

of § 390.3 of this chapter, or is exempt under the provisions of § 390.4 of this chapter.

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## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Part 404 and Part 416

[Regulations Nos. 4 and 16]

RIN 0960-AF85

#### **Mandatory Exclusion of Health Care Providers and Representatives From Participating in Programs Administered by the Social Security Administration, Including Representative Payment**

**AGENCY:** Social Security Administration.

**ACTION:** Proposed rule.

**SUMMARY:** This proposed rule creates a new administrative procedure requiring the Social Security Administration (SSA) to exclude representatives and health care providers who are convicted of fraud in the title II or title XVI disability programs administered by SSA or who are assessed civil monetary penalties from further participation in those programs for at least five years. The Foster Care Independence Act of 1999 amended the Social Security Act and requires SSA to create an administrative procedure for imposing penalties for false or misleading statements. This proposed rule will exclude those representatives and health care providers from participating in the programs and from serving as a representative payee.

**DATES:** To be sure your comments are considered, we must receive them by August 31, 2004.

**ADDRESSES:** You may give us your comments by: using our Internet site facility (*i.e.*, Social Security Online) at <http://policy.ssa.gov/pnpublic.nsf/LawsRegs> or the Federal eRulemaking Portal at <http://www.regulations.gov>; e-mail to [regulations@ssa.gov](mailto:regulations@ssa.gov), telefax to (410) 966-2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235-7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, 6401 Security Boulevard, Baltimore, Maryland 21235-6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on our Internet site for your review, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

**Electronic Version:** The electronic file of this document is available on the date of publication in the **Federal Register** on <http://www.gpoaccess.gov/fr/index.html>. It is also available on the Internet site for SSA (*i.e.*, Social Security Online): <http://policy.ssa.gov/pnpublic.nsf/LawsRegs>.

#### **FOR FURTHER INFORMATION CONTACT:**

Charles M. Urban, Social Insurance Specialist, Professional Relations Branch, Office of Disability Programs, Office of Disability and Income Support Programs, Social Security Administration, 6401 Security Boulevard, Room 4634 Annex Building, Baltimore Maryland 21235-6401, [Charles.M.Urban@ssa.gov](mailto:Charles.M.Urban@ssa.gov), 410-965-9029, or TTY, 410-966-5609, or FAX 410-965-6659 for information about these regulations. For information on eligibility or filing for benefits: Call our national toll-free number, 1-(800) 772-1213 or TTY 1-(800) 325-0778, or visit our Internet Web site, Social Security Online, at <http://www.socialsecurity.gov>.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

There is no provision under the present law to exclude representatives and health care providers convicted of violations from further participation in Social Security programs. Social Security and Supplemental Security Income (SSI) law stipulate that anyone who knowingly or willfully makes, or causes to be made, any false statements or misrepresentations in applying for or continuing to receive Social Security or SSI payments shall be fined under title 18 of the U.S.C., imprisoned for not more than five years or both. Federal law also provides that any person who makes, or causes to be made, a statement or representation of material fact for use in any initial or continuing review of an individual's eligibility for Social Security disability benefits (title II) or Supplemental Security Income (SSI) (title XVI) benefits that the person knows or should know is false or misleading or omits a material fact or makes such a statement with knowing disregard for the truth is subject to a civil penalty of not more than \$5,000 for each such statement or representation plus up to twice the value of the amount paid fraudulently.

Fraud prevention is a top priority of the Social Security Administration. Professionals and others who play a role in helping individuals apply for Social Security and SSI have a special responsibility to maintain high standards of truthfulness. The evidence, opinion, advice and recommendations

they provide are often crucial to the eligibility determination process. Thus, any such representative or health care provider who gives false or misleading information or otherwise commits fraud as part of the eligibility determination must be subject to serious penalties. This is especially the case since experience shows that some of these individuals commit fraud in many cases, thereby resulting in substantial sums of money being paid fraudulently to numerous recipients. For instance, in December 1997, a cooperative team, consisting of members from the SSA, the Office of the Inspector General (OIG) and the State Disability Determination Service (DDS), conducted a joint vulnerability review of an extended family in a small Georgia town. There were 181 members of this family, which spanned 4 generations, receiving benefits under title XVI of the Social Security Act (the Act). The same medical provider was the treating source and conducted consultative examinations (CEs) for many of these family members. The findings of the review resulted in the creation of Cooperative Disability Investigation (CDI) units in several major cities. The IG reported on February 3, 1999, in his testimony to the Subcommittee on Human Resources that the CDIs have produced data that illustrate the need to sanction third-party facilitators who engage in fraudulent activities, as many of the allegations involved third-party facilitators such as physicians, lawyers, interpreters, and other service providers. The 1998 GAO report, "Supplementary Security Income: Action Needed on Long-Standing Problems Affecting Program Integrity," GAO/HHS-98-158, also found that the title XVI program was vulnerable to fraud and abuse.

We believe those representatives and health care providers who commit fraud or make false statements in any of the SSA administered programs should have administrative sanctions applied and be excluded from participating in any SSA program.

