**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Administration for Children and Families**

**45 CFR Part 283**

**RIN 0970–AB79**

## Implementation of Section 403(a)(2) of Social Security Act Bonus To Reward Decrease in Illegitimacy

**AGENCY:** Administration for Children and Families, HHS.

**ACTION:** Proposed rule.

**SUMMARY:** The Administration for Children and Families proposes to issue regulations describing how we will award a bonus to those States that experience the largest decreases in out-of-wedlock childbearing and also reduce their abortion rates. The total amount of the bonus will be $100 million in each of fiscal years 1999 through 2002, and the award for each eligible State in a given year will be $25 million or less.

This incentive provision is a part of the new welfare reform block grant program enacted in 1996—the Temporary Assistance for Needy Families, or TANF, program.

**DATES:** You must submit comments by May 1, 1998. We will not consider comments received after this date in developing the final rule.

**ADDRESSES:** You may mail or hand-deliver comments to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade, S.W., 7th Floor West, Washington, D.C. 20447. You may also transmit comments electronically via the Internet. To transmit comments electronically, or download an electronic version of the proposed rule, you should access the ACF Welfare Reform Home Page at http://www.acf.dhhs.gov/news/welfare and follow the instructions provided.

We will make all comments available for public inspection at the Office of Planning, Research and Evaluation, 7th Floor West, 901 D Street, SW, Washington, DC 20447, from Monday through Friday between the hours of 9 a.m. and 4 p.m.

We will only accept written comments. In addition, all your comments should:

- be specific;
- address only issues raised by the proposed rule, not the law itself;
- where appropriate, propose alternatives;
- explain reasons for any objections or recommended changes; and
- reference the specific section of the proposed rule that you are addressing.

We will not acknowledge the comments. However, we will review and consider all comments that are germane and received during the comment period.

**FOR FURTHER INFORMATION CONTACT:** Kelleen Kaye, (202) 401–6634, or Ken Maniha, (202) 401–5372.

Deaf and hearing-impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 between 8:00 a.m. and 7:00 p.m. Eastern time.

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## I. 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. The first title of this new law (Pub. L. 104–193) establishes a comprehensive welfare reform program designed to change the nation's welfare system dramatically. The new program is called Temporary Assistance for Needy Families, or TANF, in recognition of its focus on moving recipients into work and time-limited assistance.

PRWORA repeals 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 repeals 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.

This landmark welfare reform legislation dramatically affects not only needy families, but also intergovernmental relationships. It challenges Federal, State, Tribal and local governments to foster positive changes in the culture of the welfare system and to take more responsibility for program results and outcomes.

This new legislation also gives States 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, and it offers States an opportunity to try new, far-reaching ideas so they can respond more effectively to the needs of families within their own unique environments.

## II. Summary of the Bonus Provision

### *A. Legislative History*

One of the greatest concerns of Congress in passing the PRWORA was the negative effect of out-of-wedlock births. This concern is reflected in the Congressional findings at section 101 of PRWORA. Here, Congress describes the need to address issues relating to marriage, the stability of families, and the promotion of responsible fatherhood and motherhood. It cites: the increasing number of children receiving public assistance; the increasing number of out-of-wedlock births; the negative consequences of an out-of-wedlock birth to the mother, the child, the family, and society; and the negative consequences of raising children in single-parent homes.

Section 101 concludes:

> Therefore, in light of this demonstration of the crisis in our Nation, it is the sense of the Congress that prevention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests and the policy contained in Part A of title IV of the Social Security Act (as amended by section 103(a) of this Act) is intended to address the crisis.

Congressional concern is also reflected in the goals of the TANF program and the provision entitled Bonus to Reward Decrease in Illegitimacy. One purpose of the TANF program, as stated in section 401(a)(3) of the Social Security Act, is to ''prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies.''

In enacting this separate bonus provision to reward decreases in out-of-wedlock childbearing, Congress intended to provide greater impetus to State efforts in this area and encourage State creativity in developing effective solutions.

*B. The Bonus Award*

This rulemaking addresses the provision in the new law to reward States for high performance through the ''Bonus to Reward Decrease in Illegitimacy.'' (See section 403(a)(2) of the Social Security Act (the Act)).

In this Notice of Proposed Rulemaking, the ''Bonus'' refers to the Bonus to Reward Decrease in Illegitimacy and the ''ratio'' refers to the ratio of out-of-wedlock births to total births.

As specified in section 403(a)(2) of the Act, we will award a total of $100 million annually, in each of fiscal years 1999 through 2002. The amount of the bonus for each eligible State in a given year will be $25 million or less. For the purposes of this award, States include the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam and American Samoa, (as provided in section 419(a)(5)). However, the criteria for determining eligibility and size of the bonus for Guam, American Samoa and the Virgin Islands are different than the criteria for the remaining States, as specified in section 403(a)(2).

We would base the bonus award on birth and abortion data for the State population as a whole, not on data for TANF or other more limited populations.

