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December 1, 2022

Via e-mail

Daniel W. Tietz, Commissioner
Stephen Bach, Director of Program Integrity
Tiffinay Rutnik, General Counsel
Office of Temporary and Disability Assistance
40 North Pearl Street
Albany, NY 12243-0001

Re: Demand for OTDA Skimming Policy Change, Compensation of SNAP and Temporary Assistance Skimming Victims, and Steps to Prevent Further Skimming

Dear Commissioner Tietz, Director Bach, and General Counsel Rutnik:

Empire Justice Center and The Legal Aid Society understand that based on August 2022 data, at least 2,208 low-income New Yorkers have been the victims of benefit theft by perpetrators of EBT card skimming schemes as of August 2022, and that number is likely significantly higher now as skimming continues to spread around the State. We represent some of the individual families who have fallen victim to skimming and are seeing the tremendous harm they are suffering when local districts refuse to compensate them for their losses.

As attorneys for participants in SNAP and TA in New York State, we are requesting that OTDA take the following steps: (1) immediately change its policy, *see Skimming & Phishing: EBT Scams Currently Impacting Recipient Households*, 22 TA/DC097 (October 27, 2022), which denies skimming victims compensation for the value of benefits stolen through skimming, and issue

victims the value of benefits stolen through skimming from January 1, 2022 into the future; and (2) fulfill the agency's duty to take immediate and strong prevention actions to protect clients from further victimization, including converting all magnetic stripe EBT cards to chip cards.

Background on How Skimming is Affecting Low Income New Yorkers

As the agency is aware,¹ TA and SNAP benefits are being stolen through "skimming." Skimming involves the use of a physical overlay device secretly installed at a retail point-of-sale (POS) device, creating a system error whereby card and PIN information is remotely transmitted to a thief offsite. It is so difficult to tell that such devices have been installed that both retail establishments and our clients do not readily detect them. The perpetrators then use the data to create fraudulent EBT cards. In yet another system error, a different point-of-sale device (often in another state), allows the perpetrator to use the fraudulent EBT card to drain the legitimate user's account of all available benefits. Victims have no way of being aware of the theft until after their benefits have been stolen, often when they attempt to use their EBT card to make a purchase or access TA funds.

The loss of SNAP and TA benefits is having a devastating impact on affected households. We have clients who have been robbed of their households' SNAP, including P-EBT benefits, and special TA grants such as a furniture allowance, that leave their families without any resources to pay for food and basic needs.

In one case, a client family of The Legal Aid Society, two parents and a 16-year-old child with disabilities, went to a store in Queens on October 6, 2022 to make a purchase and noted that their receipt indicated a \$1,200 balance. When the parents returned to the grocery store to purchase food two days later, on October 8, 2022, they learned that there was a \$54 balance in SNAP. One of the parents immediately contacted the number on the back of the EBT card, and he was informed that two different purchases were made on October 7, 2022, in Indiana, leaving their family with just \$54 to buy food until they received their next SNAP issuance on November 2, 2022. HRA refused to reimburse the family for the value of the stolen benefits and suggested that he apply for an emergency food allowance, amounting to far less than the \$1,200 stolen from the family.

Another client and her 4-year-old daughter recently moved into a permanent residence after living in a shelter while they were experiencing homelessness. She was issued a furniture allowance of \$1,350 by HRA on October 4, 2022, so that she could purchase essential furnishings for herself and her child. On October 5, when she looked at her AccessHRA account, she discovered that the money had been stolen at 6 am – less than 24 hours after it had been issued. She went to her local HRA center and was told to call the number on the EBT card to report the theft. She called and was advised that it would take 15 days to investigate, but that the money went to a Capital One Liberty account in Richmond Hills, New York. She and her daughter had no choice but to sleep on the floor until her lawyers at Legal Aid obtained an exception to policy.

¹ See GIS 22 TA/DC095 (Oct. 19, 2022), available at <https://otda.ny.gov/policy/gis/2022/22DC095.pdf>.