For these reasons, we propose to add a new section in both part 404 subpart P and part 416 subpart I to exclude representatives and health care providers who have committed fraud in any program administered by SSA from further participation in these programs for a period of at least five years.

#### **Purposes of Administrative Sanctions**

Administrative sanctions are civil remedies that agencies impose under their own authority to protect their programs from transactions with untrustworthy individuals or entities

and to recover program funds paid improperly or fraudulently. Because administrative sanctions are not considered to be "punitive," they can, and frequently are, imposed in addition to other remedies, such as criminal or civil judicial action.

The administrative sanction we propose to use in this rule is exclusion. We define exclusion as removing an individual or entity from participation in a program for a designated period of time, or permanently, after a due process proceeding.

#### **Administrative Exclusion of Health Care Providers and Representatives**

The principal objective of administrative sanctions activities will be to protect the integrity of the benefit programs SSA administers by excluding health care providers and representatives whose conduct indicates that they pose a threat to the integrity of SSA's programs. Excluded health care providers and representatives will be prohibited from serving as a representative payee. Excluded health care providers will be prohibited from supplying consultative examinations used to document the existence of impairments. All medical records produced by excluded parties resulting from treatment of individuals will be barred from use in the SSA disability evaluation process as of the date the exclusion takes effect. The public will be notified of the exclusion of health care providers and representatives. Medical records produced as result of treatment by the excluded providers will not be admitted as evidence to support a claim for benefits on account of disability.

#### **Length of Exclusion**

This proposed rule establishes a minimum 5-year period of mandatory

exclusion for one infraction, a 10-year exclusion for two infractions, and permanent exclusion for three or more infractions. The time period of an exclusion will be based on Federal fraud convictions and/or the imposition of administrative penalties under section 1129a of the Act. This proposed rule also adopts the practice of using specific factors to determine whether a permanent exclusion should be imposed. Program exclusion will be in addition to any penalties based on SSA's or another agency's actions. Individuals or entities subject to a proposed mandatory exclusion will receive a 30-day advance notice of the impending exclusion and may challenge SSA's action by submitting information and arguments on their behalf (see sec. 205(b) of the Act). The proposed exclusion can be withdrawn only if the basis for it no longer exists, such as when a conviction is reversed on appeal, or the proposed subject is incorrectly identified.

#### **Waiver of Exclusion**

This proposed rule contains a limited waiver provision. The waiver would allow a party who meets the criteria for exclusion to continue to represent or provide health care to those who apply for benefits payable under title II and XVI of the Act only in cases where that party is the sole source of essential specialized services in the geographical area described in the proposed rule. This is being done so as not to disadvantage persons who live in sparsely populated rural areas. The Commissioner's waiver decision is not subject to review.

#### **Regulatory Procedures**

##### *Clarity of These Proposed Rules*

Executive Order 12866 requires each agency to write all rules in plain

language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand.

##### *For example:*

- Have we organized the material to suit your needs?
- Are the requirements of the rules clearly stated?
- Do the rules contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
- Would more (but shorter) sections be better?
- Could we improve the clarity by adding tables, lists, or diagrams?
- What else could we do to make the rules easier to understand?

##### *Executive Order 12866*

The Office of Management and Budget (OMB) has reviewed these proposed rules in accordance with Executive Order 12866, as amended by Executive Order 13258.

##### *Regulatory Flexibility Act*

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided for in the Regulatory Flexibility Act, as amended, is not required.

##### *Paperwork Reduction Act*

These proposed rules contain reporting requirements as shown in the following table.

Section	Annual number of responses	Frequency of responses	Average burden per response (minutes)	Estimated annual burden (hours)
20 CFR 404.1503b 416.903b .....	3-5	1	30	2½

An Information Collection Request has been submitted to OMB for clearance. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments should be mailed or faxed to the Office of Management and Budget

and to the Social Security Administration at the following addresses/fax numbers:

Office of Management and Budget, Attn: Desk Officer for SSA, New Executive Office Building, Room 10235, 725 17th Street, NW., Washington, DC 20503, Fax Number: 202-395-6974.

Social Security Administration, Attn: SSA Reports Clearance Officer, Rm. 1338 Annex Building, 6401 Security

Boulevard, Baltimore, MD 21235-6401, Fax Number: 410-965-6400.

Comments can be received for between 30 and 60 days after publication of this notice and will be most useful if received by SSA within 30 days of publication.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security Disability Insurance; 96.002, Social Security Retirement Insurance; 96.004, Social Security

Survivors Insurance; and 96.006, Supplemental Security Income)

## List of Subjects

### 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

### 20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

Dated: April 7, 2004.

**Jo Anne B. Barnhart,**

*Commissioner of Social Security.*

For the reasons set forth in the preamble, we propose to amend subpart P of part 404 and subpart I of Part 416 of chapter III of title 20 of the Code of Federal Regulations as set forth below.

## PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950— )

### Subpart P—[Amended]

1. The authority citation for Subpart P of part 404 continues to read as follows:

**Authority:** Secs. 202, 205(a), (b), and (d)—(h), 216(i), 221(a) and (i), 222(c), 223, 225 and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)—(h), 416(i), 421(a) and (i), 422(c), 423, 425, and 902(a)(5); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

2. Add a new § 404.1503b to read as follows:

#### **§ 404.1503b Mandatory exclusion of health care providers and representatives from participating in SSA programs including serving as a representative payee.**

(a) *Reasons for mandatory exclusions.* We will exclude from participation in social security programs any representative or health care provider who, on or after December 14, 1999:

(1) Has been convicted of a violation of section 208 or section 1632 of the Act;

(2) Has been convicted of any violation under title 18, U.S.C., relating to an initial application for or continuing entitlement to, or amount of, benefits under title II of the Act or an initial application for or continuing eligibility for, or amount of, benefits under title XVI of the Act; or

(3) Has been determined by the Commissioner to have committed an offense described in section 1129(a)(1) of the Act.

(b) *Effect of exclusion on the individual.* When we exclude an individual, we will prohibit that individual from:

(1) Acting as a medical source who provides items or services for claimants or beneficiaries for the purpose of assisting claimants or beneficiaries to demonstrate that they are disabled;

(2) Being appointed or recognized as a representative of claimants or beneficiaries, in dealings with us, under subpart R of this part and subpart O of part 416; and

(3) Being selected in the future, or from continuing to act as a representative payee, under subpart U of this part and subpart F of part 416.

(c) *Effect of exclusion on information or evidence from health care providers.* Beginning with the effective date of the exclusion, we will not consider the provider's medical source statements, opinions on issues reserved to the Commissioner, or other evidence prepared for the purpose of assisting a claimant or beneficiary in demonstrating disability. We will consider information or evidence derived from the services of an excluded medical source only when those services were rendered before the effective date of the exclusion.

(d) *Effect of exclusion on the records of the excluded representative.* An exclusion under this section will not be construed as having the effect of limiting access by a claimant, beneficiary, State disability determination agency, or us to records maintained by the excluded representative for services provided to a claimant or beneficiary before the effective date of an exclusion.

(e) *Length of exclusion.* We will exclude an individual for a period of five years, ten years or permanently.

(1) The minimum length of time for an exclusion will be:

(i) Five years if an individual has been subject to one excluding event as stated in paragraph (a) of this section;

(ii) Ten years if an individual has been subject to two separate excluding events as stated in paragraph (a) of this section (one of those events may have occurred before December 14, 1999); and

(iii) Permanent exclusion if an individual has been subject to three or more excluding events as stated in paragraph (a) of this section (one or two of those events may have occurred before December 14, 1999).

(2) Notwithstanding the time periods set forth in paragraph (e)(1) of this section, we shall impose a permanent exclusion upon the first or second

excluding event if two or more of the following exist:

(i) The criminal sentence is for five or more years of incarceration and/or probation;

(ii) The criminal sentence includes payment of restitution to us in an amount equal to or more than \$30,000;

(iii) The criminal conviction includes five or more separate violations of law;

(iv) The assessment of civil monetary penalties is equal to or more than \$50,000;

(v) The assessment of civil monetary penalties was based on five or more violations of law;

(vi) The individual has been convicted of fraud, making false statements, or misrepresentations in any other government program or has been administratively determined to have committed such acts;

(vii) A State licensing authority has revoked or suspended any license issued to the individual in the past for fraud, false statements or misrepresentations; or

(viii) The individual failed to comply with § 404.1503b(v).

(f) *Exclusion determination.* The Inspector General is responsible for providing us with pertinent documentation regarding the excluding event within 45 days of the conviction or of the date upon which the determination under section 1129a of the Act becomes final. The information supplied by the Inspector General should, whenever practical, include the charging documents, plea agreements, agreements for deferred adjudication or pre-trial diversion, judgments of conviction, and in cases decided under section 1129a of the Act, a copy of the final decision that imposes civil monetary penalties. When we obtain evidence that an individual meets one or more of the criteria in paragraph (a) of this section, we will make a proposed determination to exclude that individual.

(1) We will use all of the information that we have collected.

(2) Based on this information, we will prepare a proposed determination that explains the reasons why we believe the individual should be excluded. Once we determine that the individual meets the criteria for exclusion, we will provide the individual with notice of the date on which the exclusion takes effect. We will also notify the individual of his or her right to appeal the determination to an administrative law judge and his or her right to request waiver of the exclusion.

(3) The exclusion determination will become effective 35 days after it is issued unless a request for hearing is

filed as described in paragraph (i) of this section or a request for waiver is made.

(4) If the individual requests a waiver of the proposed exclusion, that individual must submit to us a written statement and any relevant documentary evidence as required in paragraph (h) of this section. The statement and evidence to support the request for waiver must be submitted within 30 days of receiving the notice of proposed exclusion. We assume that the individual will receive the notice five days after the date that the notice of proposed exclusion is mailed.