Briefly, we propose to award the bonus as follows:

- We would calculate the ratio of out-of-wedlock births to total births for each State for the most recent two-year period for which data are available and for the prior two-year period. To compute these ratios, we would use the vital statistics data reported annually by States to the National Center for Health Statistics.
- For States other than Guam, American Samoa or the Virgin Islands, we would identify the five States that had the largest proportionate decrease in their ratios between the most recent two-year period for which data are available and the prior two-year period. These States would be potentially eligible.
- For Guam, American Samoa and the Virgin Islands, we would identify which had a comparable decrease in their ratios (i.e., a decrease at least as large as the smallest decrease among the other qualifying States). These additional States would also be potentially eligible. We call to your attention that bonus funds for Puerto Rico, Guam, American Samoa, and the Virgin Islands are not subject to the mandatory ceilings in section 1108(c)(4) of the Act.
- We would notify the potentially eligible States that, to be considered for the bonus, they need to submit data on the number of abortions.
- We would determine which of the potentially eligible States also experienced a decrease in their rate of abortions for the most recent calendar year compared to 1995, the base year specified in the Act. These States would receive a bonus award.

**III. Regulatory Framework**

*A. Consultations*

In the spirit of both regulatory reform and PRWORA, we implemented a broad and far-reaching consultation strategy prior to the drafting of all proposed regulations for the TANF program. We discussed major issues related to this rulemaking with outside parties at numerous meetings.

We held two types of consultations. First, we raised issues related to this bonus award in the general TANF consultation meetings with representatives of State and local government; non-profit, advocacy, and community organizations; foundations; and others. Second, we held consultations with technical, statistical and substantive experts focused specifically on these bonus provisions. We spoke with a number of different audiences including representatives of the National Association for Public Health Statistics and Information Systems (NAPHSIS); the Maternal and Child Health Technical Advisory Group (coordinated by the American Public Welfare Association primarily to advise the Health Care Financing Administration of the Department of Health and Human Services on policy matters); and other interested agencies and organizations (e.g., the Alan Guttmacher Institute, the NOW Legal Defense Fund, and Catholic Charities USA).

The purpose of these discussions was to gain a variety of informational perspectives about the potential benefits and pitfalls of alternative regulatory approaches. We solicited both written and oral comments, and we worked to ensure that 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. However, we would like to emphasize that we are issuing these regulations as a proposed rule. Thus, all interested parties have the opportunity to voice their concerns and to react to specific policy proposals. We will review comments we receive during the comment period and will take them into consideration before issuing a final rule.

*B. Related Regulations Under Development*

The NPRM to address the work, accountability, and data collection and reporting provisions of the new TANF program was published on November 20, 1997.

Over the next several months, we expect to issue other related proposed rules. The upcoming NPRMs will cover high performance bonuses, Tribal work and TANF programs, and child poverty rates.

*C. Statutory Context*

These proposed rules reflect PRWORA, as enacted, and amended by the Balanced Budget Act of 1997 (Pub.L. 105–33). This latter legislation included some technical changes and an adjustment to the formula if Guam, the Virgin Islands, or American Samoa is eligible for a bonus.

*D. Regulatory Reform*

In its latest *Document Drafting Handbook*, the Office of the Federal Register supports the efforts of the National Performance Review and encourages Federal agencies to produce more reader-friendly regulations. In drafting this proposed rule, we have paid close attention to this guidance. Individuals who are familiar with prior welfare regulations should notice that this package incorporates a distinctly different, more readable style.

*E. Departmental Activities Related to Out-of-Wedlock Births*

The Department has undertaken several initiatives in recognizing the importance of reducing out-of-wedlock childbearing. These include activities focused on the total population, as well as the teen population. In 1995, the Department published the *Report to Congress on Out-of-Wedlock Childbearing.* This volume provides an extensive compilation of many statistics on issues related to out-of-wedlock childbearing, as well as a literature review on the causes, consequences, and strategies to reduce childbearing outside of marriage. In that same year, the Department published *''Beginning too Soon: Adolescent Sexual Behavior, Pregnancy and Parenthood,''* a report prepared by Child Trends, Inc.

Recently, the Department has developed the National Strategy to Prevent Teen Pregnancy, as required in section 905 of PRWORA. This strategy targets both girls and boys, and it contains both program and research

initiatives. Section 905 of PRWORA also required that the Department assure that at least 25 percent of communities in this country have teen pregnancy prevention programs in place. The National strategy sends the strongest possible message to all teens that postponing sexual activity, staying in school, and preparing for work are the right things to do. It strengthens ongoing efforts across the nation by increasing opportunities through welfare reform; supporting promising approaches; building partnerships; improving data collection, research, and evaluation; and disseminating information on innovative and effective practices.

The Department is also administering the State Abstinence Education Program as authorized by section 912 of the PRWORA. This program authorizes $50 million per year beginning in FY 1998. By July 1997, every State had applied for this money to build on their State efforts to prevent teen pregnancy.

## IV. Section-By-Section Discussion of the NPRM

*What Does This Part Cover? (§ 283.1)*

This section of the proposed rule provides a summary of the content of part 283. Part 283 covers how we would determine which States qualify for the bonus award, what data we would use to make this determination, and how we would determine the amount of the award.

*What Definitions Apply to This Part? (§ 283.2)*

Section 283.2 proposes definitions of the terms used in part 283. Some of these definitions assign a one-word term to represent a frequently used phrase. For example, ''Bonus'' is defined to mean the Bonus to Reward Decrease in Illegitimacy authorized under section 403(a)(2) of the Act.

