Social Security Disability Update

Blowin' in the Win

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Timothy N. Tripp
Tripp, P.C. (a law firm)

810 Washington Street
Pella, Iowa 50219

4090 Westown Parkway
West Des Moines, Iowa

1.800.368.1423
ttripp@tripplaw.us
www.tripplaw.us
www.desmoinesdisability.com

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By Timothy N. Tripp[1]

Disability does not discriminate!

I. Introduction

A. Disability defined in the Social Security Act:

"inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

42 U.S.C. § 423(d)(1)

B. Procedure
1. application
2. initial determination
3. reconsideration
4. administrative hearing before administrative law judge ("ALJ")
5. review of decision from administrative hearing
6. 405(g) appeal/review in Federal District Court.
   a. whether the Commissioner's final decision is supported by substantial evidence, or
   b. whether the Commissioner committed an error of law.

42 U.S.C. § 405(g)

II. Miscellaneous

A. The Acting Commissioner Announced there will be a 2.8% cost-of-living increase for 2019. 83 Fed. Reg. 53702 (Oct. 24, 2018); www.ssa.gov/news/press/factsheets/colafacts2019.pdf

	2017	2018	2019
1. SSI	$ 735	$ 750	$ 771
2. SGA	$1,170	$1,180	$1,220
Blind	$1,950	$1,970	$2,040
3. TWP	$ 840	$ 850	$ 880
4. Quarter of Coverage	$1,300	$1,320	$1,360
5. User Fee	$ 91	$ 93	$ 95
6. Tax Max	$127.2K	$128.4K	$132.9K

[1]**Disclaimer:** This outline is designed to address general issues about Social Security disability insurance benefit process and case law. This outline should not be substituted for legal advice. Social Security claims are almost always very fact specific and legal advice should be sought for any legal question presented.

B. Nancy A. Berryhill, Acting Commissioner of Social Security. Since January 23, 2017 she has served as Acting Commissioner, replacing Carolyn Colvin. A Commissioner is appointed for a term of 6 years. 42 U.S.C. § 902(a)(3). The Commissioner's position was designed to span Administrations.

Andrew Saul appears to be headed to confirmation for term expiring on January 19, 2019. Confirmation hearing was held on October 2, 2018.

C. Rules of Conduct
20 C.F.R. § 404.1740(b)(5)(i); 416.1540(b)(5)(i)

5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

> (i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or
> (ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

D. Elimination of In-Person Hearing
"We would not permit individuals to opt out of appearing by VTC"

83 Fed. Reg. 57368 (Nov. 15, 2018)
(Comment period ends 1/14/19)

E. Three New SSR's
On Oct. 2, 2018, SSA issues 3 new Social Security Rulings (SSRs). See 83 Fed. Reg. 49616; 83 F.3d Reg. 49621.

SSR 18-01p
SSR 18-02p together rescind SSR 83-20 "Onset of Disability" and clarify how SSA determines the established onset date (EOD) in disability claim

SSR 18-3p rescinds and replaces SSR 82-59 "Failure to Follow Prescribed Treatment"

F. Central Scheduling Unit
By the 15th of each month you must notify SSA of your unavailability 5 months from the current month. For example: Submit unavailability for May 2019 by December 15, 2018.

G. Withdrawal of representation
NOT allowed once the hearing has been scheduled except under "extraordinary circumstances."
83 Fed. Reg. 30849 at 30850 (July 2, 2018) (effective Aug. 1, 2018)

III. Selected 2018 Case law

A. Eighth Circuit Court of Appeals

November 1, 2017- November 25, 2018		35 cases
Published	8	
Unpublished	27	
Affirmed		30
Reverse & Remand for Further Proceedings		4
Dismissed for lack of appellate jurisdiction		1

1. *Combs v. Berryhill*, 878 F.3d 642 (8th Cir. 2017).
12/28/17
Smith, Kelly, and Sippel (Chief Judge, E.D. Missouri, sitting by designation)
Reversed and remanded