(g) *Notice of proposed exclusion.* We will send the notice of proposed exclusion to the individual's last known address by certified mail. This notice will provide the following information:

- (1) The basis for exclusion;
- (2) The effect of the exclusion;
- (3) The proposed effective date of the exclusion;
- (4) The proposed period of exclusion; and
- (5) The procedure and timeframe by which the individual may object to the exclusion and submit a written statement and relevant documents.

(h) *Waiver of exclusion.* We may waive the exclusion of an individual if we determine that he or she is the sole source of essential services in a community. We will consider only the location in which the infraction(s) took place in our determination. We will not consider situations where the party has moved to a remote location after the excluding event. Our decision concerning waiver of the exclusion shall not be subject to review.

(i) *Right to a hearing before an administrative law judge.* If an excluded individual is dissatisfied with our determination to exclude, the individual may request a hearing. The Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint an administrative law judge to conduct the hearing.

(1) The request for a hearing must be made within 30 days of the date that the excluded individual receives the determination to exclude.

(2) The individual must submit, with the request for a hearing, all exhibits that the individual wants to be received into the record, a list of any witnesses whom the individual intends to call at the hearing, and a statement of the issues being raised.

(3) A failure to submit a timely request for hearing, evidence, or witness list may be excused for good cause. If there is an untimely submission of a request for hearing and the administrative law judge does not find that there is good cause to excuse the

untimely filing, the administrative law judge will dismiss the request for hearing. If there is an untimely submission of evidence or a witness list and the administrative law judge finds that there is no good cause to excuse the untimely filing, the administrative law judge will not enter such evidence into the record and will not permit the witnesses to testify at the hearing.

(j) *Disqualification of administrative law judge.* An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. The excluded individual has the right to object to the administrative law judge assigned to hear the individual's appeal. The individual must inform the administrative law judge, in writing and at his or her earliest opportunity, of the objection. The administrative law judge will consider the objection and decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint another administrative law judge to conduct the hearing.

(k) *Issue before the administrative law judge.* The administrative law judge may only decide whether the basis for an individual's exclusion exists and whether the length of exclusion meets the requirements of paragraph (e) of this section. The administrative law judge has no authority to review the factual or legal conclusions of the conviction or determination that is the basis for the determination to exclude.

(l) *Pre-hearing procedures.* An administrative law judge may dismiss any hearing request that fails to state either an issue of disputed material fact or law regarding a matter that is subject to review; *i.e.*, whether the underlying conviction or civil monetary penalty exist. If the individual's hearing request and supporting documentation does not reveal the existence of a material factual or legal dispute, the administrative law judge will issue an order to show cause why the hearing request should not be dismissed. The individual must respond to the order to show cause 30 days from the date of receipt, which will be presumed to be five calendar days from the date of mailing. The administrative law judge will decide whether a material factual or legal dispute exists and will either dismiss the hearing request or set a date for the hearing.

(m) *Hearing procedures.* The procedures in §§ 404.936–404.938, 404.944, 404.948–404.949, 404.950(c-e), 404.953(a), and 404.957(a-b), 404.961 will apply to the hearing before the administrative law judge. If the

administrative law judge dismisses a case, the administrative law judge may, within 60 days of the dismissal, vacate such dismissal if good cause exists.

(n) *Appeals Council review.* The Appeals Council may, on its own motion and within 60 days of the issuance of an administrative law judge's decision or dismissal, initiate review of the administrative law judge's decision or dismissal. We or the excluded individual may request the Appeals Council to exercise its authority to take own motion review. Sections 404.970(a), 404.973–404.975, 404.976(a) and (b)(2), will apply to the Appeals Council review of an administrative law judge's decision or dismissal. The Appeals Council will issue a decision or remand the case to the administrative law judge. The Appeals Council may affirm, modify, or reverse the administrative law judge's decision. A copy of the Appeals Council's decision will be sent to the excluded individual at his or her last known address.

(o) *Effect of Appeals Council review on exclusion.* Unless the Appeals Council reviews the decision or dismissal, the administrative law judge's decision or dismissal shall become the Commissioner's final decision 60 days after it is issued. If the Appeals Council decides to review the administrative law judge's decision within 60 days from the date it is issued, and the Appeals Council issues a decision, it will become the Commissioner's final decision.

(p) *Judicial review.* The excluded individual has the right to file a civil action in a Federal district court within 60 days of the date of the Commissioner's final decision. The excluded individual shall serve a copy of any civil action on the Commissioner at 6401 Security Boulevard, Baltimore, Maryland 21235–6401. Sections 404.983–404.984 will apply to any cases remanded by a Federal court.

(q) *Termination of exclusion.* (1) An individual excluded from participation under this section may request that we terminate an exclusion:

- (i) At the end of the minimum period of exclusion;
- (ii) If the individual becomes the sole source of essential services in a community; or
- (iii) If the judgement or conviction that is the basis of the exclusion is set aside or expunged.

(2) We may terminate the exclusion if we determine, based on the conduct of the excluded individual that occurred after the date of the notice of exclusion, or which was unknown to us at the time of the exclusion, that:

(i) There is no basis for a continuation of the exclusion; and

(ii) There are reasonable assurances that the types of actions that formed the basis for the original exclusion have not recurred and will not recur.

