violence and the objectives of the Act will best be served if we maintain the integrity of the work requirements and promote appropriate services to the victims of domestic violence. We do not want our rules to create incentives for States to waive work requirements routinely, especially in cases where a recipient can work; service providers who work closely with victims of domestic violence attest that work is often a key factor in helping victims escape their violent circumstances.

We do realize that, in certain cases, working or taking steps toward independence may aggravate tensions with a batterer and place the victim in further danger. Under the final rule, States may provide temporary waivers of work requirements in such cases. Also, States may grant waivers to extend time limits to families that were not able to participate in work activities or to make due progress towards achieving

self-sufficiency within 60 months; we would give Federal recognition to waivers granted to extend time limits under such circumstances. We have revised the language on service plans to provide that work elements in a service plan should be consistent with the statutory expectations about ensuring safety and fairness. We have also modified the language on waivers to extend time limits (as discussed in a subsequent comment and response).

We continue to believe that removing victims of domestic violence from the work participation rate calculation could result in inappropriate exemptions or deferrals of work requirements for victims of domestic violence. As an alternative, commenters suggested that we could protect against this result by requiring States to give waiver recipients access to appropriate education and training services. However, we do not believe such a requirement would suffice; States will have an inherent interest in focusing their resources on individuals who are part of the participation rate calculations and who could put them at penalty risk.

Comment: Many commenters expressed general concerns about the proposed definition of the good cause domestic violence waiver. They argued that it should be more in line with the statutory language and less prescriptive.

Response: We added the extra criteria related to Federal recognition of waivers (at § 260.55) because we wanted to assure that victims of domestic violence would receive appropriate protections and services and the goals of TANF would be sustained. At the same time, as we have discussed, we have made a few modifications to the provisions that make the rules more consistent with the statute and responsive to the specific concerns that commenters raised.

To ensure that our rules promote access to appropriate services, we have added reporting requirements at §§ 260.54 and 265.9(b)(5) designed to ensure that States seeking Federal recognition of their good cause domestic violence waivers implement meaningful alternative service strategies for victims of domestic violence. The new reporting will tell us and other interested parties about the strategies and procedures States have put in place to ensure that these families receive appropriate supports. It will also give us information on the aggregate number of good cause domestic violence waivers granted by the State each year.

Comment: One commenter expressed concerns about the administrative burden that States would face in filing a claim of reasonable cause.

Response: We have not regulated specific requirements that States must meet in filing reasonable cause claims. While States must provide information sufficient to justify their claims, the burden associated with demonstrating reasonable cause should not be great. In fact, we would encourage States to present their reasonable cause arguments as succinctly as possible.

State data reporting systems will contain information on the number of cases that received federally recognized good cause domestic violence waivers every month. States will be able to rely on that data in justifying their reasonable cause claims.

(b) Time Limits on Good Cause Waivers

Comment: A significant number of commenters objected to the six-month durational limit that we placed on good cause domestic violence waivers. They said that six months did not provide enough time and that the length of waivers should be determined on a case-by-case-basis. They also argued that our proposed rule could create an additional administrative burden on States for cases where a waiver needed to be renewed. They noted that the six-month limit is neither required by statute nor consistent with the statutory language that waivers continue ''as long as necessary.'' Finally, commenters noted that they found our policy authorizing extension or renewal of waivers only in the preamble language; at a minimum, they wanted this policy to be added to the regulatory text.

Response: In the NPRM we said that we did not intend that all good cause waivers should last six months. Rather, the length of the waiver should reflect the State's individualized determination of what length of time a client needs. This was our way of giving States significant leeway in how they implemented their Family Violence Option programs. However, we agree with the commenters that our rules should be more consistent with the statute and have revised the final rule accordingly. At the same time, the rule continues to assure that these cases will receive periodic attention from service workers. More specifically, like the statute, it allows for the waiver to be granted for ''as long as necessary.'' However, at § 260.55(b) and (c), it also requires that a reassessment will take place every 6 months to determine if the waiver is still necessary and if the service plan is still appropriate.

(c) Adoption of the Family Violence Option

Comment: A small number of commenters expressed concern that, by providing special consideration only to States that have opted for the FVO, we could be penalizing States that did not choose the option.

Response: As we stated in the proposed rule, we consciously tied penalty relief to State implementation of the FVO because we felt the FVO provided a constructive framework for identifying, screening, and serving victims of domestic violence. Also, because the FVO is a State plan provision, there are some statutory expectations on States that adopt it, the public will have access to information about it, and consultation with local governments and private sector organizations will take place.

Comment: A couple of commenters said that we should mandate that any State seeking relief from penalties for not meeting work participation rates or for exceeding the cap on exemptions to the time-limits must officially adopt and properly implement the FVO within 60 days as part of the corrective plan.

Response: States have the option of submitting corrective plans for our review, and this final rule provides wide latitude to States in developing the content of those plans. In that context, we do not believe it would be appropriate to be very prescriptive about what a State must include related to adoption of the FVO. Also, we want States to adopt the FVO based on broad policy and programmatic considerations, not because such a step would give them a quick way to avoid penalty liability.

It is important that States understand that, to us, compliance means more than adoption of the Family Violence Option. In deciding whether a corrective compliance plan is acceptable, we will consider the strides that a State has already taken toward developing and implementing a broad strategy to serve victims of domestic violence and ensure their safety.

Comment: A small number of commenters expressed concern that the regulations should require all States to demonstrate that the Family Violence Option is being implemented statewide.

Response: We reviewed the TANF State plan provisions at section 402 and found no specific requirement that the provisions there be implemented on a statewide basis. In fact, because the statutory language at section 402(a)(1)(A)(i) refers to TANF as a ''program, designed to serve all political subdivisions in the State (not necessarily in a uniform manner),'' it would be a reasonable interpretation of the statute to conclude that plan provisions need not be implemented statewide.

If we were sure that a statewide requirement would produce the optimal policy results, we would have the authority to add such a requirement to our standards for waivers in determining penalty relief. However, we are not convinced that a statewideness requirement would result in better protections or more appropriate services for victims of domestic violence. For example, if a State could not enact statewide legislation for political reasons or could not implement a program in remote areas of the State for administrative reasons, a statewideness requirement might preclude any residents of the State from benefiting from the FVO.

Thus, under the statute and this rule, there can be variations in the implementation of the FVO across a State. However, we hope that all States will work toward statewide implementation because we believe that recipients would generally be better served under a statewide program. Also, we point out that States can expect broader protection against penalties if they implement statewide.

We would like to take this opportunity to clarify the meaning of the phrase ''optional certification'' in section 402(a)(7). Under this provision, election of the Family Violence Option is optional, i.e., States may use their own discretion in deciding if they will elect the option. However, for States that have adopted the option, the State plan certification is not optional. States adopting the option must submit the certification with their State plan or submit a State plan amendment and notify the Secretary of DHHS within 30 days.

(d) Scope of Penalty Relief Available

Comment: A couple of commenters pointed out that our ''reasonable cause'' proposal gave States very limited penalty relief with respect to FVO waivers. If a State did not fully meet the work participation rates or time-limit cap when we removed waiver cases from the calculations, it could get no other consideration. For example, our proposed rules did not consider such waivers in deciding whether a State qualified for penalty reductions under § 271.51 or in deciding the potential size of reductions under that provision.

Response: In the revised language at § 260.58(b), we indicate that we will consider good cause domestic violence waivers in deciding eligibility for, and the amount of, penalty reduction under § 261.51. In §§ 260.58(c) and 260.59(b), we indicate that we may take waivers into consideration in deciding if a State qualifies for penalty relief as the result of its performance under a corrective compliance plan.

Also, while §§ 260.58 and 260.59 set specific criteria for automatic reasonable cause determinations based on domestic violence waivers, under the revised language at § 262.5(a), the Secretary has some discretion to grant reasonable cause in cases where a State could not attribute its failure entirely to one of the established ''reasonable cause'' criteria. Thus, a State could request that we grant ''reasonable cause'' in cases where federally recognized good cause domestic violence waivers did not justify ''reasonable cause'' in and of themselves, but were one of several factors contributing to its failure.

Taking waivers into consideration in deciding penalty reduction under § 261.51 seemed to be a logical extension of our proposed ''reasonable cause'' provision. Under the statute and rules, the penalty reduction under § 261.51 is available based on the degree of noncompliance. If two States had the same participation rate, but one could attribute its failure in part to the granting of federally recognized good cause domestic violence waivers and the other could not, we think that the State granting waivers is complying to a greater degree and deserves a smaller penalty. The revised rules at § 260.58(b) reflect this philosophy.

The revised rules do not provide for automatic penalty relief for waivers granted during a corrective compliance period. As we have indicated in the response to another comment, we do not want States to look to the FVO as a quick fix for their penalty problems. Under these rules, at §§ 260.58(c) and 260.59(b), we reserve discretion whether to give an individual State credit for good cause domestic violence waivers in determining whether it has achieved compliance during the corrective compliance period. In making this decision, we would expect to look at evidence provided by the State that it had adopted the FVO and had implemented a broad, thoughtful, and long-term strategy for identifying and serving victims of domestic violence.

(e) Service Plans and Work Requirements

Comment: We received a number of comments on the requirement in the proposed rule that waivers be accompanied by service plans that ''lead to work.'' They argued that this language diverted the focus of the FVO away from the safety considerations emphasized in the statute and that the reference to work had no statutory basis.

Response: As we indicated in the proposed rule, we believe that work is an important part of service plans because many victims of domestic violence need to make progress on that front in order to escape their abusive situations. In § 270.30 of the proposed rule, we indicated that good cause domestic violence waivers must be designed to lead to work. However, we recognize that, in the short-term, safety issues and other demands on the family may preclude specific steps toward work. Thus, we have added new regulatory text at § 260.55(c) to clarify that States have the ability to postpone work activities when safety or fairness issues would so indicate. For example, if a victim of domestic violence needs time to recover from injuries, secure safe and stable housing, and get her children resettled, or needs to stay at home or in a shelter to avoid danger, there may be a need to postpone work activities.

We encourage States to incorporate work activities as a key component of the service plan for victims of domestic violence, to the extent possible. Also, we note that, with our removal of the 6-month limit on the duration of waivers, these final rules may make it more feasible to do so.

Comment: Several commenters expressed concerns that the service plan requirements in the proposed rules would make victims of domestic violence more vulnerable to sanctions (i.e., penalty reductions) for not meeting welfare agency expectations. TANF caseworkers are trained to sanction participants who do not adhere to the caseworkers' instructions or who do not comply with eligibility conditions. Additionally, they stated that, in certain circumstances, an appropriate service plan for a victim may be to do nothing. Forcing victims to take specific steps within a fixed time frame may make their situation more precarious. They also argued that services provided by domestic violence counselors would be better for victims since these workers understand that developing a plan for the family's safety can be emotionally painful and may involve continuous reassessments.

Response: The FVO provides for waiver of program requirements ''where compliance with such requirements would make it more difficult for individuals receiving assistance * * * to escape domestic violence or unfairly penalize such individuals. * * *'' Thus, it would be inconsistent with the FVO for domestic violence victims to be more at risk of program sanctions than other individuals receiving assistance. In other words, States should be giving victims of domestic violence the same, or greater, access to ''good cause'' for failing to comply or cooperate with

work, personal responsibility, and child support requirements. They also should consider the needs of victims of domestic violence in deciding eligibility for State time-limit exemptions and exceptions.

In general, we view service plans not as additional requirements for victims of domestic violence, but as alternatives to normal program requirements. In developing these plans, and determining if an individual has good cause for not complying with a plan, States should take the other demands on the family and the family's ability to respond into account. States should also recognize that a battered woman often does not have control over her own actions and respect a victim's judgment of whether she can safely take certain action steps (e.g., move out of her home).

Comment: A significant number of commenters asked that we delete the requirement for a service plan because they felt it placed an additional burden on TANF caseworkers who may not be equipped to engage in this type of work and raised potential privacy issues. Commenters also wanted to see a requirement that States provide referrals to supportive services, as specified in the statute.

Response: Implicit in these comments seems to be an assumption that TANF caseworkers would have full responsibility for developing and enforcing service plans. This is not our assumption, and it is not consistent with the evolving nature of the TANF program. The TANF statute does not have the same statutory or regulatory requirements for ''single State agency'' administration that the AFDC program did. Thus, under TANF, other public and private agencies can make discretionary decisions on behalf of the TANF agency.

In the context of the FVO, States have a lot of flexibility in deciding the appropriate roles for TANF staff and domestic violence service providers in administering these provisions. The statutory language in section 402 provides for State referral of domestic violence victims to counseling and supportive services. It makes no distinction as to who will provide these services. Thus, services may be provided within the TANF agency, with referrals to specially trained agency staff, or by referrals to an outside agency. There is also no specification as to when these referrals can occur; for example, they could occur before or after the service plan is in place.

If there are concerns about the ability of TANF staff within a State to perform certain roles, e.g., because of resource constraints or expertise, the TANF agency can and should work with third parties on the development of service plans and the delivery of supportive services.

Also, readers should note that we modified the regulatory text in § 260.55 to include an expectation that assessments and service plans be developed by persons trained in domestic violence. This regulatory text does not prescribe any specific training curriculum, any specific staff credentials, or any specific administrative structure for delivering services. However, it does require that staff performing these functions have some training in domestic violence. The regulatory change reflects our view and the view of commenters about the critical importance of these activities. Staff need some level of special knowledge and expertise in order to make appropriate decisions in these highly sensitive case situations.

At the Federal level we have been investing resources to improve the capacity of TANF staff to screen, identify, and serve victims of domestic violence. We supported a project in Anne Arundel County, Maryland, to pilot test such an effort. In 1997, ACF awarded a grant to train all of Anne Arundel County's Department of Social Services staff on domestic violence. This training has now been incorporated into the regular training for all new employees. This project is one of the first in the nation and has become a model for other States considering adopting a State domestic violence curriculum. In addition, we are developing resource materials that agencies can use as part of our

Welfare and Domestic Violence Technical Assistance Initiative, under the National Resource Center on Domestic Violence. The first two ''practice papers'' issued under this initiative address the subjects of ''Building Opportunities for Battered Women's Safety and Self-Sufficiency'' and ''Family Violence Protocol Development.'' You may contact the National Resource Center at its toll-free number, 1–800–537–2238.

Comment: A couple of commenters felt that our rules should specify that service plans should also provide for referrals to appropriate alternative support, such as SSI and child support.

Response: One of the expectations for all TANF recipients is to cooperate in establishing paternity and obtaining child support. Under both the Family Violence Option and the rules of the Child Support Enforcement program, the State may waive these requirements if the individual has ''good cause'' for not cooperating. Thus, we would expect child support referrals except in cases where it creates a risk to the family or is otherwise inappropriate.

Our rules generally expect that service plans will help enable victims to attain the skills necessary to ''lead to work'' and to become self-sufficient because economic self-sufficiency is a major goal of the TANF program. However, our rules also envision that the plans will reflect individualized assessments of the needs and circumstances of victims and their families. The rules recognize that work requirements are not necessarily appropriate in some cases and that some women will need extra time on assistance because of their current or past circumstances.

We would not prescribe the specific content of a State's assessments or the specific nature of its referrals. However, we would point out that, for a State's TANF program to achieve long-term success, families will need to receive appropriate supports and referrals. Also, based on State practice in recent years, it seems fairly clear to us that States understand the value of making appropriate referrals to SSI.

(f) Waivers of Time Limits

Comment: Some commenters felt that our regulatory interpretation on time-limit waivers appeared to be contrary to the purpose of the welfare reform statute. A majority recommended that the final regulations should allow States to ''stop the clock'' for families and give them good cause domestic violence waivers at the time they are at risk of violence, not just at the time that they approach the 60-month time limit. A number of commenters had similar concerns about the proposed language that only recognized time-limit waivers for cases that were ''unable to work.''

They felt that the proposed definition of good cause domestic violence waiver would not necessarily be consistent with an individual's circumstances. They argued that some domestic violence victims might need an extended period of time to set up a new household, help their children adjust to new surroundings, and receive counseling. If the trauma of the abusive relationship is substantial, a woman might not be psychologically ready to develop the employment skills that are required under TANF. In these types of cases, the clock should be stopped until the victim is healthy and feels safe enough to engage in work activities. Similarly, the clock should be stopped if States determine that abused women are not able to comply with the Federal work requirements. They also expressed concerns that our proposed policies

would treat victims inequitably, based on the particular timing of their domestic abuse situations.

Response: Although we have not adopted the specific suggestion of commenters to recognize waivers that ''stop the clock'' and automatically exempt families from the time limit, we have revised the final rules to give Federal recognition to a much broader array of waivers to extend the time limits. Under the final rules, we will recognize such waivers, based on need, due to current or past domestic violence or the risk of further domestic violence. Thus, States will be able to provide victims with specific assurances that: (1) They can receive assistance for as long as necessary to overcome the effects of abuse; and (2) extensions will be available in the future based on their current inability to move forward. For example, States could look at whether victims were unable to pursue work or child support for any period of time while they were on assistance or whether a current or prior unstable housing situation creates a need for extended assistance. As a result, States could advise a victim that the family will receive an extension for as long as necessary if the family accrues 60 months of assistance.