Combs applied for disability benefits in 2012 alleging rheumatoid arthritis, osteoarthritis, asthma, and obesity. The claimant argues that the ALJ's findings of her RFC did not take into account the substantial evidence on the record as a whole. See Strongson v. Barnhart, 361 F.3d 1066, 1070 (8th Cir. 2004) (quoting McKinney v. Apfel, 228 F.3d 860, 863 (8th Cir. 2000)). The ALJ found that Combs could perform past work and other work such as cashier or fast food worker. Combs claims that the ALJ was inaccurate in determining which physician's opinions to credit. Claimant argues that the ALJ should have sought clarification from medical providers for phrases like "no acute distress" and "normal movements." As per previous decisions, an ALJ does not "have to seek additional clarifying statements from a treating physician unless a crucial issue is undeveloped" (See Ellis v. Barnhart, 392 F.3d 988, 994 (8th Cir. 2005)). But "an ALJ must not substitute his opinions for those of the physician." (See Strongson, 361 F.3d at 1070). In this case, the court found that the ALJ erred in relying on his own inferences as to the relevance of the above comments, and failed to fully and fairly develop the record.

Chief Judge Smith dissented based on his interpretation that the ALJ was not "duty-bound" to clarify these terms. "In this case, no crucial issue was undeveloped as to create a duty to seek additional information from Combs's treating physicians." The record had dozens of treatment notes that should have been sufficient. Chief Judge Smith points to Stormo v. Barnhart, 377 F.3d 801, 806 (8th Cir. 2004), and KKC ex rel. Stoner v. Colvin, 818 F.3d 364, 372 (8th Cir. 2016).

2. *Thomas v. Berryhill*, 881 F.3d 672 (8th Cir. 2018).
2/5/18
Smith, Arnold, and Kelly
Reversed and Remanded

Claimant argues that there was an error in the fourth and fifth step of the 5 step evaluation because the ALJ gave little weight to her treating physician's opinion of RFC, and based his finding on the VE's testimony that she could work two jobs in particular. The court found that the ALJ did not err in giving the treating physician's opinions little weight, but did err in relying on the VE's testimony. The VE's testimony was problematic in suggesting "that machine tending was suitable work." The Commissioner ruled that an ALJ cannot rely on a VE's testimony if an "apparent unresolved conflict" exists between the testimony and the description in DOT. The VE testified that "new accounts clerk" was a reasonable fit for Thomas, when in reality it was two reasoning levels higher than her RFC limitations, and the mistake was made when no one brought up this error.

3. *Chismarich v. Berryhill*, 888 F.3d 978 (8th Cir. 2018).
4/27/18
Smith, Malloy, and Shepard (per curiam)
Affirm

The court holds that the ALJ properly analyzed all 5 of the steps in the 5 Step Evaluation, whereas the claimant believed that step-two and three analyses are inconsistent with ALJ's step-four analysis. The ALJ held that at steps 2 and 3 the claimant had severe impairments that did not meet listings. The ALJ also held that the claimant had moderate limitations in some life activities. At steps 4 and 5, the ALJ determined that claimant had RFC for SGA.

The court held that the ALJ's finding of "moderate" impairments in social functioning, activities of daily living, and concentration, persistence, or pace was not in error since moderate difficulties in these areas "are consistent with being able to understand, remember, and carry out simple instructions while performing non-detailed tasks." The court held that as long as apparent inconsistencies in the ALJ's opinion can be harmonized, then there is no problem, since each step of the 5 step evaluation does not require identical levels of precision in interpretation. See Lacroix v. Barnhart, 465 F.3d 881, 888 n.3 (8th Cir. 2006) ("Each step in the disability determination entails a separate analysis and legal standard.").

4. *Winn v. Comm'r, SSA*, 894 F.3d 982 (8th Cir. 2018).
7/6/18
Loken, Benton, and Erickson
Affirmed

Winn applied for DIB in 2007, alleging impairments of degenerative disc disease of the cervical spine, carpal tunnel syndrome, and neuropathy. The central issue is whether the ALJ's decision was supported by substantial evidence of the record as a whole. Specifically, Winn alleges that the ALJ did not give enough weight to his treating physician, and the RFC found by the ALJ was not consistent with the medical evidence surrounding his ability to use his hand.