We also define key technical terms used in calculating the bonus award for clarity and precision. For example, we define the ''most recent calendar year for which abortion data are available'' as the year that is two calendar years prior to the current calendar year. We also propose to define abortions to include both medically and surgically induced pregnancy terminations. This is consistent with the way data are collected in most States.

You will note that we use the term ''we'' throughout the regulation and preamble. The term ''we'' means 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.

*What Steps Will We Follow To Award the Bonus? (§ 283.3)*

This section of the proposed rule describes the process we propose to follow for identifying which States would be eligible for the bonus and what the amount of the bonus would be. This process is based on the definition of ''eligible State'' in section 403(a)(2)(C)(i)(I)(aa). This definition indicates that a State must have a qualifying decrease in its ratio and also experience a decrease in its abortion rate. We propose to award the bonus based on decreases in ratios and abortion rates throughout the State. We would not award the bonus based on limited populations, e.g., teens or public assistance recipients.

Competition for the bonus is voluntary, and this rule places no mandates on States with respect to data collection. Also, where possible, this NPRM proposes to use existing data sources or data that are the least burdensome to collect and report.

In determining eligibility for the bonus, we first would consider States other than Guam, American Samoa, and the Virgin Islands. Among these States, we propose to identify which five States have the largest decrease in their ratios. We would then determine whether Guam, American Samoa and the Virgin Islands have decreases in their ratios at least as large as the smallest decrease among the other qualifying States. If so, they too would be potentially eligible for the bonus. We would not consider any other States for bonus eligibility, regardless of whether these potentially eligible States ultimately qualify for the bonus or not.

When calculating decreases in the ratios, we would use the vital statistics data for total births and out-of-wedlock births that States submit to the National Center for Health Statistics (NCHS). Vital statistics data include information on virtually all births occurring in the United States and are already reported by State health departments to NCHS through the Vital Statistics Cooperative Program (VSCP). Hospitals and other facilities report this information to the State health departments on a standard birth certificate, following closely the format and content of the U.S. Standard Certificate of Live Birth. The States process all of their birth records and send their files to NCHS in electronic form in a standard format. The mother of the child or other informant provides the demographic information on the birth certificate, such as race, ethnicity, age, and her marital status at the time of birth.

We chose vital statistics data to measure births because we viewed them as the most reliable and standard data available across States. Also, using vital statistics data from NCHS would allow us to measure the same years for all States and would give States a reasonable and standard time frame in which to submit the data. This is particularly important for birth data because we would rank States on their decrease in the ratio.

We also determined that obtaining these data directly from NCHS rather than from the individual States would avoid a duplicate information collection activity and would be less burdensome for the States and for us. In most cases, States would not need to provide any new data or information related to births beyond what they already submit to NCHS.

As specified in section 403(a)(2) of the Act, once we have identified the potentially eligible States with the largest decreases in their ratios, we would notify those States that, to be considered for eligibility for the bonus award, they must submit the necessary data on the number of abortions for both 1995 and the most recent year.

We concluded that there is no need for all States to submit data on abortions, based on the definition of ''eligible State'' in section 403(a)(2)(C)(i)(I)(aa). A State cannot qualify for the bonus unless it is potentially eligible based on its decrease in the ratio. Even if some potentially eligible States later become ineligible based on their abortion data, all States who were previously ineligible based on their birth data would remain ineligible. We see no purpose in requesting abortion data from States that are not potentially eligible. Requesting data from only the potentially eligible States would be less burdensome for States and for us.

Each of the potentially eligible States that submits abortion data and also experiences a decrease in its abortion rate relative to 1995 would be eligible to receive the bonus. If a State does not submit the necessary abortion data or has not experienced a decrease in its abortion rate, it would be ineligible.

We want to call attention to the fact that, as specified in section 403(a)(2)(C)(i)(I)(bb) of the Act, the comparison year for the abortion rate will be 1995 for every bonus year. Any State that is potentially eligible for the bonus and does not submit the 1995 abortion data along with the other

required information within two months of notification by ACF would be ineligible for the bonus that year.

It is important to note that, based on the definition of ''eligible State'' in section 403(a)(2)(C)(i)(I)(aa), we propose to rank States only on the basis of their ratios. States do not compete with respect to their abortion rates. Once a State is ranked on decreases in the ratio and determined to be potentially eligible, changes in its abortion rate would affect only its own eligibility. A State's abortion rate has no affect on the eligibility of any other State. Thus, while abortion data affects whether an individual State receives the bonus, competition among States for the bonus depends primarily on the birth data.

Section 403(a)(2)(B) of the Act specifies that the total amount of the bonus in each year shall be $100 million. The amount of the bonus awarded to each State will depend on the number of eligible States, and whether Guam, American Samoa or the Virgin Islands are among the eligible States. In no case will the amount of a State's bonus be more than $25 million.

*If a State Wants To Be Considered for Bonus Eligibility, What Birth Data Must It Submit? (§ 283.4)*

This section of the proposed rule describes in more detail what data a State must have submitted to NCHS for each year in the calculation period as a first step in qualifying for the bonus. As specified in section 403(a)(2)(C)(I)(i)(aa) of the Act, the calculation period for each bonus year covers four years, i.e., the most recent two calendar years for which NCHS has final data and the prior two calendar years. Consider the hypothetical example where bonus eligibility is being determined in July of 1999 and the most recent year for which NCHS has final data for all States is 1997. In this example, the calculation period would be calendar years 1997, 1996, 1995, and 1994.