We encourage States to give victims the assurance they need that: (1) They will not be cut off assistance when they reach the Federal time-limit if they still need assistance; and (2) they will be able to return for assistance if the need recurs. Such assurances are important because they will alleviate pressure on victims to take steps that might jeopardize their personal or their family's safety. We intend to defer to State judgments on the need for such waivers and the length of time such waivers are needed. For example, if a State granted a waiver that extended a family's eligibility for assistance based on the length of time that the victim was unable to participate in work activities, we would recognize a State waiver that extended assistance for that period of time.

The disaggregated data reporting will indicate those cases whose time limit has been extended based on a federally recognized domestic violence waiver, as reported by the State. (We will also get information on the aggregate number of waivers granted under the annual report.)

As we have stated previously, we remain concerned that individuals granted waivers receive appropriate attention from TANF staff, access to services, and appropriate consideration of their safety issues. Therefore, we have added new annual reporting requirements at § 265.9(b)(5) that should give us insight into actual State practice in these waiver cases and tell us how frequently such waivers are being granted. In addition, at §§ 260.54, 260.58, and 260.59, we have specified that a State may receive special penalty consideration under these regulatory provisions if it submits this information. The primary purpose for creating criteria for Federal recognition of a State's good cause domestic violence waivers was to set in place a structure for ensuring that victims receive appropriate alternative services. In addition, the reporting will provide a public description of the basic strategies that the State has put in place.

Comment: A few commenters expressed concern about the proposed language in § 274.3 that appeared to require that the victim of domestic violence receive both a hardship exemption from the 60-month time limit and a separate good cause domestic violence waiver based on inability to work. The language in the NPRM stated that, in order to qualify for exclusion from the calculation of work participation rates, families must have good cause domestic violence waivers that were in effect after the family received a hardship exemption from the limit on receiving assistance for 60 or more months. They expressed concern that the effect of this requirement would be that a State wishing to use the FVO must include domestic violence as part of the hardship extension criteria. Commenters stated that this is not supported by law and could result in some States not being able to benefit from the penalty relief that we were trying to provide.

Response: The language in the NPRM apparently did require that both a hardship exemption and a good cause domestic violence waiver be in effect. We agree with the commenters that waivers should not have to meet both requirements, and we have deleted the problematic language from the final rule.

(g) Confidentiality

Comment: A large number of commenters expressed concerns about the lack of attention paid to confidentiality. Commenters argued that individual case files should not be kept. Such files could have a negative effect on victims, potentially discouraging them from seeking services and even endangering them, if special attention is not paid toward protecting the files. They asked us to clarify in both the preamble and final regulation that we would neither require nor expect States to include sensitive information in their files that could jeopardize a woman's safety or security. They recommended that States retain and report information in an aggregated form to protect the anonymity of victims and their children.

Response: We have revised the regulation to incorporate the statutory language on confidentiality found in the FVO (see § 260.52). We also encourage States to consider the special needs of victims of domestic violence and to consult with providers of domestic violence services as they develop procedures to ''restrict the use and disclosure of information'' on recipients, pursuant to section 402(1)(A)(iv). The experience of domestic violence service providers should help shed light on questions such as what information is sensitive, what particular cautions should be taken with victims of domestic violence, and what practices work best in ensuring confidentiality.

We recognize the importance of this issue. However, in order to administer these provisions and have effective and accountable programs, it will be necessary for States to maintain records that identify victims and recipients of good cause domestic violence waivers. Since it is vital to keep this information, States should consider whether their standard confidentiality safeguards are sufficient to protect victims or whether they should institute additional safeguards. For example, these could include establishing special safeguards for both computer and paper files, training TANF staff about the importance of confidentiality for domestic violence victims and specific procedures to be used in their workplace, using extreme caution when determining whether to release the whereabouts of victims to anyone, and handling disclosures of abuse with extreme sensitivity.

(h) Notice Requirements

Comment: A small number of commenters asked to see language in both the preamble and the text of the regulation requiring that States provide TANF applicants written notice when a request for a good cause domestic violence waiver is denied.

Response: Under section 402(a)(1)(B)(iii), in their TANF plans, States must set forth objective criteria for fair and equitable treatment and explain how they will provide opportunities for hearings for recipients who have been adversely affected. Although we are not regulating this provision, in light of the restrictions on our regulatory authority at section 417, we encourage States to send notices in these cases as a matter of fairness and

equity and to treat these waiver denials as adverse actions.

E. Recipient and Workplace Protections

Background

A number of commenters expressed concerns that the NPRM focused too much on penalties and was unacceptably silent on protections for needy individuals and families, including the protections available through Federal nondiscrimination and employment laws.

One concern of commenters was that the stringency of the proposed rules on issues like penalty relief, waivers, child-only cases, and separate State programs would make it less likely that hard-to-serve families would receive appropriate services and treatment. Throughout the final rule you will find responses to this latter concern.

However, commenters also had some specific suggestions as to how we could incorporate specific protections available in the TANF law and other Federal laws into these rules. It is this latter set of comments that we address in this section.

You will find discussion of some related comments and our response in the sections of the rules dealing with nondisplacement (at subpart G of part 261) and individual sanctions (at subpart A of part 261).

Comments and Responses

(a) Applicability of Other Federal Laws

Comment: Several commenters noted that there was no reference in the TANF regulations to the applicability of Federal employment laws to TANF-funded positions, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and title VII of the Civil Rights Act. They noted that welfare recipients are not exempted from such laws; rather they are entitled to a safe, healthy employment environment, per OSHA, and to equal protection under all other statutes that apply to the workplace.

We received a number of related comments about the lack of reference to Federal nondiscrimination laws, including the Americans with Disabilities Act, Equal Pay Act, and Age Discrimination in Employment Act.

In both cases, commenters argued that we needed to take a more active role in the enforcement of these laws. There were a variety of suggestions about how we should do that.

At one end of the spectrum, commenters want us to speak to the applicability of such statutes under the TANF program, reference guidance put out by the Department of Labor and EEOC, inform welfare systems about existing laws and enforcement procedures, and acknowledge the role of EEOC in addressing individual complaints.

At the other end were comments saying that we should actively engage in litigation or promote actions through other agencies with enforcement authority upon evidence of systemic violations or a pattern of substantiated complaints. One commenter explicitly indicated that we could defer to agencies of proper jurisdiction for enforcement.

Response: In the NPRM preamble, we had noted that our proposed rules did not cover the nondiscrimination provisions at section 408(d) of the Act. These provisions specify that any program or activity receiving Federal TANF funds is subject to: (1) the Age Discrimination Act of 1975; (2) section 504 of the Rehabilitation Act of 1973; (3) the Americans with Disabilities Act of 1990; and (4) title VI of the Civil Rights Act of 1964. We had decided not to include the provisions in the NPRM because ACF was not responsible for administering these provisions of law, and they were not TANF provisions.

We suggested that individuals with questions about the requirements of the nondiscrimination laws, or concerns about compliance of individual TANF programs with them, should address their comments or concerns to the Director, Office of Civil Rights, Department of Health and Human Services, 200 Independence Ave, SW, Room 522A, Washington, DC 20201.

We recognize that this language and approach did not adequately represent this Administration's commitment to the enforcement of civil rights and labor laws. In that context, we have decided that we should focus more attention on these protections in the final rule. We can do that without violating section 417 (in letter or spirit) or interfering with the jurisdiction of other Federal agencies. In light of the concerns raised in these comments, we believed it would be helpful to include the nondiscrimination provisions referenced at section 404(d) of the Act in the regulation. They appear at § 260.35(a).

In § 260.35(b), you will find new regulatory language designed to further clarify the protections applicable to TANF programs and activities. In this new clarifying language, we make the point that section 417 of the Act does not limit the effect of other Federal laws, including those that provide workplace and nondiscrimination protections. We also indicate that Federal employment laws and nondiscrimination laws apply to TANF beneficiaries in the same manner as they apply to other workers.

Based on comments we received in this subject area and on some of the fiscal issues being raised, we were concerned that some States were reading the limitations in section 417 more broadly, in effect to free States from all provisions of Federal law, except those in the new title IV–A. In fact, section 417 only limits regulation and enforcement of the TANF provisions. It does not affect the applicability of other Federal laws or the authority of other Federal agencies to enforce laws over which they have jurisdiction.

In addition to adding this new regulatory text at § 260.35, we added a new reporting requirement at § 265.9(b)(7). Under this provision each State must include a description of the grievance procedures that are in place in the State to resolve complaints that it receives about displacement.

Each State must create nondisplacement procedures under section 407(f) of the Act. This provision and the related provision at section 403(a)(5)(J) of the Act (which applies to the WtW program) reflects long-standing concern among unions, labor groups, and others about the possibility that placement of welfare recipients at work sites could displace other workers from their jobs.

States also are concerned about displacement because of its potential negative effect on their labor force and the long-term success of their TANF programs. At the same time, States are facing economic and programmatic pressures to move applicants and recipients into the workforce. For example, they want to avoid work participation rate and time-limit penalties, and they want to increase their job placements in order to qualify for a High Performance Bonus. In light of these countervailing pressures, we believe that it is important that we monitor State activity in this area. Thus, we are asking for information on the procedures available in the States to protect against displacement. We will incorporate a summary of this information on nondisplacement procedures as part of the characteristics of State programs that we feature in the annual report to Congress (pursuant to section 411(b)(3)). We can also make the descriptions publicly available to interested parties within the State.

To the extent that a State includes such a description in its State TANF plan, it could merely cross-reference the plan material in the annual report. It

would not need to resubmit the information.

In addition to these specific regulatory changes, we encourage States to exercise due care as they promote work and implement new job development, placement, and referral activities. They should not use TANF programs in any way that would cause displacement or compel people to endure discriminatory work places, unsafe work environments, or unfair work conditions in order to obtain assistance.

There is a potential that States without adequate nondisplacement procedures may have an unfair advantage in obtaining job placements. Therefore, as we work on developing proposed rules for the High Performance Bonus, we will consider State grievance procedures or the record of a State with respect to displacement complaints as potential factors in determining eligibility for, or the size of, a High Performance Bonus. We look forward to receiving public comments on this issue and other issues when we publish the High Performance Bonus NPRM shortly.

Finally, we wanted to use this opportunity to provide additional information to State agencies, employers, and the public about the workplace and nondiscrimination protections that do apply in TANF. We will not attempt to provide detailed information on how various other Federal laws would apply to the TANF program or to TANF recipients. Rather, our goal is to give enough background information so that readers will understand the basic context and know where to go for further information.

As commenters pointed out, the four Federal laws that are cited in section 408(d) of the Act are not the only Federal nondiscrimination and employment laws that are applicable to, and relevant for, the TANF program. Other laws that may come into play include the Fair Labor Standards Act (which covers issues like minimum wage and hours of work), the Family and Medical Leave Act, the Occupational Safety and Health Act, title IX of the Education Amendments of 1972, title VII of the Civil Rights Act of 1964 (title VII), and the Equal Pay Act. A variety of Federal agencies are responsible for enforcing these laws, and the enforcement tools available differ by program.

The Department is developing guidance that will provide an overview of the applicable civil rights laws and the enforcement mechanisms for each. We advise you to consult this guidance for information on which Federal agencies have jurisdiction over which types of complaints; for example, as one commenter pointed out, the Department's Office of Civil Rights may be the appropriate reference for certain issues, but the EEOC generally handles individual complaints of employment discrimination. We will provide access to the guidance through the Web, when it is available.

The U.S. Department of Labor (DOL), and the Equal Employment Opportunity Commission (EEOC) have also issued guidance on the applicability of Federal discrimination and employment laws to welfare recipients. In part, this guidance indicates that welfare recipients participating in certain types of activities may be ''employees'' and thus covered by the FLSA, OSHA, and title VII. You may access these two documents through links on our Web site. The DOL guidance is entitled ''How Workplace Laws Apply to Welfare Recipients (May 1997),'' and the EEOC guidance is entitled ''Enforcement Guidance: Application of EEOC Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997).''

Likewise, the Internal Revenue Service (IRS) has issued guidance on the ''Treatment of Certain Payments Received as Temporary Assistance for Needy Families (TANF).'' IRS Notice 99–3, dated December 17, 1998, addresses the treatment of TANF payments under certain income and employment tax provisions. For example, it notes that, under the Internal Revenue Code, earned income for Earned Income Credit (EIC) purposes does not include amounts received for service in community service and work experience activities, to the extent that TANF subsidizes those amounts. It also specifies the conditions under which TANF payments would not be includible in an individual's gross wages, would not be earned income for EIC purposes, and would not be wages for employment tax purposes.

(b) Effect on Recipient Sanctions and State Penalties

Comment: We received a couple of comments saying that our regulations should provide that a person whose failure to comply with work participation requirements is caused by a violation of employment standards (e.g., a woman who leaves her job due to unremedied sexual harassment) may not suffer reduction or elimination of assistance, under section 407(e). Likewise, a few commenters suggested that we provide that State definitions of good cause (e.g., for failure to participate in work or meet responsibilities under an Individual Responsibility Plan) include workplace rights and/or discrimination situations.

Response: We have not directly required States to provide a good cause exception from the sanction provisions, as some of these comments suggest, because it is not clear that we have the authority to do so. Section 417 generally limits our regulatory authority, and the language at the end of section 407(e) indicates that State sanction decisions are ''subject to such good cause and other exceptions as the State may establish.'' Thus, we believe that we should defer to State decisions on the specific definition of ''good cause.''

At the same time, we do not want to see TANF programs fostering work or participation that is in violation of Federal law. If we learn that violations are occurring, we will pursue additional enforcement, administrative, regulatory, or legislative remedies, as appropriate.

Comment: A commenter also suggested that we deny reasonable cause and penalty relief if a State does not have an adequate process in place for recipients to raise good cause.

Response: We have not made any changes to our regulation in response to this comment. Section 402(a)(1)(B)(iii) requires that the State plan must explain how the State ''will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process.'' Also, as we previously mentioned, section 407(e) indicates that States have discretion in establishing rules on good cause exceptions to sanctions. In light of these provisions, section 417, our lack of plan approval authority, and the general expectation under the TANF statute and rules that States will have discretion in deciding how services are delivered, we do not think it be appropriate to regulate a State's good cause process in this manner.

Comment: A couple of commenters said that we should not penalize States for failing to meet work requirements when their failure could be attributed to compliance with certain laws, such as employment discrimination. A related set of comments was that we should consider State efforts to comply with employment laws in determining whether a State gets reasonable cause or penalty reduction. For example, one said we should require States to develop ''an effective enforcement plan for the employment rights of recipients in work programs'' that include monitoring of laws as a prerequisite for getting a reduced penalty under § 261.51(a). One commenter said we should deny reasonable cause and penalty reductions if the State has no system in place for

monitoring and enforcing of compliance.

Response: We have not included any changes in our regulation in response to these comments. First, it was not clear to us that we should reward States for complying with other Federal laws. We thought it would be better to start with the presumptions that: (1) All States would comply with applicable Federal laws; and (2) we should rely on the procedures available under those other laws as the appropriate mechanisms for promoting compliance. We also had concerns about how we could incorporate such factors into our penalty determination decisions. We would not want to be making independent judgments about the level of State compliance with laws for which other agencies had jurisdiction. Further, it would be difficult for us to get timely, complete, and definitive compliance information from other agencies. Looking beyond Federal law to State and local laws would exacerbate these difficulties. Furthermore, we would have little assurance that official actions on official complaints accurately represented the overall level of compliance within the State, and we would have difficulty developing objective standards that would help convert evidence on violations—or State efforts to comply or enforce compliance—into objective, quantifiable standards.

(c) Procedural Requirements

Comment: A few commenters suggested that we require States to inform recipients of their rights and/or procedures for addressing violations. One commenter said we should require that staff be informed as well. One commenter also said we should require posting of appropriate nondiscrimination notices following the model under title VII of the Civil Rights Act.

Response: We recognize the value of providing full information to recipients, staff, and employees on these matters. However, we do not believe that imposing these requirements would be consistent with section 417 of the Act or the basic principle of State flexibility of the TANF legislation. Through the efforts by our Office of Civil Rights and other Federal agencies, we are making information on protections more widely available to the public, but in a framework more consistent with the TANF legislation.

You can find additional discussion about workplace protections in the preamble for part 261.

F. Comments Beyond the Scope of the Rulemaking

General

A few comments we received were outside the scope of this rulemaking. However, we wanted to take the opportunity to speak briefly to them in this preamble because they raise important TANF issues that merit discussion.

Special Issues

(a) Work Standards

Comment: We received some comments expressing concerns about the statutory provisions—most notably about the work participation rate requirements. Readers noted two specific concerns—their failure to recognize certain kinds of educational activities as participation and the inordinately high standards applicable to two-parent families.

Response: While certain policy decisions in this regulation respond to these concerns, to the extent that they represent statutory, and not regulatory, issues, they are beyond the scope of this rule. You may find additional discussion of this issue and our response in the preamble and rules for part 261.