An Empire Justice Center client and her family have struggled with food insecurity for a long time. She had recently been issued what we believe to be overdue P-EBT benefits for her children, and as a result, she had a balance of \$1,935.54 on her EBT card. She was delighted to get that extra support for her family's nutritional needs, especially right before the Thanksgiving holiday. But much to her surprise, when she tried to pay for groceries at the store, she discovered that her balance was \$0. On Saturday, November 19, someone had stolen all of the money out of her account in three unauthorized back-to-back charges: \$270.55, \$1606.80, and \$58.19. She filed a police report right away. On Monday, she reported the issue to Nassau County DSS. DSS declined to replace the stolen benefits and did nothing more than give her a new EBT card. We worked with the client to help her access a gift card for a grocery store so the family would have food for the holiday.

OTDA's most recent policy concerning skimming, 22 TA/DC097 at 3, reflects the agency's decision not to replace benefits for or otherwise compensate the victims of skimming. For SNAP benefits, the agency states that the U.S. Department of Agriculture, Food and Nutrition Service prohibits replacing stolen SNAP benefits using federal funds even where skimming is confirmed. With respect to Temporary Assistance benefits, the policy simply states:

TA benefits that have been stolen/skimmed, cannot be replaced, even if a reported case of skimming is confirmed. In addition, TA cannot be used to replace the amount of SNAP benefits stolen/skimmed.

Id. Beyond this policy, the agency suggests that victims should seek assistance from already overtaxed community organizations, like food pantries, and only as a "last resort" indicates that victims can request an emergency food allowance. The allowance is limited to the amount of the basic allowance, HEA and SHEA, or restaurant allowance, which in many cases is far less than the amount stolen. *Id.*

Urgent Requests

The agency's policy is inadequate to meet what is swiftly becoming a growing crisis for many families in New York State. It is our understanding that as of August 2022, OTDA was already aware of 2208 households that were the victims of skimming, with 2096 cases in New York City and 112 in the rest of the State. The total value of benefits known to be stolen was \$737,522.94. We suspect there have been many more victims around the state since the data was last reported in August.

In light of the growing incidence of skimming and the severity of the impact of on low-income New Yorkers affected, we respectfully request that the agency take two urgent actions: (1) issue a new OTDA policy providing that verified victims of skimming will have the value of their SNAP benefits and lost TA benefits replaced and reimburse clients for all benefits stolen; and (2) take immediate action to prevent further incidences of skimming in accordance with known best practices.

1. OTDA Must Change its Policy and Compensate Skimming Victims with the Value of the Benefits Lost.

At the outset, OTDA needs to change its policy on skimming to call for proactive identification of skimming victims and the reimbursement to victims who either self-identify or are identified by the agency using its systems. The policy must require the agency to issue benefits to replace the federal and state benefits lost due to skimming. Unless our clients' stolen benefits and the benefits of those similarly situated are restored, these low-income New Yorkers will continue to face food insecurity and hardship despite their need and eligibility for the stolen benefits.

We see three steps to implement this policy.

The first step is identification. OTDA must respond to both those skimming victims who have identified themselves, and the agency should affirmatively identify victims using its systems. As OTDA noted in its October 19 General Information System message addressing this issue,² OTDA is often able to identify illegitimate transactions much more quickly and easily than benefit recipients. We encourage the agency to review all available data to determine which households have likely been the victims of skimming.

The second step is notification. Especially for households who may be unaware that they have lost benefits due to skimming, it is essential that the agency notify households who appear to be victims, advise the household what immediate steps they should take to avoid further skimming, and obtain any additional information needed to verify what happened in preparation for providing the household compensation.

Finally, the households who have lost benefits through skimming must be made whole by the State. If federal funds are not available, OTDA should use state funds to protect these vulnerable families – households that include children who need to eat. Recommending that victims rely on charity or an inadequate emergency food allowance is a misguided policy that abdicates the State's constitutional duty to aid the needy. We request that the agency reimburse victims of skimming back to the beginning of the year, January 1, 2022.