If a State did not change its method for determining marital status at any time during the calculation period, it would not need to submit any additional information beyond the information submitted to the NCHS as part of the vital statistics program. States must have submitted these vital statistics files for each year in the calculation period. Among other elements, these files must contain the number of total births and out-of-wedlock births that occurred in the State. NCHS would use these data to tabulate the number of total and out-of-wedlock births occurring to residents of each State.

While the determination of marital status at the time of birth is fairly standard across States, there is some variation. Most States use a direct question on marital status, while a few infer marital status based on various pieces of information.

Section 403(a)(2)(C)(i)(II)(aa) of the Act requires us to disregard changes in data due to changed reporting methods. Accordingly, we propose in paragraph (b) of this section that, if a State changed its method of determining marital status during the calculation period, the State must provide additional information to NCHS in order to demonstrate the effect of that change. The information that States must provide includes the years(s) of the change and data resulting from a replication of the prior methodology, i.e., data showing what the numbers of out-of-wedlock births would have been if such a change had not occurred. Examples of such changes include replacing an inferential procedure with a direct question on marital status, or changing the data from which marital status is inferred.

In providing the information on the prior methodology, the State must replicate as closely as possible the method for determining marital status in the previous year. The State must submit this alternative calculation of the number of out-of-wedlock births for years in which the determination of marital status is different from that in the prior year. The State would also have to submit documentation to NCHS describing the change in determination of marital status and how it made the alternative calculation.

Consider the following hypothetical example of determining bonus eligibility in 1999:

A State changes from an inferential procedure to a direct question on marital status in 1996 and then leaves its procedure unchanged. This State would need to submit vital statistics data on total and out-of wedlock births for each year in the calculation period. This State would also need to submit an alternative measure showing what the number of out-of-wedlock births would have been in 1996, using the earlier inferential procedure. The State would not need to submit alternative measures for any other years in the calculation period. NCHS would use the information for 1996 to calculate an adjustment factor for other relevant years in the calculation period. For FY 2000 and subsequent bonus years, the State would not need to submit any data beyond the basic vital statistics files, as long as it made no further change in its procedures.

This alternative calculation of the number of births and documentation is necessary only if a State chooses to be considered for the bonus. It is not required as part of the Vital Statistics Cooperative Program.

We propose in paragraph (c) of this section that, for changes that occurred prior to 1998 or prior to final rule publication, the State has one year after final rule publication to submit the required information. For changes that occur during or after 1998 and after final rule publication, a State must submit the information with its vital statistics data for that year. This policy would help ensure that timely information is available when we determine bonus eligibility.

*How Will We Use These Birth Data To Determine Bonus Eligibility? (§ 283.5)*

This section of the proposed rule explains how we would identify which States have the largest decrease in their ratios. We would do this by using data provided by NCHS on total births and out-of-wedlock births for each State. In States that changed their methods of determining marital status, NCHS would have adjusted the number of out-of-wedlock births to disregard the effect of those methodology changes. This adjustment would be based on information provided by the States.

In paragraph (b) we propose to use the NCHS data to calculate the ratio for each State that has submitted the required data. As specified in the Act, this ratio would equal the number of out-of-wedlock births during the most recent two years divided by the number of total births for the same period. We would also calculate this ratio for the prior two-year period. Both ratios would be calculated to three decimal points.

We would then calculate the proportionate change in the ratios. This proportionate change would equal the ratio from the most recent two-year period, minus the ratio for the previous two-year period, all divided by the ratio from the previous two-year period. A negative result would indicate a decrease in the ratio. A positive result would indicate an increase in the ratio, and mean the State was not eligible for a bonus. We would calculate these ratios to three decimal places.

We also considered measuring the absolute change in the ratio. The absolute change would equal the ratio from the most recent period minus the ratio from the prior period.

We believe the proportionate change is a better measure than the absolute change because it would allow States starting with high and low ratios to compete more fairly. This is because a

State starting with a low ratio could have more difficulty achieving a given absolute decrease in ratios compared to a State starting with a high ratio. For example, a State starting with a ratio of .100 would need to cut its ratio in half to achieve an absolute decrease of .050 points. On the other hand, a State starting with a ratio of .500 would need to cut its ratio by only a tenth to achieve the same absolute decrease. Using the proportionate change in ratios rather than the absolute change in ratios helps to mitigate this potential difficulty by measuring the change relative to the State's ratio in the base period.

In paragraph (c) we propose to rank States with respect to the proportionate change between their two ratios. For States other than Guam, American Samoa and the Virgin Islands, we would identify the five States with the largest decrease in their ratios. These States would be potentially eligible. The number of such States potentially eligible for the bonus would be fewer than five if fewer than five States show decreases in their ratios.

If a tie exists that would result in more than five such States being potentially eligible, we would calculate the percentage change to enough decimal places to eliminate the tie.

We would then determine whether Guam, American Samoa and the Virgin Islands have a comparable decrease in their ratios (i.e., a decrease at least as large as the smallest decrease among qualifying States other than Guam, American Samoa and the Virgin Islands). These identified States would be potentially eligible for the bonus.