(b) Drug Testing

Comment: One organization expressed its opposition to urine drug testing, provided a number of suggestions about guidelines we could issue to protect clients against unfair sanctions, asked that we promulgate guidance to States on how to conduct testing in a way that ensures the due process rights of clients, and suggested that treatment for addiction would be a more cost-effective approach than sanctions, in the long run, for States. It also asked that we remind States that the law allows sanctions only against the person who tests positive, not other family members.

Response: We are working with the Substance Abuse and Mental Health Services Administration (SAMHSA) on developing guidance and technical assistance materials that will help States deal effectively and appropriately with needy families that have substance abuse problems. In fact, we have developed an action plan of activities that we could undertake jointly with SAMHSA. Under that plan, we are co-sponsoring some sessions on substance abuse and welfare reform as part of our FY 1999 ''Promising Practices'' Conferences.

Regarding the commenter's last point, we assume the commenter is referring to section 902 of PRWORA, which says that the Federal government would not prohibit States from sanctioning welfare recipients who test positive for use of controlled substances. Clearly, this language envisions that sanctions in such cases would not extend beyond the individual to other family members.

Technically, we could claim the authority to regulate this provision because the limits to our regulatory authority at section 417 cover only those provisions in part IV–A of the Act. (Part IV–A of the Act incorporates section 103(a) of PRWORA, but not section 902 or the other sections.) However, requiring States to continue TANF benefits to other family members would contravene the intent of section 401(b) of the Act, which eliminates the entitlement to assistance under TANF, and the spirit of the TANF statute, in giving States discretion in deciding which families should receive benefits. Thus, while we might advise against sanctioning other family members, we decided not to regulate State decisions in this area.

(c) State Plan Requirements

Comment: One commenter asked that our regulations include specific requirements about State plan descriptions, due process, and notifications to recipients.

Response: In general, these are areas where we do not have clear, direct regulatory authority. However, there are places in the final rule where we have made changes that address this concern. One is in the section dealing with MOE expenditures. Because MOE expenditures must be made on behalf of ''eligible families,'' in order for us to determine if State MOE expenditures are ''qualified expenditures,'' State plans must contain information on how the State defines ''needy families.'' The revised rule at § 263.2(b) contains a reference to this State plan requirement. Also, in the sections of the rule and preamble that deal with appropriate implementation of the work sanction provisions (§§ 261.54 through 261.57), we draw a connection between the adequacy of a State's notification and hearings processes and its eligibility for penalty relief. We believe these provisions are clearly within our regulatory authority, because of their connection to penalty enforcement, even though we do not have general regulatory or enforcement authority in these areas.

However, we would point out to States that the absence of regulation does not eliminate the requirements as the statute does address State responsibilities in these areas. Under section 402(a)(1)(B), the State plan must

set forth objective criteria for the delivery of benefits and the determination of eligibility and for fair and objective treatment. It must also explain how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process. Section 402(b) requires that States must notify the Secretary of plan amendments within 30 days, and section 402(c) requires that States make summaries of the plan and plan amendments available. Section 407(e) provides that State penalties against individuals (i.e., sanctions) are subject to such good cause and other exceptions as the State establishes, and it prohibits penalties against single custodial parents with children under age 6 who refuse to work and have a demonstrated inability to obtain needed child care.

(d) Tribal Issues

Comment: We also received a couple of comments concerned about the Tribal regulations and the consultation process used in that rulemaking.

Response: We have referred those comments to the Division of Tribal Services in the Office of Community Services for further consideration. At the same time, we would like to address a couple of concerns raised by the comments.

Comment: One commenter asked that we require States to coordinate with Tribes as part of the planning process. Another noted that the proposed rule did not provide specific mechanisms for building State-Tribal relationships. The commenter indicated that history of State-Tribal relationships over the past 200 years was primarily negative and suggested we add specific financial penalties or sanctions to foster cooperation.

Response: We believe it would be contrary to the spirit of this legislation and the restrictions placed on our regulatory authority by section 417 to require States or Tribes to take specific actions in this area. However, as indicated by our subsequent comments on State-Tribal coordination, for welfare reform to succeed in Indian country, States and Tribes need to work together in addressing administrative, economic, and service delivery issues. Thus, we have spent some time trying to identify ways to make coordination between States and Tribes easier and more beneficial, and we have included a few provisions in this rule designed to foster better coordination. More specifically, this rule: (1) allows State contributions to Tribal TANF programs to count towards the State MOE; (2) exempts individuals covered by Tribal TANF reporting from the State case-record reporting sample; and (3) gives States an option whether to include individuals in Tribal programs in the State work participation rate calculations. Also, we continue to look for opportunities outside of this rule—such as in our technical assistance and outreach initiatives—to enhance coordination of State and Tribal programs.

Comment: One commenter spoke about the concerns of Tribes and Tribal organizations in meeting the proposed TANF data collection and reporting requirements, in light of the limited resources available to Tribes. The commenter said that these requirements might prevent Tribes from implementing their own TANF programs and place those who do participate at risk of sanction. Because Tribes lack the same infrastructure as States, we should provide them administrative resources.

Response: Because the statute imposes the same reporting requirements on Tribes as States and specifies many of the data elements that must be reported, we have limited ability to reduce the reporting burden for Tribes. However, we have made a few adjustments, as we discuss in part 265. Also, we would point out that: (1) there are some reports that Tribes do not have to submit, including the MOE-SSP data report, which is inapplicable to Tribal programs; (2) Tribes are not subject to a penalty if they fail to submit complete, accurate, and timely reports; (3) in these rules, we try to facilitate State support of Tribal programs in the form of MOE expenditures, systems support, and infrastructure; and (4) we will be providing technical assistance to Tribal programs to help address their infrastructure needs.

G. Additional Cross-Cutting Issues

Pregnancy Prevention

Comment: One commenter asked that we address pregnancy prevention in the rules.

Response: This issue did not get much direct attention in the NPRM because of the scope of the regulatory package and our limited regulatory authority. However, it is clear from the statement of findings in section 101 of PRWORA, the stated TANF goals at § 260.20, the preamble discussions on allowable uses of Federal and MOE funds, and activities underway outside the scope of these rules that: (1) the TANF legislation recognizes out-of-wedlock pregnancy prevention as a critical component of welfare reform; and (2) subject to some general restrictions, States may spend Federal TANF and State MOE funds on pregnancy prevention efforts.

Because of the significance of this issue, in the final rule, we have added a limited amount of new reporting to capture information on State activities related to out-of-wedlock pregnancies. First, at § 265.9(b)(8), as part of their annual report, we are asking States to include a description of the out-of-wedlock pregnancy prevention activities they provide under their TANF program. Second, in the TANF Financial Report, we are asking States annually to provide a break-out of their expenditures on these activities—to the extent that such expenditures are not reflected in other reporting categories. (We have added similar requirements for reporting on activities related to the formation and maintenance of two-parent families.)

The TANF bonus provisions, which are the subject of separate rulemakings, also address this concern. First, there is a bonus under section 403(a)(2) for States that achieve the greatest reductions in their rates of out-of-wedlock childbearing (without increasing their abortion rates). We will also be considering inclusion of pregnancy prevention measures as we develop proposed rules for the High Performance Bonus, awarded under section 403(a)(4).

We would also point out that, under section 413(e) of the Act, we must rank States based on their rates of out-of-wedlock births for families receiving TANF assistance and conduct annual reviews of those States with the highest and lowest rankings. The TANF Data Report contains data collection related to this provision.

Program Coordination

Comment: One commenter complained that the lack of coordination between the U.S. Department of Agriculture and the Department of Health and Human Services shackled State efforts to meet Federal agency goals.

Response: We have worked diligently over many years to deal with some of the program inconsistency issues that have created administrative problems for States. We will continue our interagency efforts to coordinate program policies and minimize inconsistencies through active dialogue with the Department of Agriculture.

Rural and Transportation Issues

Comment: One commenter offered several suggestions in response to concerns about the effects of TANF in rural areas, including: (1) a rural set-aside of TANF evaluation funds to

determine whether there were inequities for rural areas; and (2) the use of existing rural networks to provide information on the effects of welfare reform in rural areas and lessons learned.

The commenter also suggested that we set guidelines for State implementation in rural areas.

The commenter's final suggestion was that we come up with a method to encourage innovative programs in rural areas as an alternative to State waivers or exemptions of rural residents.

Response: We referred the first two comments to the Director of the Office of Planning, Research and Evaluation for further consideration. At the same time, we would point out that a critical part of our overall research strategy is to ensure that our studies cover a broad diversity of geographic and demographic situations so that we can get a fuller understanding of the effects of our programs. In that context, in July of 1998, we announced that we would be awarding grants to State agencies to stimulate research of emerging approaches for welfare reform programs and policies in rural America. In the first phase of this project, we have awarded planning grants to increase knowledge about current rural strategies, develop new strategies that can be tested, and design evaluations for assessing these strategies. Contingent upon the availability of funds, we would then enter a second phase to fund implementation and evaluation activities.

With regard to rural implementation, we believe that setting guidelines would violate the principle of State flexibility in TANF and the restrictions on our regulatory authority at section 417. However, we will give consideration to rural concerns as we continue to develop our research and evaluation, technical assistance, and outreach agendas.

One of our goals in developing our technical assistance and outreach strategies is to foster efforts that help programs reach all families, including those in isolated communities. An area where we have made significant early progress is in the area of connecting needy individuals to work through more innovative uses of transportation resources and networks. We have been working with the Departments of Labor and Transportation to identify how new and existing resources can be used to address the transportation needs of low-income families and to highlight innovative approaches that have been developed at the community level. We expect these activities to develop further in response to the new Job Access program authorized under the Transportation Equity Act. You can find additional information on these transportation initiatives, including guidance on how TANF and other funds can support these activities and descriptions of program models, through the ACF Web site.

Comment: We received a related comment from a national public transportation group, which urged that TANF plans be developed at the local level with local public transit systems and metropolitan transportation planning organizations.

Response: We recognize the value of these local collaborations and are working on a variety of fronts to foster them. However, we have not included anything in our rule to require them because such a requirement would be beyond the scope of this rule and inconsistent with the limits of our regulatory authority at section 417.

Introduction to Section-by-Section Discussion

Following is a discussion of the regulatory provisions we have included in this package. The discussion follows the order of the regulatory text, addressing each part and section in turn.

V. Part 260—General Temporary Assistance for Needy Families (TANF) Provisions (Part 270 of the NPRM)

Subpart A—What Provisions Generally Apply to the TANF Program?

This subpart of the rules helps set the framework for the rest of the rule. For the convenience of the reader, it reiterates the goals stated in the new section 401. It also includes a set of definitions that are applicable to this part.

We received no comments on this section and have made no changes in the final rule.

Section 260.10—What Does This Part Cover? (§ 270.10 of the NPRM)

This section of the rules indicates that part 260 includes provisions that are applicable across all the TANF regulations in this rulemaking.

We received no comments on this section and have made no changes in the final rule.

Section 260.20—What Is the Purpose of the TANF Program? (§ 270.20 of the NPRM)

This section of the rules repeats the statutory goals of the TANF program. In brief, they include reducing dependency and out-of-wedlock pregnancies; developing employment opportunities and more effective work programs; and promoting family stability.

While we did not elaborate on the statutory language in the proposed rule, in the preamble we pointed out that, in a number of ways, the new law speaks to the need to protect needy and vulnerable children. We advised States to keep this implicit goal in mind as they implement their new programs.

Comment: A couple of commenters argued that we should do more in our rules to promote job preparation and/or marriage. One expressed explicit concern about the negative effect of the two-parent work participation rate on State support for two-parent families.

Response: This section of the regulation directly incorporates the statutory language and reflects the premise that States need and merit flexibility in deciding how to meet these goals. However, we have incorporated policies in other sections of the regulation to support State efforts in these areas. For example, our policy to let States define work activities will enable States to better support job preparation. Likewise, we have limited disincentives for States to serve two-parent families in TANF under our policy to limit the potential penalty States face when they fail only the two-parent participation rate (i.e., by basing the penalty on the proportion of the total caseload that two-parent cases represent). Also, we revised the calculation of caseload reduction credits in a couple of ways that address the commenters' latter concern. First, we allow the State an option of applying a credit based either on the two-parent caseload or on the overall caseload. Secondly, we provide for offsets in cases where the State has made eligibility changes that have the effect of increasing the caseload.

We have also made changes to help focus more attention on State efforts to promote the formation and maintenance of two-parent families. In recognition of the significance of this issue, we have added a limited amount of new reporting to capture information on State activities in this area. First, at § 265.9(b)(8), as part of their annual report, we are asking States to include a description of their activities to promote two-parent families. Second, in the TANF Financial Report, we are asking States annually to provide a break-out of their expenditures on these activities—to the extent that such expenditures are not reflected in other reporting categories. (We have added similar requirements for reporting on activities related to the prevention of out-of-wedlock pregnancies.)

In a related effort, the formula that we created to award high performances, under separate guidance, encourages State efforts to prepare recipients for work, by setting aside a substantial share of the monies for States whose recipients succeed in the workplace (i.e., retain jobs and show earnings gains).

Section 260.30—What Definitions Apply Under the TANF Regulations? (§ 270.30 of the NPRM)

General Explanation

(a) Scope

This section of the rule includes definitions of the terms used in parts 260 through 265. It also includes references to definitions that pertain only to individual parts or provisions. You can find the definition of terms that are specific only to individual parts or provisions in the appropriate individual parts of the final rules.

In drafting this section, we defined only a limited number of terms used in the statute and regulations. We understood that excessive definition of terms could unduly and unintentionally limit State flexibility in designing programs that best serve their needs. Commenters were generally supportive of this approach, but had specific concerns about specific terms, that we address below.

(b) General Terms to Note

In the proposed rule, we pointed out our use of the term ''we'' throughout the regulatory text and preamble—to mean the Secretary of the Department of Health and Human Services or any of the following individuals or agencies acting on her 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.

We also cited the terms ''family'' and ''head-of-household'' as examples of terms that we did not define. We said that States were thus free to define what types of families would be eligible for TANF assistance. (However, we also advised readers to look at several sections of the proposed rule because, while not defining the term ''family,'' they addressed key requirements on the State that related to the State's definition. These sections included: work participation rates (§§ 271.22 and 271.24 of the NPRM), MOE requirements (subpart A of part 273), time limits (§ 274.1), and data collection definitions (§ 275.2). We received a number of comments on the proposed policies in these related areas, including the proposed provisions on child-only cases. Thus, you will find related discussion in those other sections of the preamble.)

In the final rule, we have added a definition of noncustodial parent. It clarifies that, under TANF, this term is not used in the narrow legal context to refer to parents lacking legal custody, but to parents who do not live in the same household as the minor child. It also does not refer to parents who live outside the State and are beyond the reach of the State's TANF program. We felt it was necessary to include a basic definition because we received so many questions about how the TANF rules on expenditures, data collection, work requirements, and time limits applied to this group of individuals. You will find additional discussion of noncustodial parent issues throughout the preamble that follows.

We decided not to define the individual work activities that count for the purpose of calculating a State's participation rates. We directed readers to the preamble discussion for § 273.13 and subpart C of part 271 in the NPRM, respectively, for additional discussion. While commenters generally supported our decision not to define work activities, we received a few comments in this area. We discuss these comments in the preamble to subpart C of part 261. (NOTE:

The reference to § 273.13 in the NPRM preamble was incorrect, and we deleted it.)

For reference purposes, we noted the use of the term ''Act'' to refer to the Social Security Act, as amended by the new welfare law, and ''PRWORA'' for the new law itself. Any section reference is a reference to a Social Security Act section, unless otherwise specified.

This part incorporates the major definitions from the PRWORA statute, including: ''adult,'' ''minor child,'' ''eligible State,'' ''Indian, Indian Tribe and Tribal organization,'' ''State,'' and ''Territories.'' (Readers should note that the term ''State'' includes the ''Territories,'' unless specifically noted.) We include these definitions largely for the readers' convenience.

This part also incorporates some clarifying definitions, commonly used acronyms (such as ACF, AFDC, EA, IEVS, JOBS, MOE, PRWORA, TANF, and WtW), and commonly used terms and phrases (such as the Act and the Secretary). While the meaning of many of these terms is generally understood, we included them to ensure a common understanding and enable some reductions in regulatory text.

(c) Significant Fiscal Terms

This part also incorporates a number of definitions that have substantial policy significance, which we included for clarification purposes. For example, it incorporates terms that distinguish among several types of expenditures. These distinctions are critical because the applicability of the TANF requirements vary depending on the source of funds for the expenditures. In particular, it distinguishes between expenditures from the Federal TANF grant and from the State funds expended to meet MOE requirements (either within the TANF program or in separate State programs), as follows:

Federal expenditures. This is short-hand for the State expenditure of Federal TANF funds.

Qualified State Expenditures. This term refers to expenditures that count for basic MOE purposes (at section 409(a)(7)). (By regulation, many, but not all, of the requirements that apply for countable basic MOE expenditures also apply for Contingency Fund MOE purposes.)