In addition, we ask that OTDA join a local and national effort to convince USDA-FNS to make clear that it authorizes the replacement of SNAP benefits to skimming victims given that the loss of SNAP due to skimming is through no fault of the recipient household.

² *Id.*

2. OTDA Must Fulfill Its Duty to Secure the EBT System by Among Other Things, Using Chip Cards.

OTDA has a duty to secure the EBT system using recognized techniques as quickly as possible to prevent skimming from happening in the first instance. As discussed below, using chip cards is the best way to maximize security.

Federal law and policy are clear that safeguarding the integrity of the EBT system is paramount. As noted by the United States Department of Agriculture (USDA) and the Administration for Children and Families (ACF), “[b]enefit security and prevention of unauthorized EBT card usage are critical components to ensure participating households are able to use benefits as Congress intended.”³ When electronic benefit transfer (EBT) systems were promoted in the 1990 Farm Bill, the goal of Congress was to “better safeguard food stamp benefits” and “cut down on fraud.”⁴ Since the use of EBT systems for SNAP benefits became mandatory in 2002,⁵ Congress set forth an expectation that states would implement systems that evolve over time to protect benefits.⁶ Pursuant to 7 U.S.C. 2016(h)(2), EBT systems must account for “evolving technology and comparable industry standards.” Systems must be designed to consider the need for “recipient protection.” 7 U.S.C. 2016(h)(2)(A). Security must be maximized “using the most recent technology available that the State agency considers appropriate and cost effective . . . to protect against fraud and abuse.” 7 U.S.C. 2016(h)(2)(C)(i).

USDA and ACF have charged state agencies like OTDA with taking strong preventive action. On October 31, 2022, USDA and the Administration for Children and Families issued a memorandum on skimming prevention, urging states to take strong preventive actions to protect clients from victimization.⁷ One of the tools for states provided in an appendix to the memorandum is to implement additional safeguards for EBT cards, including validation of the card authentication value (the CVV number on the back of the card). The notice also encourages states to give EBT cardholders the ability to block specific transactions, like those made out-of-state, or to easily

³ USDA & ACF, Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) Electronic Benefit Transfer (EBT) Card Skimming Prevention – Tools and Resources (Oct. 31, 2022), available at <https://fns-prod.azureedge.us/sites/default/files/resource-files/ebt-card-skimming-prevention.pdf>.

⁴ Legislative History of the Food, Agriculture, Conservation and Trade Act of 1990, P.L. 101-624, 104 Stat. 3359, Formulation of the 1990 Farm Bill (Food Stamp and Commodity Distribution Programs), Sucomm. On Domestic Marketing, Consumer Relations, and Nutrition of the Comm. on Agriculture (Sept. 8, Oct. 31, Nov. 1, 15, and 16, Dec. 1, Dec. 8, 1989, and Feb. 28, 1990), Part C, at p. 1070-71.

⁵ See 7 U.S.C. 2016(h)(1)(A).

⁶ Similarly, for cash assistance benefits, members of Congress have expressed an intent to ensure that benefits stored electronically are protected. When EBT cards were excluded from the Electronic Funds Transfer Act in 1996, on behalf of the welfare conferees, Senator Patrick Leahy noted that the USDA was empowered to establish regulations to protect recipients from the loss of benefits through electronic transfer systems, and encouraged the Department of Health and Human Services to do the same, noting that such protections were essential. 142 Cong. Rec. S9387-01, *S9394 (Aug. 1, 1996).

⁷ USDA & ACF, Supplemental Nutrition Assistance Program (SNAP) and Temporary Assistance for Needy Families (TANF) Electronic Benefit Transfer (EBT) Card Skimming Prevention – Tools and Resources (Oct. 31, 2022), available at <https://fns-prod.azureedge.us/sites/default/files/resource-files/ebt-card-skimming-prevention.pdf>.

freeze cards when not in use. To the best of our knowledge, OTDA has not yet implemented these strategies to protect benefit recipients.