(3) Our decision regarding termination of exclusion is not subject to review.

(r) *Penalties are not exclusive.*

Exclusion imposed under this section is in addition to any other penalties or sanctions prescribed by law.

(s) *Notice to State agencies and the public.* (1) We will notify the State agencies employed for the purpose of making disability determinations of the exclusion of an individual from participating in Social Security programs when the Commissioner has issued a final decision to exclude. We will provide the following information:

(i) The facts and circumstances of the exclusion of the individual; and

(ii) The period that the exclusion will be in effect.

(2) We will also notify the state agencies of the fact and circumstances of each termination of exclusion made under paragraph (g) of this section. We will also provide the public with appropriate notice of individuals or entities who have been excluded from participation in our programs.

(t) *Notice to State licensing authorities.* We will notify appropriate State or local licensing agencies or other licensing authorities when the Commissioner has issued a final decision to exclude. We will provide those agencies or authorities with the facts and circumstances of the exclusion. We will also request that an appropriate investigation in accordance with State law be conducted, that appropriate sanctions be invoked, and that the State or local licensing agency or other licensing authority keep us currently and fully informed of their actions in response to our request.

(u) *Definitions.* As used in this section—

(1) *Individual* means any representative or health care provider.

(2) *Representative* will have the same meaning as stated in section 404.1703 of this part.

(3) *Health care provider* means any person or entity that employs a person or persons who would be considered a medical source.

(4) *Medical source* means any health care provider who is defined under section 404.1513(a) and (d)(1) of this part.

(5) *Act* means the Social Security Act.

(6) *Social security programs* means the program providing for monthly insurance benefits under title II of the

Act and the program providing for monthly supplemental security income payments under title XVI of the Act (including State supplementary payments that we make.)

(7) *Sole source of essential services in a community* means that, in the case of health care providers, no other health care providers who perform similar services or, in the case of representatives, no other representatives who perform similar services exist within a 50 mile radius of the limits of the town, county or city in which the infraction took place.

(8) *Convicted* means:

(i) A judgment of conviction that has been entered against the individual by a Federal, State, or local court, except if the judgment of conviction has been set aside or expunged;

(ii) A finding of guilt against the individual by a Federal, State or local court;

(iii) A plea of guilty or nolo contendere by the individual has been accepted by a Federal, State or local court; or

(iv) The individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgement of conviction has been withheld.

(v) *Reporting requirements.* Any individual participating in or seeking to participate in any Social Security programs will inform us by letter, as soon as practicable, of any excluding event stated in paragraph (a) of this section. If the individual is a health care provider the letter must be sent to the following address: Social Security Administration, Office of Disability and Income Security Programs, Section 1136 Exclusion, Room 4634 Annex Building, 6401 Security Boulevard, Baltimore, MD 21235-6401. If the individual is a representative, the letter must be sent to the following address: Social Security Administration, Office of Hearings and Appeals, Attention Special Counsel Staff, 5107 Leesburg Pike, Suite 1605, Falls Church, VA 22041. This letter must include a copy of the conviction, judgment, or administrative determination. The individual making such a report to us must comply with any further requests that we make for information regarding the reported matter.

## **PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED**

### **Subpart I—[Amended]**

3. The authority citation for Subpart I of part 416 continues to read as follows:

**Authority:** Secs. 702(a)(5), 1611, 1614, 1619, 1631(a), (c), and (d)(1), and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1382, 1382c, 1382h, 1383(a), (c), and (d)(1), and 1383b); secs. 4(c) and 5, 6(c)–(e), 14(a), and 15, Pub. L. 98–460, 98 Stat. 1794, 1801, 1802, and 1808 (42 U.S.C. 421 note, 423 note, 1382h note).

4. Add a new § 416.903b to read as follows:

### **§ 416.903b Mandatory exclusion of health care providers and representatives from participating in SSA programs including serving as a representative payee.**

(a) *Reasons for mandatory exclusions.* We will exclude from participation in social security programs any representative or health care provider who, on or after December 14, 1999:

(1) Has been convicted of a violation of section 208 or section 1632 of the Act;

(2) Has been convicted of any violation under title 18, U.S.C., relating to an initial application for or continuing entitlement to, or amount of, benefits under title II of the Act or an initial application for or continuing eligibility for, or amount of, benefits under title XVI of the Act; or

(3) Has been determined by the Commissioner to have committed an offense described in section 1129(a)(1) of the Act.

(b) *Effect of exclusion on the individual who has been excluded.*

When we exclude an individual, we will prohibit that individual from:

(1) Acting as a medical source who provides items or services for claimants or beneficiaries for the purpose of assisting claimants or beneficiaries to demonstrate that they are disabled;

(2) Being appointed or recognized as a representative of claimants or beneficiaries, in dealings with us, under subpart R of part 404 of this chapter and subpart O of this part; and

(3) Being selected in the future, or from continuing to act as a representative payee, under subpart U of part 404 of this chapter and subpart F of this part.