Basic MOE. This term refers to the expenditure of State funds that a State must make in order to meet the basic MOE requirement for the TANF program and avoid the penalty specified at section 409(a)(7). (In the NPRM, we used the term ''TANF MOE,'' but we changed the term in response to comments and concerns about confusing readers.)

Contingency Fund MOE. This term refers to expenditures of State funds that a State must make in order to meet the Contingency Fund MOE requirements under sections 403(b) and 409(a)(10). States must meet this MOE level in order to retain contingency funds made available to them for the fiscal year. Note that this term is more limited in scope than the term ''basic MOE.'' See discussion at subpart B of part 264 for additional details.

State MOE expenditures. This term refers generically to any expenditures of State funds that may count for basic MOE or Contingency Fund purposes. It includes both State TANF expenditures and expenditures under separate State programs, where allowable.

State TANF expenditures. This term encompasses the expenditure of State funds within the State's TANF program. It identifies the only expenditures that can be counted toward the Contingency Fund MOE. It includes both commingled and segregated State TANF expenditures.

Commingled State TANF expenditures. This term identifies the expenditure of State funds, within the

TANF program, that are commingled with Federal TANF funds. Such expenditures may count toward both the State's basic MOE and Contingency Fund MOE. To the extent that expended State funds are commingled with Federal TANF funds, they are subject to the Federal rules.

Segregated State TANF expenditures. This term identifies State funds expended within the TANF program that are not commingled with Federal TANF funds. Such expenditures count for both basic MOE and Contingency Fund MOE purposes. They are not subject to many of the TANF requirements that apply only to Federal TANF funds (including time limits).

Separate State program (SSP). This term identifies programs operated outside of TANF in which the expenditure of State funds counts toward the basic MOE requirement, but not for Contingency Fund MOE. Expenditure of State funds must be made within the TANF program in order to count as MOE for Contingency Fund purposes.

It also incorporates terms to distinguish among different categories and amounts of TANF grant funds. These distinctions are important because they affect the size of grant adjustments and total funding available to the State. In some cases, different spending rules apply to different categories of funds.

State Family Assistance Grant (or SFAG). This term refers to the annual allocation of Federal TANF funds to a State under the formula at section 403(a)(1).

Adjusted State Family Assistance Grant, or ''Adjusted SFAG.'' In the NPRM, we indicated this term refers to the grant awarded to a State through the formula and annual allocation at section 403(a)(1), minus any reductions due to the implementation of a Tribal TANF program to serve Indians residing in the State. In the final rule, we modified the definition to also exclude any funds transferred from TANF pursuant to section 404(d) of the Act. We explain this change in the Comment/Response section below. The distinction between ''Adjusted SFAG'' and ''SFAG'' is significant in determining spending limitations and the amount of penalties that might be assessed against a State under parts 261–265.

Federal TANF funds. This term includes not just amounts made available to a State through the SFAG, but also other amounts available under section 403, including bonuses, supplemental grants, and contingency funds. In expending Federal TANF funds, States are subject to more restrictions than they are in expending State MOE monies, as discussed under subpart B of part 263. (The NPRM used this term and the terms ''Federal funds'' and ''TANF funds'' interchangeably.)

(d) Cross-References

In § 260.30, you will find cross-references for the definitions of ''assistance'' and ''WtW cash assistance.'' In the NPRM, the definition of ''assistance'' appeared at § 270.30. In the final rule, we decided to move it to its own separate section. You will find it in § 260.31. The discussion of the comments on our proposed definition appears in the corresponding preamble section. ''WtW cash assistance'' was not defined in the NPRM; in the final rule, it appears in § 260.32.

In the NPRM, we included definitions for the terms ''Family Violence Option (FVO),'' ''good cause domestic violence waiver,'' and ''victim of domestic violence'' in section § 270.30 and explained them in this section of the preamble.

In the final rule, § 260.30 only contains cross-references for the definitions of the domestic violence terms. As we discussed earlier in the final rule, we have moved the domestic violence provisions to a new subpart B of part 260. The definitions appear at § 260.51. For the discussion of these provisions, you should go to the earlier preamble section entitled ''Treatment of Domestic Violence Victims.''

Likewise, in the final rule, we have moved the waiver definitions (including the definitions of ''waiver'' and ''inconsistent'') to a new subpart C of part 260. For the discussion of the waiver definitions and waiver policies, you should go to the earlier preamble section entitled ''Waivers.''

We received a few comments on the definition of child care terms that are relevant to the issue of whether single parents with children under age 6 may be sanctioned for failing to meet work requirements. For a discussion of those comments, you should go to §§ 261.56 and 261.57.

Finally, we would like you to note that we added a reference to § 263.0(b), which contains a definition of ''administrative costs.'' We decided not to define ''information technology and computerization costs needed for tracking or monitoring required by or under title IV-A of the Act.'' However, we do provide some regulatory language to explain the scope of the exclusion at §§ 263.2(a)(5) and 263.13(b). You will find a discussion of this language in the preamble for § 263.0. (These terms are important because States are subject to 15-percent caps on the amount of Federal TANF and State MOE funds that they may spend on administrative activities, exclusive of such computer-related costs.)

Additional Definitional Issues in § 260.30

(a) Fiscal Terms

Comment: A few commenters pointed out that the proposed rule had an apparent inconsistency in that the base for determining the administrative cost cap and the base for determining penalty amounts were different in States that chose to transfer funds to CCDBG (the Discretionary Fund of the CCDF).

Response: Not all commenters presented this as a definition comment, but we think the appropriate place to address it is by revising the definition of the ''adjusted SFAG.'' The revised definition excludes amounts transferred to SSBG and the Discretionary Fund of the CCDF. This change has the effect of removing the transferred amounts from the base for both the administrative cost cap and the penalty calculations. We believe the exclusion is most consistent with the statutory provision at 404(d), which provides that transferred amounts are subject of the rules of the program to which they are transferred. You can find additional discussion of this issue in the preamble for § 263.0.

Comment: One commenter indicated that we had too many financial and program terms in the list of definitions and asked that we delete some. Of particular concern were: (1) the distinction between SFAG and TANF funds; and (2) State MOE expenditures versus State TANF expenditures, TANF funds and TANF MOE. The commenter recommended that a different term be used for either TANF MOE or State MOE expenditure.

Response: First, while ''SFAG'' and ''TANF funds'' are similar terms, they are not identical. It is important to make and understand the distinction. ''SFAG'' refers only to the basic Federal TANF block grant, the amount given to the State based on prior AFDC, JOBS, and EA payments. ''Federal TANF funds'' refers to Federal funds awarded to the State under section 403 of the Act, except for WtW funds. It thus includes any supplemental grants, bonuses, contingency funds. The ''SFAG'' amount (adjusted) is the base amount for determining any penalties assessed on the State. Most of the provisions on use of funds apply to all ''Federal TANF funds,'' and thus extend to the funding provided under section 403, not just the basic TANF block grant amount.

We have modified the definition of Federal TANF funds slightly to clarify

that the term does not include WtW funds provided under section 403(a)(5). By statute (section 403(a)(5)(C)(v)), the restrictions on the use of TANF funds do not generally apply to WtW funds and the Secretary of Labor is responsible for administering the WtW grants. The exceptions are the TANF provisions on use of funds for administrative costs, Individual Development Accounts, and Employment Placement Programs. The Department of Labor has addressed the restriction on administrative costs for WtW funds separately in its WtW rules, we have made a conforming change to our IDA rules (at § 263.21), and we have not addressed use of WtW funds for Employment Placement Programs because the TANF rules do not directly address this issue. While the proposed rule contained three definitions related to maintenance-of-effort—Contingency Fund MOE, MOE, and TANF MOE, we believe it is best to keep three terms. Since the statute applies some different rules for the basic MOE requirement and Contingency Fund MOE, the rules need to include at least two terms. We included the third term—MOE—because there are many places where the same rules apply to both types of State expenditures, and it is more efficient to use the one short acronym than two longer terms.

As we noted earlier, we did decide to change the term ''TANF MOE'' to ''basic MOE.'' We recognized that the term ''TANF MOE'' could cause confusion because States could expend funds outside the TANF program in meeting the basic MOE requirement; the term ''TANF MOE'' suggested that we were looking only at MOE expenditures under the TANF program.

The proposed rule also contained three terms for Federal TANF funds—TANF funds, Federal funds, and Federal TANF funds. In this case, the three terms were duplicative. We chose to eliminate the first two from the list of terms at § 260.30 and keep the definition for Federal TANF funds. We have made changes throughout the preamble and regulatory text to reflect this decision.

Comment: One commenter noted that our definition for ''Contingency Fund MOE'' contained an incorrect reference to child care expenditures.

Response: The commenter correctly noted that our proposed definition did not conform to the amendments in the Balanced Budget Act. We have revised the definition in the rules to remove the reference to child care expenditures. We also made conforming changes to the preamble discussion.

(b) Miscellaneous Issues

Comment: One commenter indicated that we needed a definition of Governor and that we should include the Mayor of the District of Columbia in that definition.

Response: We have added a standard definition that includes the Mayor of the District of Columbia and the chief executive officer of the eligible Territories as well.

Comment: One commenter wanted us to establish a Federal definition for ''violating a condition of their parole or probation,'' like the one used in New York State. The commenter's suggestion would have the effect of limiting the scope of the ''fugitive felon'' provision at section 408(a)(9) by providing for uniform standards that exclude certain ''technical violations.''

Response: For several reasons (including the limits to our regulatory authority under section 417 and existing variations in State law), we believe that this definition is an appropriate area to leave to State discretion. Therefore, we have not included a Federal definition.

Miscellaneous Technical Changes To Note

Finally, we made a few minor changes based on our own internal reviews. First, we noted that the proposed definition of ''eligible State'' did not reflect the amendment made by the Balanced Budget Act. Under PRWORA, as enacted, an ''eligible State'' was one that had submitted a complete plan in the two-year period immediately preceding the fiscal year. Under the change, ''an eligible State'' is one that submitted a complete plan in the ''27-month period ending with the close of the first quarter of the fiscal year.'' The final rule incorporates this revised language.

According to the Committee Report (H.R. Rep. No. 78, Part 1, 105th Cong., 1st sess., p. 38), the purpose of the amendment was to give States an additional quarter to submit their plans. However, the meaning of the new statutory language is a little more complicated. If you would like additional information, you may refer to guidance that we sent out on May 15, 1998 (OFA-TANF–PA–98–3). A copy of this document is available through the OFA Web page (at http://www.acf.dhhs.gov/ofa).

Secondly, we have added some cross-references to terms defined in other parts of the TANF rules, including ''Individual Development Accounts'' and ''administrative costs.''

Thirdly, as we have previously discussed, we created a new subpart A in part 260 for the definitions and other general provisions that were in part 270 of the NPRM, and we moved the definition of terms related to domestic violence and welfare reform waivers to new subparts of part 260. We believe this new structure will make our policies in these latter areas clearer and more coherent.

Finally, we added definitions for ''Social Services Block Grant,'' ''SSBG,'' ''State agency,'' ''CCDBG,'' and the ''Discretionary Fund of the Child Care and Development Fund'' because these terms were helpful in describing other provisions of these rules. These definitions are straightforward references, based on existing statutory and regulatory language.

§ 260.31 What Does the Term Assistance Mean? (New Section)

This is a new section in the final rule. The proposed rule contained the definition of assistance in § 270.30, with the other TANF definitions. However, because of the length and significance of this term, we decided to give it its own section.

(a) Background

In the NPRM we advised readers to note the definition of ''assistance'' proposed in this section. We indicated that PRWORA uses the terms ''assistance'' and ''families receiving assistance'' in many critical places, including: (1) most of the prohibitions and requirements at section 408, which limit the provision of assistance; (2) the numerator and denominator of the work participation rates in section 407(b); and (3) the data collection requirements of section 411(a). Largely through reference, the term also affects the scope of the penalty provisions in section 409. Thus, the definition of ''assistance'' is very important. At the same time, because TANF replaces AFDC, EA and JOBS, and provides much greater flexibility than these programs, what constitutes assistance is less clear than it was in the past.

Because TANF is a block grant, and it incorporates three different programs, a State may provide some forms of support under TANF that would not commonly be considered public assistance. Some of this support might resemble the types of short-term, crisis-oriented support that was previously provided under the EA program. Other forms might be more directly related to the work objectives of the Act and not have a direct monetary value to the family. We proposed to exclude some of these forms of support from the definition of assistance.

The general legislative history for this title indicated that Congress meant for this term to encompass more than cash assistance, but did not provide much specific guidance (H.R. Rep. No. 725, 104th Cong., 2d sess.). Likewise, our pre-NPRM consultations did not provide clear guidance or direction.

In our January 1997 guidance (TANF–ACF–PA–97–1), we expressed the view that the definition of assistance should encompass most forms of support. However, we recognized two basic forms of support that would not be considered welfare and proposed to exclude them from the definition of assistance. In brief, the two exclusions were: (1) services that had no direct monetary value and did not involve explicit or implicit income support; and (2) one-time, short-term assistance.

In the proposed rule, we clarified that child care, work subsidies, and allowances that cover living expenses for individuals in education or training were included within the definition of assistance. For this purpose, child care included payments or vouchers for direct child care services, as well as the value of direct child care services provided under contract or a similar arrangement. It did not include child care services such as information and referral or counseling, or child care provided on a short-term, ad hoc basis. Work subsidies included payments to employers to help cover the costs of employment.

We also proposed to define one-time, short-term assistance as assistance that is paid no more than once in any twelve-month period, is paid within a 30-day period, and covers needs that do not extend beyond a 90-day period. In response to the policy announcement, we had received a number of questions about what the term ''one-time, short-term'' meant. Based on our experience with the EA program, we realized that a wide range of interpretations was possible, and we were concerned that States might try to define as ''short-term'' or ''one-time'' many situations where assistance was of a significant and ongoing nature. Thus, we proposed to limit what was excluded as one-time, short-term assistance to items that were paid no more than one time a year over no more than a 30-day period for needs that did not extend beyond 90 days. We expressed the hope that our proposal would give States the flexibility to meet short-term and emergency needs (such as an automobile repair), without invoking too many administrative requirements and undermining the objectives of the Act. We welcomed comments on whether the proposed policy achieved this end.

In drafting the NPRM, we had considered allowing States to include additional kinds of benefits and services as assistance, at their option. However, we were concerned that varying State definitions would create additional comparability problems with respect to data collection and penalty determinations. Also, we were concerned that an expanded definition might have undesirable program effects (e.g., in extending child support assignment to cases where it would not be appropriate). Thus, we did not give States the option to expand the definition.

For those concerned about the inclusion of child care in the definition of assistance, we pointed out that the child care expenditures made under the Child Care and Development Fund (CCDF) are not subject to TANF requirements, and States have the authority to transfer up to 30 percent of their TANF grant to the Discretionary Fund of the CCDF program.

We also proposed to collect data on how much of the program expenditures were being spent on different kinds of ''assistance'' and ''nonassistance.'' We referred readers to the discussion of the TANF Financial Report at part 275 of the NPRM for additional details.

We said that, if the data show that large portions of the program resources are being spent on aid that fell outside the definition of assistance, we would have concerns that the flexibility in our definition of assistance is undermining the goals of the legislation. We would then look more closely at the aid being provided outside the definition and try to assess whether work requirements, time limits, case-record data and child support assignment would be appropriate for those cases. If necessary, we would consider a change to the definition of assistance or other remedies.

Since we issued the NPRM, Congress enacted the Child Support Performance and Incentives Act of 1998. As we discussed earlier in the preamble, section 403 of that legislation included several provisions on the use of Federal TANF funds to help pay for transportation benefits for welfare recipients under the Job Access program. In a new section 404(k)(3) of the Social Security Act, there is a ''rule of interpretation'' indicating that the provision of transportation benefits to an individual who is not otherwise receiving TANF assistance, pursuant to these provisions, would not be considered assistance. We have added a new exclusion to the definition of assistance to reflect this provision. (Also, as we discuss later, the final rule incorporates other changes that exclude transportation benefits for employed families from the definition of assistance.)

(b) Overview of Comments

We received a number of comments supportive of the definition in our January 1997 guidance and the definition in the NPRM (which was derived from this guidance).

At the same time, a wide range of commenters—including States, advocates, and union groups—wanted to see changes to one or both of our proposed exclusions. A significant number of commenters indicated that this was one of the most important issues in the NPRM for them. All these commenters wanted to narrow the scope of benefits that would be considered within the definition of assistance; many expressed a particular concern about the treatment of supports for working families under the definition. Some wanted modest changes to the proposed definition, while a significant number sought significant additional exclusions, such as: (1) child care, transportation, and other work supports; and (2) work-based assistance, such as wage subsidies.

Moreover, subsequent discussions and materials that we have received suggest increasing concern about the proposed definition over time, as individuals have had more time to ponder its implications, States have further explored supports needed by families as they transition from welfare to work, and commenters have shared their concerns with other parties.