Chip cards are the best way to maximize security of EBT cards and are cost-effective.⁸ Most credit cards and debit cards now use “EMV chips,” small microchips that make it harder to copy card information, offering a safer alternative to magnetic-swipe cards, and would essentially eliminate skimming.⁹ Mastercard and Visa set a deadline of October 1, 2015 for all credit card issuers in the United State to replace magnetic-stripe cards with credit card chips and shifted fraud liability to the bank or merchant if they failed to make the change by that date.¹⁰ Fuel merchants and convenience stores were granted an extension on the 2015 deadline, and had until April 17, 2021 to become chip compliant to avoid a shift in liability.¹¹ As a result, as of June 2022, in the United States, 84.84% of card transactions were via EMV chip.¹² Chip cards were reported to have reduced counterfeit fraud by 76% by 2019.¹³ Chip cards are not only the most appropriate means of protecting recipients of benefits from theft, they are also cost effective. Upon information and belief, chip cards cost less than \$1 each to produce.¹⁴

Conclusion

Victims of skimming have had their benefits stolen through no fault of their own and without replacement will be forced to suffer hunger and food insecurity. OTDA should immediately adjust skimming victims’ accounts to replace stolen benefits, using state funds or any federal funds it is authorized to use.

Although chip cards provide significant protection against skimming, it appears that New York and the rest of the Northeast Coalition of States (NCS) did not seek out bid on chip cards as part of the Electronic Benefits Transfer RFP.¹⁵ We encourage OTDA to renegotiate the terms of the contract for the State to provide for production of chip cards rather than magnetic stripe cards.

⁸ KrebsonSecurity, “How Card Skimming Disproportionally Affects Those Most in Need,” Oct. 18, 2022, available at <https://krebsonsecurity.com/2022/10/how-card-skimming-disproportionally-affects-those-most-in-need/#comments>.

⁹ PointofSale.com, Mike Monocello, “Chip Card vs. Magnetic Stripe Card: What You Need to Know,” April 2, 2019, available at <https://pointofsale.com/chip-card-vs-magnetic-stripe-card/>; NCR, “The rise of EMV and what it means for the magnetic stripe,” March 10, 2021, available at <https://www.ncr.com/blogs/payments/emv-magnetic-stripe>.

¹⁰ Congressional Research Service, Patricia Moloney Figliola, “The EMV Chip Card Transition: Background, Status, and Issues for Congress,” May 17, 2016, available at <https://sgp.fas.org/crs/misc/R43925.pdf>.

¹¹ Payments Journal, “Less Than Half of Major Fuel Merchants Meet Extended EMV Deadline, According to New ACI Worldwide Data,” April 19, 2021, available at <https://www.paymentsjournal.com/less-than-half-of-major-fuel-merchants-meet-extended-emv-deadline-according-to-new-aci-worldwide-data/>.

¹² EMVCo, Worldwide EMV Deployment Statistics, available at <https://www.emvco.com/about/deployment-statistics/#:~:text=EMV%20Card%2DPresent%20Transaction%20Percentage&text=The%20reported%20data%20represents%20the,of%20transactions%20are%20EMV%20Chip>.

¹³ VISA, “Chip technology helps reduce counterfeit fraud by 76 percent (May 28, 2019), available at <https://usa.visa.com/visa-everywhere/blog/bdp/2019/05/28/chip-technology-helps-1559068467332.html>.

¹⁴ Credit.com, “How a Credit Card Is Made,” Feb. 3, 2014, available at <https://www.credit.com/blog/how-a-credit-card-is-made-74903/>; JLE Consultants, “How Much Does a Credit Card Cost to Make?” May 26, 2020, available at <https://jleconsultants.com/how-much-does-a-credit-card-cost-to-make/>.

¹⁵ See <https://otda.ny.gov/contracts/2020/NCSEBT/>.

We would appreciate the opportunity to discuss these requests with you in more detail. You can reach us by email or at the numbers listed below. Thank you for your commitment to helping low-income New Yorkers meet their basic needs by ensuring the security of our public benefits systems.

Sincerely,



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