The court found that the ALJ did not err in giving some weight to his treating physician, since the physician's opinion was not supported by the medical record, and the three treating specialists all shared a similar opinion of Winn's ability to work that was inconsistent with Winn's treating physician (*see Gieseke v. Colvin*, 770 F.3d 1186, 1188 (8th Cir. 2014)) ("not supported by objective medical evidence in the administrative record"). The second issue is the RFC analysis regarding Winn's use of his hand. The RFC finding was that he could "frequently handle, finger and feel" while Winn argued that it should have been "occasionally" handle, finger, and feel. This was rejected because the VE did identify another job that Winn could perform even if he was limited to "occasionally" handle, finger and feel.

5. *Courtney v. Comm'r, SSA*, 894 F.3d 1000 (8th Cir. 2018).
7/10/18
Smith, Melloy, and Shepherd
Affirmed

Courtney applied for disability benefits in 2011, claiming degenerative disc disease/degenerative joint disease of the spine, and syncopal episodes. Additionally, she has left ankle degenerative osteoarthritis and a history of bone fractures, along with post-traumatic stress disorder, major depressive disorder, and generalized anxiety disorder. The court reviewed whether the Commissioner's step 5 analysis was flawed, by incorrectly relying on the VE's testimony. Specifically, Courtney argues that some of the limitations listed by the VE (memory of instructions, detail of tasks, etc.) were not part of the DOT listing that was used by the VE in the hearing and further claims that this testimony was "extra-DOT" knowledge and resources, and that the ALJ erroneously relied on this testimony.

The court found that the ALJ was not in error, since case law and other rulings only require the ALJ to inquire further in VE testimony if there is an apparent conflict between the VE's testimony and the DOT. Social Security Ruling (SSR) 00-4p only requires that adjudicators must "[i]dentify and obtain a reasonable explanation for any conflicts between" such evidence and the DOT. However, these regulations do not require an ALJ to question the VE if there is no conflict. The precedent states that an ALJ has an affirmative responsibility to ask about "any possible

conflict" between VE evidence and the DOT (see *Welsh v. Colvin*, 765 F.3d 926, 929 (8th Cir. 2014)) (citing *Kemp v. Colvin*, 743 F.3d 630, 633 (8th Cir. 2014)). But that was clarified when the court states that there is not a "*requirement"* that an ALJ clarify the VE's testimony if there is no apparent conflict.

6. *Higgins v. Comm'r, SSA*, 898 F.3d 793 (8th Cir. 2018).
8/1/18
Smith, Wollman, and Loken
Affirmed

Higgins applied for DIB and SSI alleging impairments of bipolar disorder, sleep apnea, and Type II diabetes, as well as obesity. The issue is whether the ALJ properly relied on the VE's testimony about accommodations in the workplace. Specifically, Higgins requires a bariatric chair to sit for 6 hours a day. The VE listed three potential sedentary occupations, and stated that the employer would need to procure this bariatric chair, which was a common accommodation, and not problematic for the jobs listed.

Higgins contends that the VE's testimony regarding the chair is assuming that the workplaces listed would comply with the Americans with Disabilities Act (ADA) and that this testimony was not acceptable. However, the court holds that "ALJs may properly rely on VE testimony that a certain needed modification is part of the functional workplace." The court found that what matters is "the functional workplace as it actually exists." In other words, even if a modification to the workplace is labeled an accommodation or reasonable accommodation, as long as the modification is commonly offered, then it may be included by the ALJ in making the decision.

7. *Stanton v. Comm'r, SSA*, 899 F.3d 555 (8th Cir. 2018).
8/9/18
Colloton, Shepherd, and Stras
Reversed and remanded

Stanton applied for child insurance benefits in 2013 alleging bipolar disorder as an impairment. The issue is whether the ALJ had a reasonable explanation of a conflict between VE testimony and the DOT. The court has held that an ALJ may rely on the testimony of a VE that conflicts with the DOT, provided that the conflict is identified and resolved (*see Porch v. Chater*, 115 F.3d 567, 572 (8th Cir. 1997). The conflict in this case was between Stanton's limitations of Level 1 Reasoning, and the DOT's description of an applicable job that required Level 2 reasoning. The ALJ did ask the VE whether the testimony was consistent with the DOT, but that is not sufficient (*see Thomas v. Berryhill*, 881 F.3d 672, 678 (8th Cir. 2018)). If an apparent conflict exists, then the ALJ must ask for a "reasonable explanation" for the conflict.