As the result of these comments, we have made some significant modifications to the definition of assistance. The modifications address the concerns of commenters both about the treatment of work supports and the exclusion for one-time, short-term assistance. We found substantial merit in the arguments made by commenters in both areas. Also, as States proceed with their implementation of TANF, they continue to explore and develop new, innovative ways to support low-income working families and to address the goals of the TANF program. As a result, their programs are beginning to look less like traditional welfare. TANF program requirements were created with a particular program model in mind. Applying the TANF requirements much more broadly makes limited policy sense.

Under the narrower definition of assistance in the final rule, States will have more flexibility in how they serve families—particularly working families—with their Federal TANF and

State MOE funds. They will also experience a significant reduction in the administrative burden associated with serving working families, providing refundable earned income tax credits, and administering Individual Development Accounts (because they will not have to provide disaggregated data in such circumstances).

With the change in the definition of assistance under the final rule, we will not be collecting disaggregated data on work supports and other types of benefits and services that are not assistance. To compensate for this loss, we have significantly revised the TANF Financial Report by adding a number of new reporting categories. We have also provided for new information on diversion programs to be included in the annual report.

At the same time, we remain concerned about the potential impact of this definition on the achievement of TANF goals. While we believe the revised definition in the final rule is sound, it is difficult to envision all of the consequences. Thus, we will monitor State programs and expenditures and periodically assess whether our definition continues to support the goals of the program. If aspects of the definition become problematic, we will pursue appropriate changes.

A detailed discussion of the comments and our policy decisions follows.

(c) The Appropriateness of a Federal Definition

Comment: A couple of commenters said we should let States create their own definitions of assistance.

Response: We do not believe this is a viable option. The definition is too central to all the accountability provisions in the statute. If we did not define this term, States might define assistance so narrowly as to undermine the key TANF provisions on child support, work requirements, and time limits. Also, wide variations in State definitions would exacerbate issues about the consistency of data collection, program information, work participation rates, time limits, and other penalty provisions.

Readers should understand that the definition of assistance does not substantially impede the flexibility each State has to set eligibility rules or to expend funds on a broad range of benefits, services, and supports for needy families in the State. The major effect of the definition is to determine the applicability of key TANF requirements to the benefits that a State does elect to provide. It does not circumscribe the types of allowable benefits; these may be inside or outside the definition of assistance.

We had indicated in the proposed rule that the definition did not apply to the MOE provisions at subpart A of part 273. We have included similar language in the final rule at § 260.31(c)(1). (We also made a conforming change in that paragraph that references Contingency Fund MOE as part of this exception). In addition, at § 260.31(c)(2), we have added language clarifying that the definition of assistance does not limit the types of benefits and services that States provide to individuals and families under the first statutory goal of TANF. This first statutory goal authorizes the provision of assistance, but does not mention other forms of benefits or services. However, in other places, the statute specifically authorizes expenditures of State and Federal funds that are ''in any manner reasonably calculated to accomplish the purpose'' of the program. Thus, the statute indicates that the word ''assistance'' needs to be interpreted more broadly in the context of this first TANF goal. (The new regulatory text refers only to the first goal of TANF; the other TANF goals do not use the term ''assistance'' and thus did not require clarification.)

Comment: Although one commenter said the proposed rule ''effectively incorporates'' the policy from the guidance (with clarification and elaboration), a number of respondents commented that the proposed definition represented a retreat from the definition provided in the guidance.

Response: We agree that the changes we proposed in the NPRM related to the exclusion for ''one-time, short-term assistance'' had the effect of narrowing what could have been excluded under our policy announcement. As discussed in the next comment, we have decided to ease the proposed restrictions on one-time, short-term assistance.

We do not believe that our proposed definition otherwise deviated from the definition in the guidance. It is our view that benefits such as child care and transportation subsidies, while not directly mentioned, were part of the definition of assistance in the January 1997 policy announcement (TANF–ACF–PA–97–1), as they involved subsidies or other forms of income support. Our intent in inserting the references to child care and transportation in the NPRM was to provide a clearer and more complete definition, not to make a substantive change.

(Nevertheless, as we discuss in the next section, on ''Work Supports,'' the final rule excludes such supports for working families from the definition of assistance.)

Comment: Several commenters suggested that we should exclude assistance that was not cash assistance or financial assistance from our definition.

Response: As we discuss in the following comments, the legislative history does not support this approach. Rather, for both TANF and WtW, it suggests that Congress envisioned inclusion of at least some noncash benefits as assistance. Otherwise, it would have been superfluous to specifically exclude noncash WtW assistance from the time-limit requirement. In addition, wholesale exclusion of noncash benefits from the definition would create some peculiar incentives for States and could substantially distort their decisions about how to provide benefits.

(d) Work Supports

Comment: A significant number of commenters called for additional exclusions from the definition of assistance. While there was a fair amount of diversity in the specific suggestions, a significant number of commenters sought exclusions of: (1) assistance that is not like traditional welfare, but directed at achieving the work objectives of the Act (e.g., child care, transportation, and other work supports); and/or (2) work-based assistance, provided as either work subsidies to employers (especially payments to employers to cover the costs of supervision and training) or as compensation for work. Many commenters expressed specific concerns about the appropriateness of child support assignment and time limits in these cases. A number objected to our standard of ''direct monetary value.''

Some commenters spoke broadly about excluding work subsidies, assistance directed at achieving the work objectives of the Act, or work supports. Others focused on specific items such as child care, transportation, and earned income tax credits. A few commenters suggested that we borrow language from the caseload reduction provisions of the proposed rule and exclude ''cases receiving only State earned income tax credits, transportation subsidies or benefits for working families that are not directed at their basic needs.''

We received more comments in support of excluding child care than for other types of supportive services. Commenters expressed strong objections to the inclusion of child care, in large part due to concerns about the time-

limit implications. They also expressed disagreement with our proposition that States could transfer funds to the Child Care and Development Block Grant in order to avoid time limits for child care benefits; they argued that there were legislative and administrative barriers associated with these transfers. Some commenters argued that child care and transportation are not like cash. Since they are not fungible (i.e., available to meet a family's basic needs), they should be excluded from the definition of assistance on that basis. Other commenters said that it was unclear that Congress intended to extend child support assignment to additional forms of aid, such as child care and JOBS-related benefits; at a minimum, they requested that we clarify that States can take an assignment of less than the amount of assistance.

In addition to some of the prior arguments, the principal arguments that commenters presented for the exclusion of work subsidies (or payments to employers to cover the costs of employment and training) were: (1) such benefits primarily benefit employers, not recipients, and thus do not have direct monetary value to the family; (2) they should be viewed as the equivalent of tax credits or like other expenditures on training; (3) employees may use up their time limit by going through a series of subsidized jobs from which employers benefit, but that give employees no prospect of long-term employment; and (4) their inclusion will create administrative problems and make it difficult to jointly fund work subsidy programs.

Commenters also presented arguments for excluding assistance for which recipients worked. They argued that this assistance represented compensation for work, rather than assistance. Since recipients ''earned'' this assistance, commenters felt that it was inappropriate for the months to accrue against the time limit on assistance and for child support assignment to apply.

Response: We agree that there are good arguments for narrowing the definition of assistance to exclude work supports such as child care and transportation. While neither the statute nor the legislative history directly suggests that a significant subset of benefits should be excluded from the definition, there is also little direct evidence that Congress intended for time limits and data collection to apply to an array of new benefits (such as IDAs and new work supports) or to working families that have not traditionally been part of the welfare system. Rather, in reforming the welfare program, it seems Congress was trying to end dependence on welfare as a way of life for families and to facilitate the ability of families to work and become self-sufficient. Two of the main effects of defining a TANF benefit as assistance are to require that a family work so that it can become self-sufficient and to time limit that assistance. However, a work requirement is unnecessary if the adult is already working and the benefit that the family receives is a work support. Further, the need to time-limit work supports is mitigated since the family is already moving toward self-sufficiency; working families should eventually become independent.

One statutory provision that raised questions about Congressional intent was section 404(k)(3). This provision, which was part of the Child Support Performance and Incentives Act of 1998, provided a ''rule of interpretation'' that specified that transportation benefits provided under Job Access to an individual who was not otherwise receiving assistance under TANF would not be considered assistance. It suggests that Congress envisioned transportation to otherwise be included within the TANF definition of assistance. However, another, equally viable, interpretation of this Congressional action exists. The child support legislation was enacted while our interim guidance was in effect. Thus, Congress could have been providing a clarification of what was excluded from assistance in that context. In fact, the legislative history did not express any opinions about the interim definition in the policy guidance that we had issued (TANF–ACF–PA–97–1).

You will note that we have incorporated an exclusion that reflects this specific statutory provision. We recognize that it is largely duplicative of the general exclusion for work-related supportive services, including transportation, in § 260.31(b)(3). However, it is possible that some Job Access transportation benefits are not covered by the general provisions, and we wanted to ensure that the statutory exclusion received full weight. Under § 260.31(b)(7), therefore, we provide a categorical exclusion for transportation benefits received under Job Access by individuals who are not otherwise receiving TANF assistance.

The definition in these rules is generally consistent with commenter suggestions, but more specific in some areas. It provides that supports for working families (such as child care and transportation) would be excluded. This exclusion covers supportive services needed to cover employment-related needs and time spent by an employed individual in education and training needed for job retention and career advancement. (As discussed below, the education and training is also excluded.)

Except as provided in paragraphs (b), the exclusion does not cover supportive services related to participation in education, training, job search and related employment activities for nonworking families. Supportive services provided in this situation look more like traditional welfare than work supports. Also, the same rationale for excluding these individuals from the TANF program requirements, including work participation and time limits, does not exist for these families as exists for families that are already working.

The education and training activities themselves are generally excluded under paragraph (b)(6). The one exception would be if education or training benefits included allowances or stipends designed to provide income support; these particular types of education and training benefits would be considered assistance. Also, we would remind readers that under sections 401 and 407 of the Act education and training services should be directed at preparing individuals for work and moving them to self-sufficiency; they should not be of a general nature.

Our definition also specifies the types of items that would be considered as part of basic needs. The listed items (food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses) reflect those items that were represented in the majority of the State needs standards under prior law. The term ''incidental expenses'' covers items States included as part of basic needs such as telephones; small allowances for child care or transportation needs associated with keeping appointments, going to the store, or fulfilling other basic responsibilities; basic supplies for the medical cabinet; insurance premiums; and miscellaneous fees and expenses, to the extent consistent with State practice.

The definition excludes contributions to, and distributions from Individual Development Accounts (IDAs). Although the TANF statute includes IDA provisions, commenters did not specifically raise questions about the treatment of IDA benefits under the definition of assistance. However, interest has grown since the passage of the Assets for Independence Act (under title IV of Pub. L. 105–285). Since then, we have received numerous questions from interested parties, including State agencies and potential grantees, about how IDA benefits would be treated

under the TANF rules. We have several reasons for the specific exclusion in the final rule. First, many of the assets in IDA accounts represent deposits from the earnings of low-income families and the interest on those deposits. Thus, many of the assets do not represent assistance from TANF or any other governmental source. Second, when contributions are made into an IDA account from the TANF agency or other third parties, they only represent potential assistance at that point. The individuals whose funds are in the account are potential beneficiaries, but have very limited access to the funds in that account. The funds are not available to meet their basic needs. Furthermore, distributions from IDA accounts would normally be excluded under other provisions of our definition (e.g., as emergency benefits, for education, and as nonrecurrent, short-term benefits). Because the residual cases might be insignificant in terms of the amount of assistance involved and the tracking of such amounts might create very significant administrative burdens, we believed it would be appropriate to provide an umbrella exclusion for IDA benefits.

While we were convinced by the arguments for excluding supportive services for working families from the definition of assistance, we have noted a few consequences of this narrower definition of assistance that were of some concern. For example, many of the funding restrictions in section 408 are restrictions on which families may receive ''assistance,'' section 404(e) of the Act only authorizes States to use the ''rainy day'' funds that they reserve for future years ''for providing assistance,'' many working families will not be included in the TANF work participation rate calculations, and we will receive data on fewer families and types of benefits from the aggregated and disaggregated reporting.

In order to compensate for the loss of reporting, we have added some additional detail to the expenditure information required in the TANF Financial Report (see Appendix D). (See the preamble for § 263.11 and the Instructions for Completion of ACF–196 (the TANF Financial Report) in Appendix D for additional information on the use and reporting of reserved funds.)

Comment: One commenter asked whether expenditures on ''work activities'' were the same as expenditures on ''employment services.''

Response: We assume this commenter wanted to know if all expenditures on work activities, as specified in section 407(d) of the Act, would be excluded from the definition of assistance. The exclusions we provide in the final rules would generally cover the specified work activities, including on-the-job training, subsidized employment, and most education and training activities (i.e, since most do not represent income support). They would also cover payments to employers and third parties for supervision and training and payments under performance-based contracts for success in achieving job placements and job retention. As discussed above, there may be types of education and training benefits (e.g., stipends or allowances) that fall within the definition. Also, the definition does not generally exclude payments to individuals participating in work experience or community service (or any other work activity). Nor does it exclude needs-based payments to individuals in any work activity whose purpose is to supplement the money they receive for participating in the activity.

The distinction we make between work subsidies paid to employers and payments to participants in work experience and community service is similar to distinctions made under tax law. For example, we would refer you to Notice 93–3, issued by the Internal Revenue Service on December 17, 1998. This notice explains that TANF payments that meet certain conditions would not be income, earned income, or wages for Federal income and employment tax purposes. The notice provides that: ''Payments by a governmental unit to an individual under a legislatively provided social benefit for the promotion of the general welfare that are not basically for services rendered are not includible in the individual's gross income and are not wages for employment tax purposes, even if the individual is required to perform certain activities to remain eligible for the payments. * * * Similarly, these payments are not earned income for Earned Income Credit (EIC) purposes.'' It also notes that, under amendments to the Internal Revenue Code under the Taxpayer Relief Act of 1997, Pub. L. 105–34, ''earned income for EIC purposes does not include amounts received for [TANF work experience and community service activities] to which the taxpayer is assigned * * *, but only to the extent such amount is subsidized under [TANF].''

Our definition of assistance distinguishes between work subsidies paid to employers and community service and work experience on a similar basis. We believe that payments to participants in work experience and community service are closely associated with traditional welfare benefits and are designed primarily to meet basic needs rather than as compensation for services performed. This view is also reflected in the Conference Report, H. Rep. 105–217, for Pub. L. 105–34, which added the WtW program. In discussing the treatment of WtW cash assistance for time-limit purposes, it indicates that wage subsidies are indirect cash assistance. We believe the reference to wage subsidies as cash assistance is to such payments as part of work experience and community service where, as in the tax provisions, welfare law determines the size of the payments and limits the hours of work so that it is, in effect, assistance received indirectly. Thus, we generally include such subsidies in the definition of assistance.

We do not believe that the mere fact that the benefits received by recipients in work experience or community service activities are conditional on work is sufficient to view it as nonassistance. The expectation under TANF is that adult recipients will generally participate in work activities as a condition of receiving TANF. This expectation is evident in the work requirement in section 402(a)(1)(A)(ii) and the fact that Congress based the calculation for work participation in section 407 on all families with adults, instead of retaining the numerous exemptions that existed under JOBS.

The regulatory text also indicates that benefits conditioned on other work activities (e.g., job search) are not excluded from the definition of assistance. We do not think that anyone would conclude that such benefits would be excluded, because there would be no historical basis for such a conclusion. However, we decided to include the broader reference to foreclose any future questions.

Comment: One commenter said we should exclude on-site case management services provided by an employer under contract from the definition of assistance.

Response: Our definition already excludes case management services provided under the TANF program. It is irrelevant who provides the case management services.

Comment: One commenter noted that the preamble in the NPRM excluded ''information about child care, child care referral services, child care counseling services and child care provide on an ad hoc basis'' and asked that we add that language to the regulatory text.

Response: We do not believe it is appropriate or even possible to specify all types of excluded services in the regulatory text. However, we have inserted ''child care information and referral'' as an example of an excluded service.

(e) Nonrecurrent, Short-Term Benefits

Comment: We received a significant number of comments from respondents who were concerned about the narrowed exclusion for ''one-time, short-term'' assistance. The major concern of commenters was that the 30 existing State welfare diversion programs, together with their local variations, could not meet such a tight definition because they might provide more than one payment in a year if a family encounters an unforeseen subsequent crisis. They suggested broader language that would exclude short-term, episodic assistance for families in discrete circumstances and encompass nonrecurrent, short-term payments that could occur more than once in 12 months. They questioned the basis for creating restrictions based on the old EA definitions. They raised concerns about the negative effect on State innovation. They also raised concerns about the administrative burdens associated with tracking eligibility, especially when outside providers, such as emergency shelters, deliver emergency services or when a State is operating both diversion and emergency assistance programs and has not administratively connected those programs.