(c) *Effect of exclusion on information or evidence from health care providers.* Beginning with the effective date of the exclusion, we will not consider the provider's medical source statements, opinions on issues reserved to the Commissioner, or other evidence prepared for the purpose of assisting a claimant or beneficiary in demonstrating disability. We will consider information or evidence derived from the services of an excluded medical source only when those services were rendered before the effective date of the exclusion.

(d) *Effect of exclusion on the records of the excluded representative.* An exclusion under this section will not be construed as having the effect of limiting access by a claimant, beneficiary, State disability determination agency, or us to records maintained by the excluded representative for services provided to a claimant or beneficiary before the effective date of an exclusion.

(e) *Length of exclusion.* We will exclude an individual for a period of five years, ten years or permanently.

(1) The minimum length of time for an exclusion will be:

(i) Five years if an individual has been subject to one excluding event as stated in paragraph (a) of this section;

(ii) Ten years if an individual has been subject to two separate excluding events as stated in paragraph (a) of this section (one of those events may have occurred before December 14, 1999); and

(iii) Permanent exclusion if an individual has been subject to three or more excluding events as stated in paragraph (a) of this section (one or two of those events may have occurred before December 14, 1999).

(2) Notwithstanding the time periods set forth in (e)(1) of this section, we shall impose a permanent exclusion upon the first or second excluding event if two or more of the following exist:

(i) The criminal sentence is for five or more years of incarceration and/or probation;

(ii) The criminal sentence includes payment of restitution to us in an amount equal to or more than \$30,000;

(iii) The criminal conviction includes five or more separate violations of law;

(iv) The assessment of civil monetary penalties is equal to or more than \$50,000;

(v) The assessment of civil monetary penalties was based on five or more violations of law;

(vi) The individual has been convicted of fraud, making false statements, or misrepresentations in any other government program or has been administratively determined to have committed such acts;

(vii) A State licensing authority has revoked or suspended any license issued to the individual in the past for fraud, false statements or misrepresentations; or,

(viii) The individual failed to comply with section 416.903b(v).

(f) *Exclusion determination.* The Inspector General is responsible for providing us with pertinent documentation regarding the excluding event within 45 days of the conviction or of the date upon which the

determination under section 1129a of the Act becomes final. The information supplied by the Inspector General should, whenever practical, include the charging documents, plea agreements, agreements for deferred adjudication or pre-trial diversion, judgments of conviction, and in cases decided under section 1129a of the Act, a copy of the final decision that imposes civil monetary penalties. When we obtain evidence that an individual meets one or more of the criteria in paragraph (a) of this section, we will make a proposed determination to exclude that individual.

(1) We will use all of the information that we have collected.

(2) Based on this information, we will prepare a proposed determination that explains the reasons why we believe the individual should be excluded. Once we determine that the individual meets the criteria for exclusion, we will provide the individual with notice of the date on which the exclusion takes effect. We will also notify the individual of his or her right to appeal the determination to an administrative law judge and his or her right to request waiver of the exclusion.

(3) The exclusion determination will become effective 35 days after it is issued unless a request for hearing is filed as described in paragraph (i) of this section or a request for waiver is made.

(4) If the individual requests a waiver of the proposed exclusion, that individual must submit to us a written statement and any relevant documentary evidence as required in paragraph (h) of this section. The statement and evidence to support the request for waiver must be submitted within 30 days of receiving the notice of proposed exclusion. We assume that the individual will receive the notice five days after the date that the notice of proposed exclusion is mailed.

(g) *Notice of proposed exclusion.* We will send the notice of proposed exclusion to the individual's last known address by certified mail. This notice will provide the following information:

(1) The basis for exclusion;

(2) The effect of the exclusion;

(3) The proposed effective date of the exclusion;

(4) The proposed period of exclusion; and

(5) The procedure and timeframe by which the individual may object to the exclusion and submit a written statement and relevant documents.

(h) *Waiver of exclusion.* We may waive the exclusion of an individual if we determine that he or she is the sole source of essential services in a community. We will consider only the

location in which the infraction(s) took place in our determination. We will not consider situations where the party has moved to a remote location after the excluding event. Our decision concerning waiver of the exclusion shall not be subject to review.

(i) *Right to a hearing before an administrative law judge.* If an excluded individual is dissatisfied with our determination to exclude, the individual may request a hearing. The Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint an administrative law judge to conduct the hearing.

(1) The request for a hearing must be made within 30 days of the date that the excluded individual receives the determination to exclude.

(2) The individual must submit, with the request for a hearing, all exhibits that the individual wants to be received into the record, a list of any witnesses whom the individual intends to call at the hearing, and a statement of the issues being raised.

(3) A failure to submit a timely request for hearing, evidence, or witness list may be excused for good cause. If there is an untimely submission of a request for hearing and the administrative law judge does not find that there is good cause to excuse the untimely filing, the administrative law judge will dismiss the request for hearing. If there is an untimely submission of evidence or a witness list and the administrative law judge finds that there is no good cause to excuse the untimely filing, the administrative law judge will not enter such evidence into the record and will not permit the witnesses to testify at the hearing.