*If a State Wants To Be Considered for Bonus Eligibility, What Data on Abortions Must It Submit? (§ 283.6)*

This section of the proposed rule describes the data a State also must submit on abortions in order to qualify for the bonus. As noted above, only those States that are potentially eligible based on their ratios would need to submit abortion data in each year. Other States cannot be eligible and, therefore, do not need to submit abortion numbers.

Under the proposed definitions at § 283.2, the term ''abortion'' includes both medically and surgically induced pregnancy terminations. In most cases, States already collect these data.

To be considered for the bonus, we propose, in paragraph (a), that States must submit to ACF data and information on the number of abortions for calendar year 1995 within two months of notification by ACF that they are potentially eligible. Under section 403(a)(2) of the Act, their data must count all abortions; it cannot be based on sub-populations, such as recipients of public assistance or Medicaid.

In paragraph (b), we propose that the potentially eligible States must also submit documentation demonstrating when they obtained their 1995 data on abortions. An eligible State must have obtained its 1995 abortion data by the end of 1997, or within 60 days of final rule publication, whichever is later. Prompt collection of these data should help to improve the reliability of the abortion data submitted for 1995.

For comparison and calculation purposes, in paragraph (c) we propose that potentially eligible States also must submit data on the number of abortions for the most recent year for which abortion data are available. We define the term ''most recent year for which abortion data are available'' in § 283.2(e) to mean the year that is two calendar years prior to the current calendar year. For example, if we are determining bonus eligibility in calendar year 1999, the State would need to submit abortion data for calendar year 1995 and calendar year 1997. We define the period this way in order to measure the same year for all States. Based on information received during the consultation phase, we concluded that two years was a reasonable time frame in which to obtain the data. A time frame of longer than two years would not result in timely data, and a time frame shorter than two years could be difficult for some States to meet.

The information the State must submit for 1995 and the most recent year is either the number of all abortions performed within the State, or the number of all abortions performed within the State on in-State residents. We would accept either measure. However, we prefer the second measure because the population of in-State residents is more relevant for the intent of this provision. We assume that State policies to reduce out-of-wedlock childbearing will affect in-State residents most directly. We received numerous comments during our external consultation that the measure should be based on in-State residents, if possible.

We understand, however, that some States collect data only on total abortions that occurred within the State and do not separately identify abortions provided to in-State or out-of-State residents. While such States could begin to collect the data on a State-resident basis in the future, their 1995 data would not be collected on this basis. We investigated whether a State could adjust its 1995 data to make it comparable to future data based on in-State residents. After extensive consultation, we concluded this would not be technically feasible.

Therefore, this proposed rule offers potentially eligible States the option to measure either total abortions that occurred within the State or abortions only among in-State residents that occurred within the State. However, the State must use the same definition to measure abortions in later years as it chooses for 1995. For example, if a State submitted data on total abortions performed in the State in 1995, it also must submit data on total abortions performed in the State in 1999.

While a State would be ineligible for the bonus if it changed its number of reported abortions in this respect, it could change its reporting in other respects and still be potentially eligible. For example, a State could change its procedures for contacting abortion providers. This flexibility would allow States to improve their abortion reporting systems without making them ineligible for the bonus.

Under this proposed rule, States would also have flexibility to choose the source of the abortion data they submit. This flexibility would allow States that do not already have their own reporting system in place to compete for the bonus using data from other sources.

While the States would have some flexibility to change their abortion reporting over time, the State would have to adjust for effects of these changes. In paragraph (d), as provided in section 403(a)(2)(C)(i)(II)(bb) of the Act, we propose that States must adjust the measure (the number of abortions) so as to exclude increases or decreases that result from changes in data reporting relative to 1995, i.e., changes in the source of the data or the methodology. We propose also that the Governor, or his or her designee, must certify that the State has made the appropriate adjustments.

These abortion reporting restrictions, including the need to adjust for changes in data reporting and the need to define the population consistently over time, apply only to the number of abortions reported to ACF for purposes of this bonus. Therefore, the number of abortions reported for purposes of the bonus might or might not equal the number of abortions reported in public health statistics.

This proposed rule does not specify what methodology States must use to adjust for changes in data collection. After extensive consultation, we do not believe it is feasible to design a single methodology that would address all possible changes in data reporting. In addition, based on comments from our

external consultation, we understand that some State privacy laws restrict the types of abortion provider information that can be reported. We considered more specific reporting requirements as a way of ensuring a more uniform methodology, but they appeared to conflict with these State confidentiality laws.

Our aim in this section of the NPRM is to obtain from States the best quality and most standard abortion data possible. We believe this is necessary for the fair and equitable distribution of these bonus awards. We also believe, however, that this proposed rule provides States with important flexibility that would make it technically feasible for States to submit the necessary data if they choose to compete for the bonus. We believe that this flexibility would better incorporate State program knowledge and expertise in measuring abortions.

This flexibility could introduce variation in measurement of abortions across States for purposes of the bonus and could raise concern about fair competition for the bonus. However, these concerns are greatly mitigated by the fact that States are not competing with each other on their abortion rates. As noted above, a State's abortion rate affects its own qualification only, not the qualification of any other State. Furthermore, the disqualification of any State, based on its abortion data, does not result in additional States becoming eligible.