Response: In part, the narrower language in the proposed rule reflected a concern that States could avoid TANF requirements by changing the manner in which they assisted families. We did not believe that it would be appropriate to exempt families that received a substantial amount of assistance, assistance over a significant period of time, or assistance provided on a recurring basis from child support assignment, work requirements, and time limits. Based on prior experience with the Emergency Assistance program, we believed that States could expand the concept of one-time, short-term assistance to cover benefits that extended over time and encompassed substantial expenditures.

At the same time, we did not intend our definition to undermine existing State efforts to divert families from the welfare rolls by providing short-term relief that could resolve discrete family problems. Based on both the comments we received and other sources of information, we realize that diversion activities are an important part of State strategies to reduce dependency and that restrictive Federal rules in this area could stifle the States' ability to respond effectively to discrete family problems. We also understand that subjecting families in diversion programs to all the TANF administrative and programmatic requirements would not represent an effective use of TANF or IV–D resources. For example, it does not necessarily make sense to require that, for a single modest cash payment, the State must open up a TANF case, collect all the case-record data which that entails, require the assignment of rights to child support, open up a IV–D case, and start running a Federal time-limit clock.

Much of the aid provided through these programs is work-focused, and, under our definition, the benefits to these families are nonrecurrent and short-term in nature. Thus, we believe that excluding this aid from the definition of assistance does not undermine the TANF provisions on work, time limits, or self-sufficiency. However, as we proposed in the NPRM, we will be collecting aggregate information on expenditures on aid that is not assistance (i.e., on ''nonassistance''). This information will be valuable in helping us to assess the extent to which benefits being provided with TANF and MOE funds fall under, or outside of, the major TANF program requirements.

Finally, we recognize that this is a policy area where policy and programs are evolving quite rapidly. Within the next year or two, we would expect to have a better knowledge base for assessing diversion programs and making policy judgments. For example, the Office of the Assistant Secretary for Planning and Evaluation and ACF are jointly sponsoring a study by George Washington University to examine the State diversion programs and activities and explore their Medicaid implications.

Thus, the final rules include a revised definition that excludes more than one payment a year, so long as such payments provide only short-term relief to families, are meant to address a discrete crisis situation rather than to meet ongoing or recurrent needs, and will not provide for needs extending beyond four months. The revised definition uses the term ''nonrecurrent'' rather than ''one-time'' because the former term is more consistent with the intended policy. A family may receive such benefits more than once. However, the expectation at the time they are granted is that the situation will not occur again, and such benefits are not to be provided on a regular basis. We believe the revised exclusion is limited enough in nature and scope not to undermine the statutory provisions of the TANF program, while giving States the flexibility to design effective diversion strategies.

The definition also would exclude supports provided to individuals participating in applicant job search. Applicant job search is a common form of diversion that clearly fits within the goals of TANF and within this exclusion's view of a ''short-term'' benefit. (The job search itself would be excluded under the general services exclusion at paragraph (6).)

Similarly, the definition would exclude supports for families that were recently employed, during temporary periods of unemployment, in order to enable them to maintain continuity in their service arrangements. Unnecessary disruptions in these arrangements could negatively affect the family's ability to re-enter the labor force quickly and, in the case of child care, could negatively affect the children in the family.

The four-month limitation reflects our belief that we could not maintain the integrity of the short-term exclusion without providing some regulatory framework. As written, the four-month limitation does not restrict the amount of accrued debts or liabilities (such as overdue rent) that a State may cover or impose a specific monetary limit on the amount of benefits that the State may provide.

You should note that we have added a new requirement at § 265.9(b)(6) for States to report annually on the nature of nonrecurrent, short-term benefits. More specifically, we are asking States to describe the benefits they are providing, including their eligibility criteria (together with any restrictions on the amount, duration, or frequency of payments), any policies they have instituted that limit such payments to families eligible for assistance or that have the effect of delaying or suspending eligibility for assistance, and any procedures or activities developed under the TANF program to ensure that individuals diverted from TANF assistance receive appropriate information about, referrals to, and access to Medicaid, food stamps, and other programs that provide benefits that could help them successfully transition to work.

To the extent that a State provides the required information either in the State plan or in the data it reports under § 265.9(b)(6), it would not have to duplicate this information.

Because of the tremendous importance of food stamp and Medicaid as supports for working families, we

strongly encourage States to maintain critical linkages among these programs because accessing these other program benefits could further the goals of TANF. In addition, diverting individuals from programs where they have an entitlement to benefits or to prompt action on a request for assistance could represent a violation of rules in the other programs.

According to the Health Care Financing Administration (HCFA), section 1931 of the Social Security Act establishes rules for Medicaid eligibility for low-income families based on the income and resources of the family. Under section 1931, States must provide Medicaid coverage at least to families with a dependent child living with them whose income and resources would have qualified them for AFDC benefits under the State plan in effect on July 16, 1996. Therefore, Medicaid eligibility is not tied to or based on eligibility for TANF-financed assistance. Also, States cannot limit Medicaid eligibility to families receiving TANF.

Medicaid regulations (at 42 CFR 435.906) require States to provide the opportunity for families to apply for Medicaid without delay.

In States that use joint TANF-Medicaid applications or utilize the State TANF agency to make Medicaid eligibility determinations, the TANF office is considered a Medicaid office. Therefore, in this situation, a TANF agency, like any Medicaid agency, must immediately furnish a Medicaid application (joint or separate) upon request and act upon that application promptly. If there is a delay in accepting or filing an application for TANF assistance (e.g., because the family is served through a diversion program, is subject to up-front job search requirements, or faces other behavioral or administrative requirements that delay assistance), the agency must make a Medicaid application available immediately. If there is a delay in processing the TANF portion of a joint application, the agency must process the Medicaid portion of the application immediately.

According to the Food and Nutrition Service (FNS), at the Department of Agriculture, in enacting PRWORA, Congress thoroughly reviewed the Food Stamp Act of 1977, as amended, and made changes to many of its provisions. However, it made clear that the Food Stamp Program continued to have a distinct set of nationwide application rights and responsibilities. Section 11(e) of the Food Stamp Act sets forth requirements that a State agency administering the Food Stamp Program must follow. Among other things, it requires that the Agency: (1) provide timely, accurate, and fair service for applicants for, and participants in, the Food Stamp Program; (2) develop an application containing the information necessary to comply with the Act; (3) permit an applicant household to apply to participate in the program on the same day the household first contacts the food stamp office in person during office hours; and (4) consider an application that contains the name, address, and signature of the applicant to be filed on the date the applicant submits the application.

Where PRWORA did not amend the Food Stamp Act, current food stamp regulations remained in effect. The regulations at 7 CFR 273.2(c) provide that: (1) each household has the right to file an application on the same day that it contacts the food stamp office during office hours; (2) the State agency must advise the household that it does not have to be interviewed before filing an application, and it may file an incomplete application as long as the applicant's name and address are recorded on an appropriately signed form; (3) State agencies shall encourage households to file an application form the same day the household contacts the food stamp office and expresses interest in obtaining food stamp assistance. If individuals express interest in the Food Stamp Program, or have concerns about food security, States have a responsibility to inform them about the Food Stamp Program and their right to apply; and (4) the State agency must make application forms readily accessible to potentially eligible households.

Although PRWORA amended section 11(e) of the Food Stamp Act by eliminating the requirement for joint processing of food stamp and TANF applications, State agencies that continue to do so must abide by the food stamp regulations at 7 CFR 273.2(j). These regulations set forth requirements regarding interviews, verification, and application processing procedures for joint applications. Most importantly, the regulations at 7 CFR 273.2(j)(1)(iii) provide that households whose public assistance applications are denied shall not be required to file new food stamp applications, but shall have their food stamp eligibility determined or continued on the basis of the original applications filed jointly for public assistance and food stamp purposes.

We advise you to look for additional guidance on food stamp and Medicaid requirements through the HCFA and FNS web sites (www.hcfa.gov/medicaid/medicaid.htm and www.usda.gov/fcs/, respectively).

We strongly believe that effective procedures to ensure that diverted individuals access Medicaid, food stamps, or other programs are critical to the success of TANF programs in achieving lasting employment for the families they serve. In addition, such procedures might help States avoid compliance and legal problems in the other programs. Given the importance of this issue, the additional information on State practices that we are requiring in the annual report will be extremely helpful in assuring the role TANF agencies are playing with individuals receiving diversion benefits.

While we dropped our proposal for a separate annual program and performance report, we still need information on key aspects of State programs in order to prepare the annual report to Congress required at section 411(b)(3) of the Act. To the maximum extent possible, we will draw upon data available through the State plans and other reports submitted by the States. However, because diversion benefits fall outside of the definition of assistance, and we have chosen not to set standards of completeness for State plan submissions, we may not have adequate information on this major feature of TANF programs to fulfill our responsibilities under section 411(b)(3).

The new reporting focuses on diversion because it is one of the major new tools States are using to achieve the work objectives of the Act and, under section 413(d), Congress has shown an interest in looking at State performance in this specific area. Also, the burden associated with providing this aggregate program information is substantially less than the burden that would be associated with providing disaggregated data; because diversion payments fall outside the definition of assistance, the disaggregated data requirements do not apply.

Comment: Several commenters also expressed concerns about the proposed limits on the amount of assistance and the meaning of the proposed 90-day restriction. Commenters were not sure whether the 90-day restriction represented a limit on the period of needs to be met or a limit on the total monetary value of assistance. They objected to both possible interpretations. While they generally seemed to prefer an interpretation that limited the duration of need that could be met, they also expressed concern about restrictions that would affect the States' ability to deal effectively with past debts or liabilities or meet needs that extended beyond 90 days.

Response: As discussed previously, we have replaced the 90-day limitation

with a more flexible four-month limitation. The new provision is more flexible with respect to past debts or liabilities; it merely limits the extent to which payments for future needs can be excluded from the definition of assistance. We also clarified in the preamble that the four-month limitation does not impose a specific monetary limit on the amount of benefits that may be excluded. Rather, the limitation reflects the period of time for which future needs can be addressed by a single ''nonrecurrent, short-term'' benefit.

When we issued the proposed rule, we did not necessarily envision a single Federal interpretation of the 90-day limitation. Our intent was to keep State payments for needs that were ongoing or extended over a significant period of time within the definition of assistance. We did not want a State to bundle several months' worth of assistance into a single assistance payment in order to avoid TANF requirements for itself or the family.

Our expectation for the language in the final rule is no different. It is appropriate for States to treat short-term assistance that addresses discrete episodes of need as ''nonassistance.'' It is not appropriate for States merely to condense the time period over which they pay assistance to needy families so that they can categorize the benefits as ''nonassistance'' and avoid TANF requirements. Also, if a family's emergency is not resolvable within a reasonably short period of time, the State should not keep the case indefinitely in emergency status, but should convert it to a TANF assistance case.

At the same time, if a family receives aid in one month that falls under the nonrecurrent, short-term exclusion, but suffers a major set-back later in the year, develops a need for ongoing aid, and starts receiving TANF assistance, we would not require the State to re-define the month of initial aid as assistance and retroactively subject the family to TANF requirements.

(f) Benefits and Supports for Noncustodial Parents

Comment: Commenters also expressed some concern about the potential effects on the custodial parent and children (especially under time limits) when a noncustodial parent receives benefits. This issue was of particular concern in light of the focus given to assistance for noncustodial parents under Welfare-to-Work.

Response: Many services and supports that States might provide to noncustodial parents (such as transportation and most work activities) are excluded under the final definition of assistance. Also, as we discuss in the preamble to § 264.1, assistance provided to noncustodial parents does not count against the time limit of the custodial parent or children living in a different household unless the noncustodial parent is receiving assistance as a member of that same family and is the spouse of the head of the TANF household.

Comment: A couple of commenters expressed concern about the effect of assistance that might be paid to a noncustodial parent. For example, a noncustodial father is paying support. However, the noncustodial parent of a second child in the family is receiving assistance. The State takes the support paid by the first noncustodial father and reimburses itself for assistance paid to the noncustodial parent of the second child. The mother and two children are not receiving any assistance for themselves and do not receive any child support because the State is retaining it. Commenters believe that it would be unfair to the custodial parent and children if assistance provided to a noncustodial parent resulted in the custodial parent's losing her right to receive child support and remaining subject to child support cooperation requirements.

Response: We do not believe that the statute intends or requires this absurd result. Rather, the assignment of the rights to support by the custodial parent is only intended to cover assistance paid to the custodial parent and the child(ren) living with the custodial parent. It does not cover assistance that the noncustodial parent receives based on his or her inclusion in the family as a noncustodial parent. Thus, the State may not reimburse itself for assistance given to the noncustodial parent, as a noncustodial parent, from child support paid for the children. However, if noncustodial parents of a TANF child are receiving assistance as the custodial parents or caretakers of another TANF child, they may be subject to separate assignment requirements. They might also have responsibility under individual State law to reimburse the State for assistance provided.

(g) Benefits and Supports From the WtW Program

Comment: A couple of commenters said that we should exclude noncash assistance paid through WtW funds from the definition of assistance. One commenter indicated that we had mentioned this exclusion in the preamble to the NPRM, but did not exclude it in the regulatory text. Another commenter expressed particular concern about child care assistance under WtW because States do not have the same authority to transfer WtW funds to the Discretionary Fund of the Child Care and Development Fund as they do with Federal TANF funds.

Response: Section 408(a)(7)(G) of the Act, which was added by the Balanced Budget Act, provides that noncash assistance paid by WtW funds ''shall not be considered assistance.'' However, this exclusion is only for the purpose of the time limit, and the regulation at § 264.1 provides that we will not count months of receipt of noncash WtW assistance against an individual's Federal clock.

We do not believe that the statutory language supports a broader exclusion of WtW assistance from the definition of assistance. However, the general changes we have made to the definition of assistance in this final rule should help alleviate this concern. Further, we would point out that many of the TANF requirements (such as participation rates) do not apply to WtW because they apply only to the ''State program funded under this part.'' This latter phrase refers to TANF only, not to WtW. (At the same time, the spending restrictions generally do apply to WtW, as they refer to grants under section 403 and WtW grants are provided under section 403(a)(5).)

The Department of Labor has received numerous questions from its grantees about the definition of ''noncash'' assistance and asked us to define the term in our rules. At the new § 260.32, you will find a definition for WtW cash assistance. If a benefit falls within the definition of assistance, but does not meet the definition of ''WtW cash assistance,'' it would be ''noncash'' assistance. Examples of ''noncash'' assistance would include housing vouchers or a State version of food stamps. You will find additional discussion in the preamble for § 260.32.

(h) Transitional Services

Comment: We received a few comments suggesting that we should explicitly exclude ''transitional assistance'' or services in support of continued employment from the definition of assistance.

Response: We do not believe it is possible to exclude ''transitional assistance'' from the definition of assistance without substantially altering the basic time-limited nature of the TANF program, and we find no statutory basis for such an exclusion.

The concept of ''transitional'' services for families that get a job and are no longer eligible for regular benefits is

recognized in the statute at section 411(a)(5), which requires a report on expenditures and a description of the services provided. However, the language there only addresses ''transitional services.'' Thus, it does not indicate that Congress envisioned a full array of transitional benefits, including ongoing needs-based payments, being available to former recipients.

To the extent that States provide only supports for working families, such as child care and transportation or work subsidies, or work-related services such as counseling, coaching, referrals, and job retention and advancement services under their transitional services programs, we already exclude those services from the definition of assistance. Also, we would exclude short-term benefits such as cash assistance to stabilize a housing situation as ''nonrecurrent, short-term'' assistance.

States wanting to provide ongoing transitional payments that meet the definition of assistance to former recipients have three options: (1) fund those programs under TANF as assistance, but use different need standards than they do for other forms of TANF assistance; (2) fund those programs with MOE money under a separate State program; or (3) transfer the funds from TANF under section 404(d). If they fund transitional benefits with State-only money, the Federal time limit will not apply, regardless of whether they provide the benefits within TANF or in separate State programs. States may also provide transitional services without invoking time limits by transferring funds to either the Discretionary Fund of the Child Care and Development Fund or the Social Services Block Grant.

(i) Housing and Related Benefits

Comment: One commenter said the short-term, one-time rules should exclude some of the former EA benefits for arrears and shelter.

Response: The proposed and final language would both exclude certain payments for rent arrears, utility arrears, security deposits and other shelter-related expenses that were previously covered in State EA programs.

However, we cannot categorically state that all former EA benefits would be excludable from the definition of assistance. For example, in some cases, States claimed shelter expenses under EA that addressed long-term, ongoing needs of families.

Comment: One commenter said that we should not consider housing and utilities to be part of ''income support.''

Response: We disagree with the comment. Housing and utilities have traditionally been major components in the definition of basic needs used in determining welfare payments. Further, the TANF statute provides no basis for excluding them from the definition of assistance under TANF. However, certain shelter or utility costs might be excludable under the two general exclusions (i.e., because they are ''nonrecurrent, short-term'' or they entail services such as counseling that do not provide income support).

(j) Foster Care and Child Welfare

Comment: A few commenters asked that we exclude payments for foster care, out-of-home placements, and substitute care from the definition.