(j) *Disqualification of administrative law judge.* An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision. The excluded individual has the right to object to the administrative law judge assigned to hear the individual's appeal. The individual must inform the administrative law judge, in writing and at his or her earliest opportunity, of the objection. The administrative law judge will consider the objection and decide whether to proceed with the hearing or withdraw. If he or she withdraws, the Associate Commissioner for Hearings and Appeals, or his or her delegate, will appoint another administrative law judge to conduct the hearing.

(k) *Issue before the administrative law judge.* The administrative law judge may only decide whether the basis for an individual's exclusion exists and whether the length of exclusion meets

the requirements of paragraph (e) of this section. The administrative law judge has no authority to review the factual or legal conclusions of the conviction or determination that is the basis for the determination to exclude.

(l) *Pre-Hearing procedures.* An administrative law judge may dismiss any hearing request that fails to state either an issue of disputed material fact or law regarding a matter that is subject to review; *i.e.*, whether the underlying conviction or civil monetary penalty exist. If the individual's hearing request and supporting documentation does not reveal the existence of a material factual or legal dispute, the administrative law judge will issue an order to show cause why the hearing request should not be dismissed. The individual must respond to the order to show cause 30 days from the date of receipt, which will be presumed to be five calendar days from the date of mailing. The administrative law judge will decide whether a material factual or legal dispute exists and will either dismiss the hearing request or set a date for the hearing.

(m) *Hearing procedures.* The procedures in §§ 404.936–404.938, 404.944, 404.948–404.949, 404.950(c–e), 404.953(a), and 404.957(a–b), 404.961 will apply to the hearing before the administrative law judge. If the administrative law judge dismisses a case, the administrative law judge may, within 60 days of the dismissal, vacate such dismissal if good cause exists.

(n) *Appeals Council review.* The Appeals Council may, on its own motion and within 60 days of the issuance of an administrative law judge's decision or dismissal, initiate review of the administrative law judge's decision or dismissal. We or the excluded individual may request the Appeals Council to exercise its authority to take own motion review. §§ 404.970(a), 404.973–404.975, 404.976(a) and (b)(2), will apply to the Appeals Council review of an administrative law judge's decision or dismissal. The Appeals Council will issue a decision or remand the case to the administrative law judge. The Appeals Council may affirm, modify, or reverse the administrative law judge's decision. A copy of the Appeals Council's decision will be sent to the excluded individual at his or her last known address.

(o) *Effect of Appeals Council review on exclusion.* Unless the Appeals Council reviews the decision or dismissal, the administrative law judge's decision or dismissal shall become the Commissioner's final decision 60 days after it is issued. If the Appeals Council decides to review the

administrative law judge's decision within 60 days from the date it is issued, and the Appeals Council issues a decision, it will become the Commissioner's final decision.

(p) *Judicial review.* The excluded individual has the right to file a civil action in a Federal district court within 60 days of the date of the Commissioner's final decision. The excluded individual shall serve a copy of any civil action on the Commissioner at 6401 Security Boulevard, Baltimore, Maryland 21235–0001. Sections 404.983–404.984 will apply to any cases remanded by a Federal court.

(q) *Termination of exclusion.* (1) An individual excluded from participation under this section may request that we terminate an exclusion:

(i) At the end of the minimum period of exclusion;

(ii) If the individual becomes the sole source of essential services in a community; or

(iii) If the judgement or conviction that is the basis of the exclusion is set aside or expunged.

(2) We may terminate the exclusion if we determine, based on the conduct of the excluded individual that occurred after the date of the notice of exclusion, or which was unknown to us at the time of the exclusion, that:

(i) There is no basis for a continuation of the exclusion; and

(ii) There are reasonable assurances that the types of actions that formed the basis for the original exclusion have not recurred and will not recur.

(3) Our decision regarding termination of exclusion is not subject to review.

(r) *Penalties are not exclusive.* Exclusion imposed under this section is in addition to any other penalties or sanctions prescribed by law.

(s) *Notice to State agencies and the public.* (1) We will notify the State agencies employed for the purpose of making disability determinations of the exclusion of an individual from participating in Social Security programs when the Commissioner has issued a final decision to exclude. We will provide the following information:

(i) The facts and circumstances of the exclusion of the individual; and

(ii) The period that the exclusion will be in effect.

(2) We will also notify the state agencies of the fact and circumstances of each termination of exclusion made under paragraph (q) of this section. We will also provide the public with appropriate notice of individuals or entities who have been excluded from participation in our programs.

(t) *Notice to State licensing authorities.* We will notify appropriate State or local licensing agencies or other licensing authorities when the Commissioner has issued a final decision to exclude. We will provide those agencies or authorities with the facts and circumstances of the exclusion. We will also request that an appropriate investigation in accordance with State law be conducted, that appropriate sanctions be invoked, and that the State or local licensing agency or other licensing authority keep us currently and fully informed of their actions in response to our request.