8. *Nash v. Comm'r, SSA*, 907 F.3d 1086
11/2/18
Loken, Benton, Shepherd
Affirmed

Jessie Mae Nash applied for DIB and SSI, alleging she was disabled since January 2012, the day she was laid off of from her job as a recruiter. She said she was not able to work due to her back, right knee, and right thumb problems, along with bladder problems. She is now 68 years old and has a sixth-grade education with a general equivalency diploma. Her PRW including telemarketing, recruiter, salesperson, medical assistant and a nursing-home aide. The court noted "It is "the ALJ's responsibility to determine [the claimant's] RFC based on all the relevant evidence, including medical records, observations of treating physicians and others, and [claimant's] own description of her limitations." *Anderson v. Shalala*, 51 F.3d 777, 779 (8th Cir. 1995); 20 C.F.R. §§ 404.1545-46, 416.945-46. But in this case Ms. Nash's alleged limitations - needing to lie down and prop up her feet and always going back and forth to the bathroom - are supported ONLY by her own testimony. The record contains not directions from her medical sources instructing her to "lie down and prop up her feet." An ALJ is not obligated to adopt a claimant's "unsupported subjective complaints and self-imposed limitations," nor is an ALJ required to ask a VE about those unsupported limitations. The court held that the substantial evidence supports the ALJ's RFC assessment, and affirmed the denial of benefits.

Fact Sheet

SOCIAL SECURITY

2019 SOCIAL SECURITY CHANGES

Cost-of-Living Adjustment (COLA):

Based on the increase in the Consumer Price Index (CPI-W) from the third quarter of 2017 through the third quarter of 2018, Social Security and Supplemental Security Income (SSI) beneficiaries will receive a 2.8 percent COLA for 2019. Other important 2019 Social Security information is as follows:

Tax Rate	2018	2019
Employee	7.65%	7.65%
Self-Employed	15.30%	15.30%

NOTE: The 7.65% tax rate is the combined rate for Social Security and Medicare. The Social Security portion (OASDI) is 6.20% on earnings up to the applicable taxable maximum amount (see below). The Medicare portion (HI) is 1.45% on all earnings. Also, as of January 2013, individuals with earned income of more than $200,000 ($250,000 for married couples filing jointly) pay an additional 0.9 percent in Medicare taxes. The tax rates shown above do not include the 0.9 percent.

	2018	2019
Maximum Taxable Earnings		
Social Security (OASDI only)	$128,400	$132,900
Medicare (HI only)	No Limit	
Quarter of Coverage		
	$1,320	$1,360
Retirement Earnings Test Exempt Amounts		
Under full retirement age	$17,040/yr. ($1,420/mo.)	$17,640/yr. ($1,470/mo.)
NOTE: One dollar in benefits will be withheld for every $2 in earnings above the limit.		
The year an individual reaches full retirement age	$45,360/yr. ($3,780/mo.)	$46,920/yr. ($3,910/mo.)
NOTE: Applies only to earnings for months prior to attaining full retirement		

age. One dollar in benefits will be withheld for every $3 in earnings above the limit.	
Beginning the month an individual attains full retirement age.	None

	2018	2019
Social Security Disability Thresholds		
Substantial Gainful Activity (SGA)		
Non-Blind	$1,180/mo.	$1,220/mo.
Blind	$1,970/mo.	$2,040/mo.
Trial Work Period (TWP)	$ 850/mo.	$ 880/mo.
Maximum Social Security Benefit: Worker Retiring at Full Retirement Age		
	$2,788/mo.	$2,861/mo.
SSI Federal Payment Standard		
Individual	$ 750/mo.	$ 771/mo.
Couple	$1,125/mo.	$1,157/mo.
SSI Resource Limits		
Individual	$2,000	$2,000
Couple	$3,000	$3,000
SSI Student Exclusion		
Monthly limit	$1,820	$1,870
Annual limit	$7,350	$7,550
Estimated Average Monthly Social Security Benefits Payable in January 2019		
	Before 2.8% COLA	**After 2.8% COLA**
All Retired Workers	$1,422	$1,461
Aged Couple, Both Receiving Benefits	$2,381	$2,448
Widowed Mother and Two Children	$2,797	$2,876
Aged Widow(er) Alone	$1,348	$1,386
Disabled Worker, Spouse and One or More Children	$2,072	$2,130
All Disabled Workers	$1,200	$1,234