Response: With regard to foster care or other out-of-home maintenance payments, we would note that such costs are not allowable TANF costs under section 404(a)(1) of the Act since they are not reasonably calculated to further a TANF purpose. However, in some cases, where a State previously covered such benefits under its IV–A plan, they could be allowable TANF costs under section 404(a)(2).

There are additional costs related to foster care or out-of-home maintenance payments that may be allowable and referred to, in short-hand, as foster care. For example, there are costs for family preservation activities, such as counseling, home visits, and parenting training, that would be allowable TANF costs because they are reasonably calculated to enable a child to be cared for in his or her own home.

There may also be other costs that were authorized under a State's EA program for which Federal TANF funds could be used, under section 402(a)(2). Examples include costs such as administrative costs for activities associated with determining whether an emergency exists and costs for the temporary placement of the child, if determined necessary, while an investigation takes place.

Comment: One commenter asked that we strengthen the definition of assistance to urge States to use this flexibility in order to maintain families intact, where services can achieve that end.

Response: Both the proposed and final definitions exclude certain services directed at family preservation and certain forms of crisis intervention from the definition of assistance. Some commenters would have liked us to go further and exclude foster care, substitute care, and out-of-home placements. As we just discussed, maintenance payments for foster care, substitute care, and out-of-home placements (except perhaps temporary emergency placements during an investigation of abuse) are not eligible TANF expenditures unless allowable under section 404(a)(2).

(k) Emergency Assistance

Comment: In different ways, a few commenters asked that we exclude assistance provided under the prior EA program from the definition of assistance. Among their underlying concerns were assistance that was paid for longer than 90 days, emergency shelter, and certain child welfare services.

Response: We can find no legal justification for categorically excluding prior EA benefits from the definition. The statute authorizes States to use Federal TANF funds for activities that were previously authorized under EA, but otherwise does not give EA special status.

Most assistance that was provided under EA is excludable under one or more of the general exclusions. However, there were EA programs that provided assistance to families for basic needs and extended periods of time. If we categorically excluded all prior EA benefits from the definition of assistance, we could be perpetuating some of the same problems that existed under prior law.

(l) Other Definitional Issues

Comment: One commenter requested exclusion of emergency shelters for victims of domestic violence; of particular concern was the potential running of the time-limit clock when individuals were receiving such assistance.

Response: Depending upon the form and duration of this assistance, it might be excludable under one of the general exclusions we provide. We do not think a special, categorical exclusion is justified for this type of benefit.

However, we would point out that, under section 402(a)(7) of the Act, known as the Family Violence Option, States may waive program requirements, including time limits, for victims of domestic violence. If States exceed the 20-percent cap on time-limit exceptions as the result of granting such waivers, they may be eligible for reasonable cause. You should see the prior discussion entitled ''Treatment of Domestic Violence Victims'' and the regulatory text at subpart B of part 260 for additional information.

Comment: One commenter expressed concern about inclusion of relatively insignificant amounts of assistance and the negative effect of such a policy on

a family's willingness to seek assistance in light of time limits.

Response: While we understand the commenter's concern, we have no basis for protecting families that receive small amounts of assistance from the time limits; nothing in the statute or legislative history suggests that a family would have to be receiving a threshold payment level in order to be considered to be receiving assistance.

We have some early indication that families who have other income and are eligible for smaller amounts of assistance are not necessarily choosing to forego aid in order to reserve their months of assistance. We will be paying attention to this issue over the coming months.

Comment: One commenter expressed concern about a broad definition of assistance because other programs might count any aid in the form of ''assistance'' as income in determining eligibility for benefits.

Response: We must create a definition that conforms with the TANF statute and the statutory intent of the TANF program. In that context, we cannot assure that our definition will have no negative spill-over effects on other programs. However, the additional exclusions from the definition in the final rule should alleviate this concern. Further, if we find out that definition is having adverse effects on other programs, we are willing to work with the other programs in exploring ways to resolve such problems. For example, we have worked with the Office of Child Support Enforcement in revising guidance on the child support distribution rules so that the interim definition of TANF assistance did not inadvertently cause child support collections intended for families to be diverted to government coffers.

Comment: One commenter asked that we explicitly exclude supportive services provided to applicants from the definition of assistance, particularly when the case does not get approved for regular TANF benefits.

Response: We do not believe it is necessary to add this situation as a separate exclusion. We would expect such applicant services to be covered by the exclusion for nonrecurrent, short-term benefits or as supports for working families. Also, if we explicitly excluded applicant benefits, we might create an incentive for States to leave a case open rather than to complete the eligibility determination process. We would not want to create such an incentive; it is important for States to act on applications and provide assistance in a timely manner.

Comment: One commenter said we should clarify the definition of assistance to exclude such items as State tax refunds. A few commenters specifically suggested that we exclude earned income tax credits.

Response: We have excluded refundable earned income credits, but have otherwise not given special consideration to tax refunds in the definition. We had two basic concerns. First, we did not want to suggest that tax refunds were categorically appropriate as either Federal TANF or State MOE expenditures. It would depend on what the nature and purpose of the ''refund'' was. Any payments have to meet at least two tests—be an ''expenditure'' and be consistent with the purposes of the program. In the case of MOE, it would also have to be targeted at needy families. We believe a refundable earned income credit can meet these tests. However, the vast majority of tax refunds probably would not. For example, if a family gets a refund of its income taxes because of over-withholding, that refund check does not represent an allowable expenditure for Federal TANF or State MOE purposes. If there were tax refunds (analogous to refundable tax credits) that were allowable expenditures for TANF-related purposes, they would be included or excluded from the definition of assistance based on the existing principles and language in the definition.

We provide an exclusion for refundable earned income tax credits because we consider them a work support rather than basic income support. They normally serve to compensate low-income working families for some of the tax-related costs of employment. Thus, they more closely resemble work supports than traditional welfare payments.

(m) Tracking of Exclusions

Comment: A number of commenters objected to language in the preamble of the NPRM indicating that we would track State expenditures on assistance and nonassistance and look more closely if we found a large portion of program resources being spent on ''nonassistance.'' We also received a few comments saying that we needed to collect more information on State TANF and MOE expenditures in order to maintain the integrity of the program and protect the interests of needy families.

Response: In the preamble of the proposed rule, we expressed concern that information showing large amounts of expenditures on nonassistance might indicate that the flexibility we provided in the definition of assistance might be undermining the goals of the legislation. We believe this is a valid concern and have not changed either the reporting requirements or our plans to look at this information. In fact, because we have significantly narrowed the definition of assistance (and thereby the categories of benefits and supports on which State must report disaggregated and aggregate data), we have decided to strengthen the fiscal reporting requirements. You will find a discussion of these changes in part 265 and the specific changes in Appendix D.

We are not saying that we will automatically change the definition of assistance or take other action if we find large amounts of resources on ''nonassistance.'' In fact, commenters noted some valid reasons why we might expect to see growth in the amount of ''nonassistance'' as welfare reform progresses. For example, we might see increasing investments in interventions and prevention strategies (such as work supports, case management, mentoring, and job retention services). Thus, we would not presume that growth in ''nonassistance'' was inappropriate. However, we would want to understand and be able to explain the reason for the growth.

At this point, we are not going to prejudge State actions or write rules that unduly limit State flexibility to develop innovative programs that can effectively serve their needy families. However, in light of our responsibility for ensuring program accountability, the evolving and increasingly diverse nature of State TANF and MOE programs, and the flexibility inherent in these rules, we believe it is appropriate to gather information and monitor what is happening.

Section 260.32 What Does the Term ''WtW Cash Assistance'' Mean? (New Section)

This is a new section in the final rule. As we discussed briefly in the last section, the Department of Labor has received numerous questions about the definition of the terms ''cash assistance'' and ''noncash assistance'' because if assistance provided under WtW is noncash, it does not count against the TANF time limit. Therefore, at the request of the Department of Labor, we have added a definition of ''WtW cash assistance'' in this new § 260.32. This definition (in conjunction with the regulation at § 264.1(b)(1)(iii)) clarifies the circumstances under which benefits received by a family under WtW count against the TANF 60-month time limit. By statute (section 408(a)(7)(G) of the

Act), WtW ''noncash assistance'' does not count for this purpose.

In defining ''WtW cash assistance'' (i.e., what does count), we started with the presumption that, to be considered ''WtW cash assistance,'' a benefit must fall within the definition of ''assistance.'' Thus, services, work supports, and nonrecurrent, short-term benefits that are excluded from the definition of assistance at § 260.31(b) are not ''WtW cash assistance.'' Also excluded are supportive services for nonworking families. Although they are assistance, these benefits are services designed to meet specific nonbasic needs and thus are not like cash.

Then, the definition clarifies what types of ''assistance'' under WtW would be considered ''WtW cash assistance.'' First, it includes assistance designed to met a family's ongoing, basic needs. Second, it includes such benefits as cash assistance to the family, even when provided to participants in community service or work experience (or other work activities) and conditioned on work; the Conference Report (H. Rept. 105–217) specifically mentions ''wage subsidies'' as an example of WtW ''cash assistance.'' Finally, our definition incorporates both cash payments and benefits in other forms that can be legally converted to currency (e.g., electronic benefit transfers and checks).

This definition does not limit the types of WtW benefits for which families that have received 60 months of TANF benefits are eligible. Under § 264.1(a)(3), State and local agencies may provide cash and noncash WtW assistance and other benefits to such families beyond the 60-month limit on assistance.

Section 260.33 When Are Expenditures on State or Local Tax Credits Allowable Expenditures for TANF-Related Purposes? (New Section)

As discussed previously, in § 260.30, we have added a definition of ''expenditure'' that helps define what would be a qualified expenditure of Federal TANF funds or State MOE funds. Within this definition of ''expenditure,'' we indicate that refundable tax credits could be an expenditure. The purpose of this section is to clarify how to determine the amount of allowable expenditures in this situation. More specifically, it says that, for an earned income tax credit or other allowable credit, we would count as an expenditure only the State's actual payment to the family for that portion of the credit that the family did not use to offset their tax liability.

The family generally determines its income tax liability by following a number of basic steps. First, the family determines its adjusted gross income (income subject to a State's income tax). Then it applies any allowable exemptions and deductions to reduce the adjusted gross income. The net figure is the total amount of income that is subject to taxation. The taxable income is the basis for determining the amount of taxes owed. Then, the family applies any allowable credits to reduce the amount of taxes that it owes.

For example, a wage earner qualifies for a $200 earned income tax credit. The family's tax liability prior to the application of any credits is $75. When reconciling at the end of the income tax year, the eligible family uses the first $75 of the credit to reduce its State income tax liability to zero. If the State elects to refund any part of the remaining $125 in EITC, then the amount that it actually pays out to the family is a qualified expenditure and counts toward the State's TANF MOE. The $125 represents an actual outlay from State funds to provide extra money to the family. In this regard, the State has spent its own funds to provide a benefit to the family that is consistent with a purpose of TANF.

For emphasis, this section also reiterates that, in order to count as an expenditure of Federal TANF funds or State MOE funds, the purpose of the tax credit program must be reasonably calculated to accomplish one of the four purposes of the TANF program. We recognize that tax credits might be an appropriate and highly efficient method for getting benefits to needy families and want to support those efforts. In particular, State earned income tax credits provide valuable supports and incentives for low-income working families, and we do not want to discourage more States from establishing these policies. At the same time, we want to be sure that our policies support the goals of TANF and promote continued State investments in needy families.

Also, because tax credits represent an area of significant interest to States, the Congress, and fiscal authorities, we have added new lines to the TANF Financial Report that will tell us how many Federal and State dollars are going to refundable earned income tax credits or other refundable State and local credits.

The mere fact that the State issues a tax refund check to a taxpayer does not necessarily indicate that the family has received a refundable tax credit. For example, a TANF-eligible family could receive a refund check simply because the aggregate amount withheld from its paychecks exceeded its tax liability. Such a refund would not meet the definition of a refundable EITC.

For example, assume an individual has a $75 State income tax liability for a year. Yet, through withholding, he or she paid a total of $150 in State income taxes throughout the year. After reconciliation at the end of the income tax year, the amount that the State owes the individual due to tax withholding is not considered a refundable tax credit. Nor is the return of an individual's overpayment of taxes an expenditure of the State.

In determining the amount of MOE that may be claimed, all credits would be subtracted from the amount of the tax liability. The family's tax liability is the amount owed to the State prior to any adjustments for credits or payments. Any excess credit remaining that the State refunds to the family may count as an expenditure if the program for tax credits is reasonably calculated to accomplish a purpose of the TANF program.

Taking another example, suppose the wage earner, who has paid $150 through withholding, actually qualifies for an earned income tax credit of $200. The $125 portion of the credit that exceeds the individual's $75 State income tax liability could qualify as an expenditure if the State pays it out to the family. The $150 withheld is irrelevant to the calculation because this does not represent the family's actual income tax liability. If the family were to receive a $275 refund, $125 (the balance remaining of the EITC after the tax liability is subtracted) would qualify as an expenditure.

Tax relief measures, including nonrefundable tax credits, as well as exemptions, deductions, and tax rate cuts, that serve only to offset a family's income tax liability do not qualify as expenditures.

In addition, tax credits that serve to rebate a portion of another State or local tax, including sales tax credits and property tax credits, are not expenditures under the definition of expenditure at § 260.30. This definition is consistent with longstanding Federal policy on the meaning of expenditure, as reflected in the single definition for outlays and expenditures at 45 CFR 92.3.

Also, if a State administers more than one tax credit program allowable for Federal TANF or State MOE purposes, the State may count as an expenditure the amount by which the combined value of the allowable credits exceeds a TANF-eligible family's State income tax liability prior to application of all allowable credits.

The questions about State tax credits generally arose in the context of what is a ''qualified State expenditure'' for MOE purposes. In particular, the issue principally centered on whether States might count the portion of an earned income credit attributable to revenue loss toward their MOE. To properly address this issue, it is important to note that, in addition to the ''eligible families'' requirement discussed at § 263.2, the statute requires two key criteria to be met for MOE purposes. These criteria are: (1) the State's cost must be an expenditure; and (2) the expenditure must be reasonably calculated to accomplish a purpose of the TANF program. The second criterion is not a difficult standard to meet. States just need to be able to demonstrate that the specific tax benefit program is ''reasonably calculated'' to accomplish a purpose of the TANF program. Because more questions were raised as to what is an expenditure, this issue required more extensive deliberation.

To consider fully the argument that the entire cost of an earned income credit might represent an expenditure, we had to consider this issue within the broader framework of the full range of potential tax relief measures. Since we published the NPRM, we have received several inquiries regarding whether the cost of other tax relief measures were expenditures for MOE purposes.

An earned income credit is but one example of a tax relief measure. Some States also have other credits available to residents. These include, but are not limited to, property tax and homestead credits, child and dependent care credits, sales tax credits, credits for families that purchase a car seat, and credits for individuals with significant medical expenses. Tax relief also takes the form of income tax deductions and exemptions. Some States also offer tax credits to investors and businesses, e.g., credits that help or promote employment of low-income residents such as a rent reduction program credits, neighborhood assistance act credits, an enterprise zone act credits, day-care facility investment tax credits, and major business facility job-tax credits.

Few of these activities result in refunds in excess of any tax liability (whether it be income, sales, property tax liability). But, all of these activities cost the State lost tax revenue. Therefore, we had to consider whether lost revenue equals an expenditure. While the statute under 409(a)(7) uses the term ''expenditures,'' it does not define it. However, since 1988, when the Department issued its common administrative rule at 45 CFR 92.3, the term expenditures has been defined as outlays, for purposes of Federal grant funds. Because Congress did not provide another definition of expenditure in the TANF statute, we have presumed that the existing regulation defining expenditure as an outlay is applicable.

To outlay is to expend, spend, lay out, or pay out. We therefore do not consider that a decrease in a State's revenue associated with a tax credit program or other tax relief measure meets the common rule definition of an ''expenditure.'' Accordingly, we conclude that tax provisions that only serve to provide a family with relief from State taxes such as income taxes, property taxes, or sales tax represent a loss of revenue to the State, but not an expenditure. However, the portion of a tax credit that exceeds a family's income tax liability and is paid to the family is an expenditure. That expenditure would count toward a State's TANF MOE requirement if it is reasonably calculated to meet a purpose of the TANF program.

Arguably, accepting less revenue (taxes) from the income of families (or business), provides a financial benefit to the family (or business) by allowing them to retain a greater share of their own money. As such, tax relief activities in general can serve to complement welfare reform efforts. However, tax relief measures that solely provide a family (or business) with relief from various State taxes are not expenditures.

In determining that the common rule Federal definition of expenditures was appropriate to use in the TANF context, we also examined the broader policy implications. Including nonrefundable credits and other tax relief measures that served solely to reduce tax liability could redirect Federal TANF and State MOE expenditures away from the neediest families (who get no direct benefit from nonrefundable credits) and could allow States to claim as MOE an extremely wide range of tax cuts. We do not think this result would be consistent with the intent of TANF.

At § 263.2, you will find additional discussion about the treatment of tax credits and other tax provisions.