A State cannot be eligible for the bonus unless it submits the necessary abortion data. However, as competition for the bonus is voluntary, this provision places no requirement on States to submit these data.

*How Will We Use These Data on Abortions To Determine Bonus Eligibility? (§ 283.7)*

This section of the proposed rule describes how we would use the abortion data to identify which States are eligible for the bonus. To be eligible, a State must meet all the requirements noted above and must demonstrate a decrease in its abortion rate as described below.

In paragraph (a), we propose to use the abortion data that States provide to calculate a rate of abortions. This rate would equal the number of abortions in a State for the most recent year, divided by the number of total resident births for the same year as reported by NCHS. This statistic is also known as the ''abortion to live birth ratio.'' It is a standard statistic used to measure abortions and incorporates the same denominator as the ratio. We would calculate the rate to three decimal places.

In paragraph (b), we propose to compare this rate for the most recent year to the rate for 1995, calculated in the same way, and to identify which of the potentially eligible States experienced decreases in their abortion rates relative to 1995. Only those States experiencing decreases relative to 1995 would be eligible for the bonus. We would always compare a State's abortion rate to its 1995 rate, as specified in section 403(a)(2)(C)(i)(I)(bb) of the Act.

*What Will Be the Amount of the Bonus? (§ 283.8)*

This section of the proposed rule explains how we would determine the amount of the bonus for eligible States. These amounts are specified in section 403(a)(2)(B) of the Act. For Guam, American Samoa or the Virgin Islands, the award would be 25 percent of their mandatory ceiling amount as defined in section 1108 of the Act. Any bonuses paid to the these States would be subtracted from the total award of $100 million, and the remainder would be divided among the other qualifying States up to a maximum award of $25 million. If Guam, American Samoa and the Virgin Islands were not among the qualifying States, the bonus for each State would be $20 million if five States qualified and $25 million if fewer States qualified. If Guam, American Samoa or the Virgin Islands were among the qualifying States, the award for each State would be some lesser amount. The bonus amount for any State will never exceed $25 million per year.

*What Do Eligible States Need To Know To Access the Bonus Funds? (§ 283.9)*

This section of the proposed rule provides additional details on how we would pay the bonus and how States may use the bonus award. We propose in paragraph (a) to pay the award to the Executive Office of the Governor. We believe that the Governor, as Chief Executive Officer of the State, is responsible not only for the TANF block grant program but for the well-being of all citizens of the State, including efforts related to reducing out-of-wedlock childbearing for the population as a whole.

Since a bonus is part of a State's Family Assistance Grant, a State may use these funds only for purposes listed in sections 404 (use of funds) and 408 (prohibitions; requirements) of the Act. These sections of the law, including their constraints and limitations, apply to all funds received under section 403 of the Act.

## V. Regulatory Impact Analyses

*A. Executive Order 12866*

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this proposed rule is consistent with these priorities and principles. This proposed rulemaking implements statutory authority based on broad consultation and coordination.

The Executive Order encourages agencies, as appropriate, to provide the public with meaningful participation in the regulatory process. As described elsewhere in the preamble, ACF consulted with State and local officials, their representative organizations, and a broad range of technical and interest group representatives.

We discuss the input received during the consultation process in the ''Supplementary Information'' section of the preamble and in the section-by-section discussion of the proposed rule. To a considerable degree, this NPRM reflects the information provided by, and the recommendations of, the groups with whom we consulted.

*B. Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (5 U.S.C. Ch. 6) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental agencies. This rule will affect only States. Therefore, the Secretary certifies that this rule will not have a significant impact on small entities.

*C. Paperwork Reduction Act*

This rule does not contain information collection activities that are subject to review and approval by the Office of Management and Budget. The birth data on which we will base the computation of the bonus are currently available from the NCHS. Therefore, no new data collection is required to measure out-of-wedlock birth ratios. The abortion data would be solicited for up to eight States only, and, therefore, does not meet the criteria for OMB review and approval.

*D. Unfunded Mandates Reform Act of 1995*

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any

Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

We have determined that this proposed rule would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small government.

**List of Subjects in 45 CFR Part 283**

Health statistics, Family planning, Maternal and child health, Public assistance programs.

Dated: September 19, 1997.

**Olivia A. Golden,**

*Principal Deputy Assistant Secretary for Children and Families.*

Approved: November 24, 1997.

**Donna E. Shalala,**

*Secretary, Department of Health and Human Services.*

For the reasons set forth in the preamble, we propose to add part 283 to chapter II of title 45 of the CFR to read as follows:

## PART 283—IMPLEMENTATION OF SECTION 403(a)(2) OF THE SOCIAL SECURITY ACT, BONUS TO REWARD DECREASE IN ILLEGITIMACY

Sec.
283.1 What does this part cover?
283.2 What definitions apply to this part?
283.3 What steps will we follow to award the bonus?
283.4 If a State wants to be considered for bonus eligibility, what birth data must it submit?
283.5 How will we use these birth data to determine bonus eligibility?
283.6 If a State wants to be considered for bonus eligibility, what data on abortions must it submit?
283.7 How will we use these data on abortions to determine bonus eligibility?
283.8 What will be the amount of the bonus?
283.9 What do eligible States need to know to access the bonus funds?