List of Subjects

16 CFR Part 1112

Administrative practice and procedure, Audit, Consumer protection, Reporting and recordkeeping requirements, Third party conformity assessment body.

16 CFR Part 1237

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, and Toys.

For the reasons discussed in the preamble, the Commission amends 16 CFR parts 1112 and 1237 as follows:

PART 1112—REQUIREMENTS PERTAINING TO THIRD PARTY CONFORMITY ASSESSMENT BODIES

■ 1. The authority citation for part 1112 continues to read as follows:

Authority: 15 U.S.C. 2063; Pub. L. 110–314, section 3, 122 Stat. 3016, 3017 (2008).

■ 2. Amend § 1112.15 by adding paragraph (b)(47) to read as follows:

§ 1112.15 When can a third party conformity assessment body apply for CPSC acceptance for a particular CPSC rule and/or test method?

* * * * *

(b) * * *

(47) 16 CFR part 1237, Safety Standard for Booster Seats.

* * * * *

■ 3. Add part 1237 to read as follows:

PART 1237—SAFETY STANDARD FOR BOOSTER SEATS

Sec.

1237.1 Scope.

1237.2 Requirements for booster seats.

Authority: Sec. 104, Pub. L. 110–314, 122 Stat. 3016 (August 14, 2008); Sec. 3, Pub. L. 112–28, 125 Stat. 273 (August 12, 2011).

§ 1237.1 Scope.

This part establishes a consumer product safety standard for booster seats.

§ 1237.2 Requirements for booster seats.

Each booster seat must comply with all applicable provisions of ASTM F2640–18, Standard Consumer Safety Specification for Booster Seats (approved on April 1, 2018). The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Bar Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428; *http://www.astm.org.* You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East-West Highway, Bethesda, MD 20814, telephone: 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *www.archives.gov/federal-register/cfr/ibr-locations.html.*

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2018–14133 Filed 6–29–18; 8:45 am]

BILLING CODE 6355–01–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA–2013–0044]

RIN 0960–AH63

Rules of Conduct and Standards of Responsibility for Appointed Representatives

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are revising our rules of conduct and standards of responsibility for representatives. We are also updating and clarifying the procedures we use when we bring charges against a representative for violating these rules and standards. These changes are necessary to better protect the integrity of our administrative process and to further clarify representatives' existing responsibilities in their conduct with us. The revisions should not be interpreted to suggest that any specific conduct was permissible under our rules prior to these changes; instead, we seek to ensure that our rules of conduct and standards of responsibility are clearer as a whole and directly address a broader range of inappropriate conduct.

DATES: These final rules will be effective August 1, 2018.

FOR FURTHER INFORMATION CONTACT: Sarah Taheri, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. 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 site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

Although the vast majority of representatives conducting business before us on behalf of Social Security beneficiaries and claimants ethically and conscientiously assist their clients, we are concerned that some representatives are using our processes in a way that undermines the integrity of our programs and harms claimants. Accordingly, we are clarifying that certain actions are prohibited, and we are providing additional means to address representative actions that do not serve the best interests of claimants.

On August 16, 2016,[1] we published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** in which we proposed clarifications and revisions to our rules of conduct for representatives. To the extent that we adopt a proposed change as final without revision, and we already discussed at length the reason for and details of the proposal, we will not repeat that information here.

In response to the NPRM, we received 154 timely submitted comments that addressed issues within the scope of our proposed rules. Based on those comments, we are modifying some of our proposed changes to address concerns that commenters raised. We have also made editorial changes consistent with plain language writing requirements. We made conforming changes in other sections not originally edited in the NPRM. Finally, we made changes to ensure correct paragraph punctuation in §§ 404.1740 and 416.1540; a nomenclature change to reflect the organization of our agency in §§ 404.1765(b)(1) and 416.1565(b)(1); and updated a cross-reference in §§ 404.1755 and 416.1555 that refers to §§ 404.1745 and 416.1545, sections reorganized and rewritten in the NPRM and codified in the final rule.