(u) *Definitions.* As used in this section—

(1) *Individual* means any representative or health care provider.

(2) *Representative* will have the same meaning as stated in section 404.1703 of this part.

(3) *Health care provider* means any person or entity that employs a person or persons who would be considered a medical source.

(4) *Medical source* means any health care provider who is defined under section 404.1513(a) and (d)(1) of this part.

(5) *Act* means the Social Security Act.

(6) *Social security programs* means the program providing for monthly insurance benefits under title II of the Act and the program providing for monthly supplemental security income payments under title XVI of the Act (including State supplementary payments that we make.)

(7) *Sole source of essential services in a community* means that, in the case of health care providers, no other health care providers who perform similar services or, in the case of representatives, no other representatives who perform similar services exist within a 50 mile radius of the limits of the town, county or city in which the infraction took place.

(8) *Convicted* means:

(i) A judgment of conviction that has been entered against the individual by a Federal, State, or local court, except if the judgment of conviction has been set aside or expunged;

(ii) A finding of guilt against the individual by a Federal, State or local court;

(iii) A plea of guilty or nolo contendere by the individual has been accepted by a Federal, State or local court; or

(iv) The individual has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgement of conviction has been withheld.



(v) *Reporting requirements.* Any individual participating in or seeking to participate in any Social Security programs will inform us by letter, as soon as practicable, of any excluding event stated in paragraph (a) of this section. If the individual is a health care provider the letter must be sent to the following address: Social Security Administration, Office of Disability and Income Security Programs, Section 1136 Exclusion, Room 4634 Annex Building, 6401 Security Boulevard Baltimore, MD 21235-6401. If the individual is a representative, the letter must be sent to the following address: Social Security Administration, Office of Hearings and Appeals, Attention Special Counsel Staff, 5107 Leesburg Pike, Suite 1605, Falls Church, VA 22041. This letter must include a copy of the conviction, judgment, or administrative determination. The individual making such a report to us must comply with any further requests that we make for information regarding the reported matter.

[FR Doc. 04-15077 Filed 7-1-04; 8:45 am]

BILLING CODE 4191-02-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 49

[REG-137076-02]

RIN 1545-BB04

#### Excise Taxes; Communications Services

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** This document requests information from the public on issues that the IRS may address in proposed regulations relating to the tax on amounts paid for communications services. All materials submitted will be available for public inspection and copying.

**DATES:** Written and electronic comments must be received by September 30, 2004.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-137076-02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-137076-02), Courier's Desk, Internal Revenue Service, 1111 Constitution

Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at [www.irs.gov/regs](http://www.irs.gov/regs) or via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-137076-02).

#### FOR FURTHER INFORMATION CONTACT:

Concerning submissions generally, the Regulations Unit, (202) 622-3628; concerning the proposals, Cynthia McGreevy (202) 622-3130 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 4251 imposes tax on amounts paid for certain communications services, including local and toll telephone service. Section 4252(a) provides that local telephone service means the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system. Section 4252(b)(1) provides that toll telephone service includes a telephonic quality communication for which there is a toll charge that varies in amount with the distance and elapsed transmission time of each individual communication. Section 4252(b)(2) provides that toll telephone service also includes a service that entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

A tax on communications services has existed for over 100 years. The communications services that currently are subject to the tax are defined in section 4252, which was enacted in its current form in 1965. That section describes the local and long distance telephone service sold under the 1965 Federal Communications Commission rules. Existing Treasury regulations do not reflect the 1965 statutory change.

Sections 4252(a) and (b) define local and toll telephone service in terms of telephonic or telephonic quality communication, which means voice quality communication. Since 1965, numerous communications services have been developed and marketed, the methods of transmission have expanded, and the industry has been deregulated.

As a result of these changes, questions have arisen concerning the application of section 4251 to certain communications services that were not available in 1965. In response to these questions, Treasury and the IRS are considering proposing regulations that would revise the existing regulations to reflect changes in technology.

The test for taxability under section 4251 is whether a service for which an amount is paid is a communications service described in section 4252. The purpose of this ANPRM is to solicit information from the public on how present technology should be treated within the description of telephonic or telephonic quality communication in the definitions of local and toll telephone service under section 4252.

To ensure that any new regulations accurately reflect the state of today's communications services industry, Treasury and the IRS request that communications services providers and other interested parties submit comments and suggestions describing the various technologies, services, and methods of transmission currently available for transmitting data and voice communications and how they should be treated under section 4251.

#### Special Analysis

This advance notice of proposed rulemaking is not a significant regulatory action for purposes of Executive Order 12866, "Regulatory Planning and Review."

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

[FR Doc. 04-15125 Filed 7-1-04; 8:45 am]

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## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[COTP Mobile-03-013]

RIN 1625-AA87 (Formerly 1625-AA00)

#### Security Zone; Bayou Casotte, Pascagoula, MS

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking; withdrawal.

**SUMMARY:** The Coast Guard is withdrawing its notice of proposed rulemaking concerning the establishment of a permanent security zone for the waters of Bayou Casotte around the Chevron Pascagoula refinery.