**Authority:** 42 U.S.C. 603.

### § 283.1 What does this part cover?

This part explains how States may be considered for the Bonus to Reward Decrease in Illegitimacy as authorized by section 403(a)(2) of the Social Security Act. It describes the data on which we will base the bonus, how we will make the award, and how we will determine the amount of the award.

### § 283.2 What definitions apply to this part?

The following definitions apply to this part:

*Abortions* means induced pregnancy terminations, including both medically and surgically induced pregnancy terminations.

*Act* means the Social Security Act.

*Bonus* refers to the Bonus to Reward Decrease in Illegitimacy, as set forth in section 403(a)(2) of the Social Security Act.

*Calculation period* refers to the four calendar years used for determining the decrease in the out-of-wedlock birth ratios for a bonus year. (The years included in the calculation period change from year to year.)

*Most recent two-year period for which birth data are available* means the most recent two calendar years for which the National Center for Health Statistics has obtained final birth data by State.

*Most recent year for which abortion data are available* means the year that is two calendar years prior to the current calendar year. (For example, for eligibility determinations made during calendar year 1999, the most recent year for which abortion data are available would be calendar year 1997.)

*NCHS* means the National Center for Health Statistics, in the Centers for Disease Control and Prevention, U.S. Department of Health and Human Services.

*Number of out-of-wedlock births for the State* means the final number of births occurring outside of marriage to residents of the State, as reported in NCHS vital statistics data.

*Number of total births for the State* means the final total number of births to residents of the State, as reported in NCHS vital statistics data.

*Rate of abortions* means the number of abortions reported by the State in the most recent year for which abortion data are available divided by the State's total number of resident births reported in vital statistics for that same year. (This measure is also more traditionally known as the ''abortion to live birth ratio.'')

*Ratio* refers to the ratio of out-of-wedlock births to total births, as defined in § 283.5(b).

*State* means the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa, as provided in section 419(a)(5) of the Act.

*Vital statistics data* means the data reported by State health departments to NCHS, through the Vital Statistics Cooperative Program (VSCP).

### § 283.3 What steps will we follow to award the bonus?

(a) For each of the fiscal years 1999 through 2002 we will:

(1) Calculate the ratios for the most recent two years for which data are available, and for the prior two years, as described in § 283.5. We will do this for every State that submits the necessary vital statistics data to NCHS, as described in § 283.4.

(2) Calculate the proportionate change between these two ratios, as described in § 283.5.

(3) Identify as potentially eligible those States that have qualifying decreases in their ratios, using the methodology described in § 283.5. We will identify fewer than five States if fewer than five States experience decreases in their ratios. We will identify more than five States if Guam, American Samoa or the Virgin Islands, in addition to five other States, have qualifying decreases in their out-of-wedlock birth ratios.

(4) Notify these potentially eligible States that we will consider them for the bonus if they submit data on abortions as stated in § 283.6.

(5) Identify which of the potentially eligible States that submitted the required data on abortions have experienced decreases in their rates of abortion relative to 1995, as described in § 283.7. These States will receive the bonus.

(b) We will determine the amount of the grant for each eligible State, based on the number of eligible States, and whether Guam, American Samoa or the Virgin Islands are eligible. No State will receive a bonus award greater than $25 million in any year.

### § 283.4 If a State wants to be considered for bonus eligibility, what birth data must it submit?

(a) To be considered for a bonus, the State must have submitted data on out-of-wedlock births as follows:

(1) The State must have submitted to NCHS final vital statistics data files for all births occurring in the State. These files must show, among other elements, the number of total births and the number of out-of-wedlock births occurring in the State. These data must conform to the Vital Statistics Cooperative Program contract for all years in the calculation period. This contract specifies, among other things, the guidelines and time-lines for submitting vital statistics data files.

(2) The State must have submitted these data for the most recent two years for which NCHS reports final data, as well as for the previous two years.

(b) If a State has changed its method of determining marital status for the

purposes of these data, the State also must have met the following requirements:

(1) The State has identified all years for which the method of determining marital status is different from that used for the previous year.

(2) For those years identified under paragraph (b)(1) of this section, the State has replicated as closely as possible the previous year's method for determining marital status at time of birth, and the State has reported to NCHS the resulting alternative number of out-of-wedlock births.

(3) The State has also submitted to NCHS documentation on what the changes in determination of marital status were for those years and how it determined the alternative number of out-of-wedlock births for the State.

(4) For methodology changes that occurred prior to 1998 or final rule publication, the State must have submitted the information described in paragraphs (b)(1), (2) and (3) of this section within 1 year of final rule publication. For such changes occurring during or after 1998 and after final rule publication, the State must have submitted such information according to the same deadline that applies to its vital statistics data for that year.

DEADLINE FOR INFORMATION ON CHANGES IN DATA REPORTING

| If Change in Data Collection Occurred: | Prior to 1998 | Prior to final rule | During 1998, after final rule | After 1998, after final rule |
|---|---|---|---|---|
| Then Deadline for Information on Alternative Data is: | Within 1 year of final rule | Within 1 year of final rule | NCHS deadlines | NCHS deadlines |

**§ 283.5 How will we use these birth data to determine bonus eligibility?**

(a) We will use the number of out-of-wedlock births and total births among women living in each State provided by NCHS as follows.