Section 260.35—What Other Federal Laws Apply to TANF? (New Section)

As we indicated in the section of the preamble entitled ''Recipient and Workplace Protections,'' a number of commenters expressed concerns about the NPRM's failure to support the protections available to TANF recipients under Federal nondiscrimination and employment laws. We added this section to the regulations in response to those comments. Please see the earlier preamble section for a more detailed discussion of the commenters' concerns and our response.

Section 260.40—When Are These Provisions in Effect? (§ 270.40 of the NPRM)

Background

This section of the proposed rules provides the general time frames for the effective dates of the TANF provisions. As we noted in the NPRM, many of the penalty and funding provisions had statutorily delayed effective dates. For example, most penalties would not be assessed against States in the first year of the program, and reductions in grants due to penalties would not occur before FY 1998 because reductions take place in the year following the failure. We referred readers to the discussion on the individual regulatory sections for additional information.

We also made the important point that we did not intend to apply the TANF rules retroactively against States. We indicated that, with respect to any actions or behavior that occurred before final rules, we would judge State actions and behavior only against a reasonable interpretation of the statute.

As we reviewed the comments, we noted a discrepancy between this preamble discussion and the proposed regulatory text. The preamble indicated that States would operate under a ''reasonable interpretation of the statute'' until issuance of final rules; the regulatory text said that the ''reasonable interpretation'' standard would apply until the ''effective date'' of the final rules. As you will see in the regulatory text at § 260.40 of this final rule, the correct policy is that the ''reasonable interpretation'' standard applies to all State behavior prior to October 1, 1999, the effective date of these rules.

Also, in the proposed rule, at § 270.40(a), we incorporated language explaining when the statutory requirements went into effect for States implementing their TANF programs. Because States all implemented their TANF programs by July 1, 1997, as required by statute, this language is obsolete, and we deleted it from the final rule.

Comments and Responses

We received several comments on this section of the rule. Commenters' greatest concern was the effective date of the proposed rule.

Comment: A significant number of commenters asked that we delay the effective date of the final rule to allow

States time to implement all the regulatory provisions, e.g., to change their administrative rules, conduct staff training, make necessary computer systems modifications, and ensure data validity. Clearly, the major area of concern was the States' ability to implement new rules on data collection and reporting. We received three dozen comments that specifically asked for a phase-in period for meeting the reporting requirements.

A number of commenters did not offer a specific suggestion as to how long this phase-in period should be. Among the commenters who did make suggestions, the suggested period of time ranged from 9 months to 2 years. The most common suggestion was 12 months. Some commenters noted that States would be simultaneously addressing Year 2000 compliance problems and would need added time for that reason.

Response: In response to those comments, we have decided to make the effective date of the final rule the beginning of the next fiscal year. Our initial inclination was to make the rule generally effective within two to three months of publication, but to lag the data reporting requirements an additional six months. However, we realized that we could not successfully implement some of the general provisions until we had the revised data reporting in place. For example, we could not adjust a State's work participation rates based on the new welfare reform waiver provisions before the new reporting took effect. Also, many of the significant provisions in this rule (including the caseload reduction credit and the administrative cost caps) would be difficult to implement part way into a fiscal year.

To clarify the meaning of this effective date, States will continue program and fiscal reporting under the ''emergency reporting'' provisions for assistance provided, and expenditures made, through September 30, 1999. The last reports under this old system will be due November 14, 1999. States will begin reporting under these rules and the forms in the appendices effective with the first quarter of fiscal year 2000. The first TANF Data and Financial reports under these new requirements will be due February 14, 2000.

The timeframes we have provide in this final rule are fairly rigorous. Also, they are substantially shorter than many States requested. However, we think that States have sufficient resources to meet these deadlines, and they will receive our continued support in doing so. Any further delays could undermine the purposes of the law.

At the same time, we recognize that Y2K compliance and these new TANF requirements may be placing extraordinary, simultaneous demands on State staff and resources. For States that commit significant resources to achieve Y2K compliance in time, we have added a reasonable cause criterion at § 262.5(b)(1). This new provision will provide some penalty relief to States that cannot report one or both of their first two quarters of TANF data on time due to Y2K compliance activities. You will find additional discussion of that decision at §§ 262.5, 265.5, and 265.8.

Comment: Several commenters expressed support for our decision not to apply the rules retroactively. A few commenters expressed concerns about the ''reasonable interpretation'' standard we intended to apply prior to issuance of rules was too strenuous. One said we should exempt States from ''all but the most flagrant program infractions.'' Another expressed concerns about the level of Secretarial discretion in such a standard and the lack of clear criteria about what it meant. Another asked that we accept any behavior that did not ''contradict any provision of the law, court decisions or due process.''

Response: This section of the rule retains our proposal to judge State actions prior to the effective date of these rules under a ''reasonable interpretation of the statute'' standard. We understand the commenters' interest in clearer criteria. However, the standard in the rule is a term of art and does in fact give most parties a very good sense of where one would draw the line. Also, to develop very specific criteria at this point would in fact amount to retroactive rulemaking, which we promised we would not do.

At the same time, we want to assure States that we recognize that this statute is complicated and do not intend to penalize anyone who has exercised reasonable discretion and judgment during the period before final rules take effect.

For example, we understand that there is a broad range of views about the interpretation of section 415 on continuation of waiver policies. Thus, in determining whether a State is liable for a penalty for failing work participation rates for FY 1997, 1998, or 1999, we would give substantial deference to the State's proposal for rate adjustments based on waiver policies that it continued.

Also, we point out that States have the opportunity to dispute any penalty finding through the administrative processes available at part 262. These processes provide a vehicle for addressing and resolving any disagreements about whether a State was operating under a ''reasonable interpretation of the statute.''

We disagree with that the view that the standard we proposed is too strenuous. We do not necessarily want to provide cover to States that pushed the envelope beyond reasonable bounds in terms of interpreting the statute.

Subpart B—Domestic Violence

As we have noted earlier, we decided to consolidate the regulatory provisions on domestic violence in this new subpart to part 260. You can find a discussion of these provisions and the comments received on the proposed rule in the earlier section of the preamble entitled ''Treatment of Domestic Violence Victims.''

Subpart C—Waivers

As we have noted earlier, we decided to consolidate the regulatory provisions on section 1115 waivers in this new subpart to part 260. You can find a discussion of these waiver provisions and the comments received on the proposed rule in the earlier section of the preamble entitled ''Waivers.''

VI. Part 261—Ensuring That Recipients Work

Section 261.1—What Does This Part Cover? (§ 271.1 of the NPRM)

This section identifies the scope of part 261 as the mandatory work requirements of TANF.

We did not receive any comments that relate solely to the scope of this part.

Section 261.2—What Definitions Apply to This Part? (§ 271.2 of the NPRM)

This section cross-references the general definitions for the TANF regulations established under part 260. We did not receive any comments on this section. We have responded to cross-cutting comments under other sections of this part.

Subpart A—What Are the Provisions Addressing Individual Responsibility?

During our extensive consultations, a number of groups and individuals asked how the requirements on individuals relate to the State participation requirements and penalties. To help clarify what the law expects of individuals (as opposed to the requirements that it places on States), we have decided to outline a recipient's statutory responsibilities as part of this regulation. In so doing, we only paraphrase the statute, without interpreting these provisions. Inclusion of these provisions in the regulation does not indicate our intent to enforce these statutory provisions; rather, we

have included the requirements in the regulation for informational and contextual reasons. Nevertheless, our expectation is that States will comply with these requirements.

Section 261.10—What Work Requirements Must an Individual Meet? (§ 271.10 of the NPRM)

PRWORA promotes self-sufficiency and independence by expanding work opportunities for welfare recipients while holding individuals to a high standard of personal responsibility for the support of their children. The legislation expands the concept of mutual responsibility, introduced under the Family Support Act of 1988. It espouses the view that income assistance to families with able-bodied adults should be transitional and conditioned upon their efforts to become self-sufficient. As States and communities assume new responsibilities for helping adults get work and earn paychecks quickly, parents face new, tougher work requirements.

The law imposes a requirement on each parent or caretaker to work (see section 402(a)(1)(A)(ii) of the Act). That requirement applies when the State determines the individual is ready to work, or after he or she has received assistance for 24 months, whichever happens first. For this requirement, the State defines the work activities that meet the requirement.

In addition, there is a requirement that each parent or caretaker participate in community service employment if he or she has received assistance for two months and is neither engaged in work in accordance with section 407(c) of the Act nor exempt from work requirements. The State must establish minimum hours of work and the tasks involved. A State may opt out of this provision if it chooses. A State may impose other work requirements on individuals, but there is no further Federal requirement to work.

Readers should understand that these individual requirements are different from the work requirements described at section 407 of the Act. Section 407 applies a requirement on each State to engage a certain percentage of its total caseload and a certain percentage of its two-parent caseload in specified work activities. For the State requirement, the law lists what activities meet the requirement. A State could choose to use this statutory list for the work requirement on individuals described above, but is not required to do so. Subpart B below explains more fully what the required work participation rates are for States and how we calculate them. Subpart C explains the work activities and the circumstances under which an individual is considered ''engaged in work'' for the purpose of those rates.

We made a minor change to the text of the regulation from the NPRM, removing the reference to the date that the community service employment provision took effect, since that date has already passed.

In addition to the comments discussed below, we received several comments in support of the language that we used in this section.

Comment: A few commenters suggested that this section should reference the fact that these work requirements must be consistent with the provisions of section 407(e)(2) of the Act, exempting a single custodial parent who cannot obtain needed child care from work.

Response: We agree that the work requirements on individuals should more clearly refer to the child care exception and have amended § 261.10(a) and (b) accordingly.

Comment: One commenter urged us to specify that individuals in active military service or participating in a National Community Services Act program be considered to be meeting the individual work requirement.

Response: As we indicated above, it is the State's prerogative and responsibility to define the activities it considers to meet these requirements; therefore, we have not modified the regulations in this area.

Comment: One commenter expressed concern that States will classify recipients prematurely as ''job-ready'' and urged us to ensure that States assess the needs of recipients properly.

Response: The statute vests responsibility for determining when a recipient is ''job-ready'' in the State. It requires each State to assess the skills, prior work experience, and employability of each recipient who is either 18 years of age or who has not completed high school (or equivalent) and is not attending secondary school (see § 261.11).

We agree with the commenter that it is important for States to assess individuals adequately before requiring them to work or engage in any activity; however, as we indicated above, this section of the regulation is intended to paraphrase the statute rather than to interpret it. We have included these provisions to clarify the differing work expectations that the statute imposes on individuals and States.

Section 261.11—Which Recipients Must Have an Assessment Under TANF? (§ 271.11 of the NPRM)

Each 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.

With respect to the timing of assessments, the State may make the assessment within 30 days of the date on which the individual is determined to be eligible for assistance, but may opt to increase this period to as much as 90 days.

Several commenters expressed support for the inclusion of this section in the regulations.

Comment: One commenter urged us to define what an appropriate assessment is to ensure that the examination of each recipient is thorough and sensitive to barriers that a recipient may hesitate to identify, such as domestic violence or substance dependence. Another suggested including guidelines or standards for assessments. Others urged us to indicate how we would address a State's noncompliance with this provision or to include a penalty related to this requirement.

Response: Because we have included this provision in the regulations for informational purposes, it would be inappropriate to define its terms or include standards. We expect States to comply with the requirements of this subpart, but including them in the regulations does not indicate our intent to create regulatory expectations or to enforce these statutory provisions. We do not have the authority to add a penalty related to this requirement.

Comment: One commenter suggested that we do not have authority to require assessment of recipients. Others expressed concern about which clients must be assessed and urged us to interpret the requirement to apply only to certain recipients, such as those who are subject to work requirements.

Response: Section 408(b)(1) of the Act requires the State to assess each recipient who is at least age 18 or who has not completed high school (or equivalent) and is not attending secondary school. The regulations reflect this language. Because we have included this provision for informational purpose, we do not think it is appropriate to interpret the statute further in this area.

Comment: One commenter thought that the regulations lacked clarity concerning the timing of assessments for

TANF recipients who had been receiving AFDC compared to the timing for those who become eligible for assistance after the State began its TANF program. Another urged us to allow States more time for conducting assessments.

Response: Because the statute specifies the timeframes in which States may comply with the requirement for an assessment, we do not think it is appropriate to modify those timeframes. However, we agree that it was confusing to describe two different assessment periods for different segments of a State's caseload. Since all States should already have conducted assessments of any recipients that they converted from AFDC to TANF, we have included only the description of the assessment period for new TANF cases in these regulations.

Section 261.12—What Is an Individual Responsibility Plan? (§ 271.12 of the NPRM)

A State may require individuals to adhere to the provisions of an individual responsibility plan. Developed in consultation with the individual on the basis of the initial assessment described above, the plan should set forth the obligations of both the individual and the State. It should include an employment goal for the individual and a plan to move him or her into private-sector employment as quickly as possible. The regulation includes more detailed suggestions for the content of an individual responsibility plan.

Comment: One commenter, acknowledging the ultimate goal of private-sector employment, thought that the individual responsibility plan should recognize and address all barriers to employment, such as mental health or literacy problems. Another commenter suggested that the State's responsibilities to the individual should be more explicit. Another commenter thought that paragraph (d) did not accurately reflect the statute.

Response: We agree that the plan should include whatever activities the State, in consultation with the individual, deems appropriate for overcoming barriers to employment. We reiterated the statute's list of possible plan obligations in paragraph (b) as examples, not as an exhaustive list. We think that paragraph (d) ensures that the plan will describe the State's obligation to the individual. States have the flexibility to draft the plan as explicitly as they find appropriate. We also understand the commenter's concern about the accuracy of paragraph (d) and have amended it to reflect the statute's references to services that enable an individual to obtain and keep employment and to job counseling.

Comment: Some commenters thought that we had overstepped our authority by including anything in the regulations about individual responsibility plans or that our language was too restrictive, preventing States from including plan requirements that do not relate to work. Others commended our inclusion of this section.

Response: As we indicated above, we have included this provision for informational and contextual purposes. In doing so, we paraphrased requirements specified in the statute. For this reason, we do not think we have overstepped our authority or that the language is more restrictive than the statute. Moreover, neither the regulations nor the statute prohibits a State from including in the individual responsibility plan other requirements that it finds appropriate for the individual.

Section 261.13—May an Individual Be Penalized for Not Following an Individual Responsibility Plan? (§ 271.13 of the NPRM)

If the individual does not have good cause, he or she may be penalized for not following the individual responsibility plan that he or she signed. The State has the flexibility to establish good cause criteria, as well as to determine what is an appropriate penalty to impose on the family. This penalty is in addition to any other penalties that the individual may have incurred.

We received comments expressing support for the inclusion of this section in the regulations.

Comment: Several commenters urged us to ensure that the good cause exception referred to in this section protects a recipient from penalty where the individual failed to follow the individual responsibility plan due to a violation of employment laws, such as sexual harassment or other forms of job discrimination. Another suggested we define the term ''good cause'' to give States guidance about the appropriate circumstances for imposing a penalty and urged a broad definition to cover the many barriers to employment that welfare recipients face. Another commenter wanted us to ensure that victims of domestic violence are protected from penalty, i.e., to define good cause to cover these individuals, regardless of whether the State has adopted the Family Violence Option (FVO).

Response: We do not believe it is necessary to define ''good cause'' exceptions. States have substantial experience in this area based on prior law. We encourage States to recognize the special needs of victims of domestic violence elsewhere in the preamble. Although we recognize that it is optional for States, we promote adoption of the FVO. We also encourage States to coordinate their policies on good cause determinations to provide consistent protection for families.

While we have chosen not to regulate ''good cause'' criteria, in order to protect individuals from violations of other employment laws, we have included a new regulatory section at § 260.35 to reference employment protections that exist under other Federal laws. These laws apply equally to welfare beneficiaries and other workers.

Comment: One commenter thought the regulations should explicitly state that a State may define ''good cause'' differently in different subdivisions.

Response: As we indicated above, States have the flexibility to define ''good cause'' as they deem appropriate. Under section 402(a)(1)(A)(i) of the Act, they also have the flexibility to implement their programs differently in different parts of the State. Thus, a State could vary its good cause criteria from one subdivision to another. Since the language of this section tracks that of the statute, we do not think it necessary or appropriate to amend the regulatory text in this regard.

Comment: One commenter urged us to ensure that the individual responsibility plan includes the individual's right to challenge the contents of the plan.

Response: States may design individual responsibility plans as they determine suitable. Because we have included this provision for informational and contextual purposes, we do not think it is appropriate for us to expand upon the provisions of the statute, which we have tracked closely in this section. However, section 402(a)(1)(B)(iii) of the Act requires the State to provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process. States should consider when and how to accommodate this recipient right in the development and implementation of individual responsibility plans.

Section 261.14—What Is the Penalty if an Individual Refuses To Engage in Work? (§ 271.14 of the NPRM)

If an individual refuses to engage in work in accordance with section 407 of the Act, the State must reduce the amount of assistance otherwise payable to the family pro rata (or more, at State