(1) If a State has not changed its method of determining marital status, these numbers will be based directly on their vital statistics data files.

(2) For years when the determination of marital status has been changed during the calculation period, NCHS will provide the number of out-of-wedlock births from vital statistics as well as an adjustment factor to disregard the effects of this change.

(b) We will use these data provided by NCHS to calculate the decrease in the ratios for each State, as follows:

(1) We will calculate the ratio as the number of out-of-wedlock births for the State during the most recent two-year period for which NCHS has final birth data divided by the number of total births for the State during the same period. We will calculate, to three decimal places, the ratio for each State that submits the necessary data on total and out-of-wedlock births described in § 283.4.

(2) We will calculate the ratio for the previous two-year period using the same methodology.

(3) We will calculate the proportionate change in the ratio as the ratio of out-of-wedlock births total births for the most recent two-year period minus the ratio of out-of-wedlock births to total births from the prior two-year period, all divided by the ratio of out-of wedlock births to total births for the prior two-year period. A negative number will indicate a decrease in the ratio and a positive number will indicate an increase in the ratio.

(c) We will identify which States have a decrease in their ratios large enough to make them potentially eligible for the bonus, as follows:

(1) For States other than Guam, American Samoa and the Virgin Islands, we will use this calculated change to rank the States and identify which five States have the largest decrease in their ratios. Only States among the top five will be potentially eligible for the bonus. We will identify fewer than five such States as potentially eligible if fewer than five experience decreases in their ratios. We will not include Guam, American Samoa and the Virgin Islands in this ranking.

(2) If we identify more than five States due to a tie in the decrease, we will recalculate the ratio and the decrease in the ratio to as many decimal places as necessary to eliminate the tie. We will identify no more than five States.

(3) For Guam, American Samoa and the Virgin Islands, we will use the calculated change in the ratio to identify which of these States experienced a decrease at least as large as the smallest qualifying decrease identified in paragraph (c)(1) of this section. These identified States will be potentially eligible for the bonus also.

(4) We will notify the potentially eligible States, as identified under paragraphs (a) through (c) of this section that they must submit the information on abortion rates specified under § 283.6 if they want to be considered for the bonus.

**§ 283.6 If a State wants to be considered for bonus eligibility, what data on abortions must it submit?**

(a) To be considered further for bonus eligibility, each potentially eligible State, as identified under § 283.5, must then submit to ACF data and information on the number of abortions for calendar year 1995 within two months of this notification. This number must measure either of the following:

(1) For calendar year 1995, the total number of abortions performed by all providers within the State; or

(2) For calendar year 1995, the total number of abortions that were performed by all providers within the State on the total population of State residents only. This is the preferred measure.

(b) States must have obtained these data on abortions for calendar year 1995 by the end of calendar year 1997, or within 60 days of publication of the final rule on the bonus, whichever is later. Within two months of notification by ACF of potential eligibility, the State must submit records documenting when it obtained the abortion data for calendar year 1995.

(c) The State also must submit data on the number of abortions for the most recent year for which abortion data are available, as defined in § 283.2. In measuring the number of abortions, the State must use the same definition, either under paragraph (a)(1) or (a)(2) of this section, for both 1995 and the most recent year.

(d) The State must adjust the number of abortions reported to ACF in any year to exclude increases or decreases due to changes in data collection or methodology relative to the number of abortions reported to ACF for 1995. The Governor, or his or her designee, must certify to ACF that such adjustments have been made.

**§ 283.7 How will we use these data on abortions to determine bonus eligibility?**

(a) For those States that have met all the requirements under §§ 283.1 through 283.6, we will calculate the rate of abortions for calendar year 1995 and for the most recent year for which abortion data are available. These rates will equal the number of abortions reported by the State to ACF for the applicable year, divided by total births

among women living in the State reported by NCHS for the same year. We will calculate the rates to three decimal places.

(b) If ACF determines that the State's rate of abortions for the most recent year for which abortion data are available is less than the rate for 1995, and, if the State has met all the requirements listed elsewhere under this part, the State will receive the bonus.

**§ 283.8 What will be the amount of the bonus?**

(a) If, for a bonus year, none of the eligible States is Guam, American Samoa or the Virgin Islands, then the amount of the grant shall be:

(1) $20 million if there are five eligible States; or

(2) $25 million if there are fewer than five eligible States.

(b) If for a bonus year, Guam, the Virgin Islands, or American Samoa is an eligible State, then the amount of the grant shall be:

(1) In the case of such a State, 25 percent of the mandatory ceiling amount as defined in section 1108 of the Act; and

(2) In the case of any other State the amount of the grant shall be $100 million, minus the total amount of any bonuses paid to Guam, the Virgin Islands, and American Samoa, and divided by the number of eligible States other than such territories, not to exceed $25 million.

**§ 283.9 What do eligible States need to know to access the bonus funds?**

(a) We will pay the bonus to the Executive Office of the Governor of the eligible State.

(b)(1) States must use the bonus to carry out the purposes of the Temporary Assistance for Needy Families Block Grant in section 404 of the Social Security Act.

(2) These funds are also subject to the limitations in, and requirements of, sections 404 and 408 of the Act.

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