Public Comments and Discussion

Comment: Some commenters suggested that our proposed rules would deter potential representatives from representing claimants in Social Security matters.

Response: These rules reflect our interest in protecting claimants and ensuring the integrity of our administrative process, and they do not impose unreasonable standards of conduct. These additional rules of conduct should not deter competent, knowledgeable, and principled representatives.

Comment: Some commenters objected to the provision in proposed § 404.1705(b)(4) and 416.1505(b)(4), which includes ''persons convicted of a

[1] 81 FR 54520. *https://www.federalregister.gov/documents/2016/08/16/2016-19384/revisions-to-rules-of-conduct-and-standards-of-responsibility-for-appointed-representatives.*

felony (as defined by § 404.1506(c)), or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft'' as examples of persons who lack ''good character and reputation.'' The commenters sometimes referred to this provision as involving a ''lifetime ban'' on representation. Commenters noted that a ''lifetime ban'' fails to consider multiple situations, such as overturned convictions. Some commenters suggested that we place the ban only on representatives with prior felony convictions but exempt those with past misdemeanor convictions, because claimants may have family members with misdemeanor convictions who are otherwise well-qualified to be representatives. Commenters opined that there is nothing inherent about a felony conviction that would prohibit a person from providing competent representation. Finally, commenters suggested that this proposed regulation would decrease the pool of representatives, particularly for minorities, because, according to these commenters, some statistics show higher conviction rates in minority populations.

Response: We have broad rulemaking authority to decide who can serve as a non-attorney representative. We believe we can achieve our goal of protecting claimants from potentially fraudulent representatives by limiting the prohibition to individuals convicted of certain offenses that are more severe in nature or involve behavior that reflects poorly on an individual's ability to represent claimants. There is no evidence that this approach will decrease the pool of available, high quality representatives for any particular population. Accordingly, we determined that individuals are not qualified to practice before us if they have a felony conviction (as defined in our rules) or a conviction involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft. These criminal convictions reflect crimes that, by their nature, are more serious based on their categorization as felonies, or involve behavior that reflects poorly on an individual's honesty and moral judgment and, therefore, also reflects poorly on the individual's ability to represent claimants. This disqualification would not apply to convictions that have been overturned or other similar situations, which we have clarified in the final rules. The regulation does not specifically bar individuals with misdemeanor convictions from serving as representatives, unless the misdemeanor involved moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft, which are the misdemeanors that we believe reflect a lack of honesty and moral judgment, characteristics that we consider necessary in representatives. Further, even if individuals are unable to serve as appointed representatives due to these rules, they may still assist their family members with claims in an unofficial capacity.

Comment: Some commenters stated that claimants should be held harmless if they appoint a representative whom they later learn was not qualified (proposed §§ 404.1705(b)(4) and 416.1505(b)(4)).

Response: These rules do not suggest that we would impose any penalty on a claimant who appoints or attempts to appoint an unqualified representative. This regulatory section only identifies whom we will recognize as a representative.

Comment: Some commenters stated that proposed §§ 404.1740(b)(3)(iii) and 416.1540(b)(3)(iii) should clarify that a list of potential dates and times that a representative will be available for a hearing is only required to be accurate at the time it is submitted. The comments explained that many representatives schedule hearings in multiple locations, and availability may change once they have other obligations scheduled.

Response: We understand that schedules change, and we do not expect representatives to hold open their schedules for all of the dates and times that they identify. We did not change the proposed regulatory text.

Comment: Commenters stated that the term ''scheduled'' is too vague (proposed §§ 404.1740(b)(3)(iv) and 416.1540(b)(3)(iv)).

Response: A hearing has been ''scheduled'' when a date and time have been set and we have notified all parties. We clarified the language in these sections.

Comment: Some commenters asserted that restricting a representative's right to withdraw after a hearing is scheduled, except under ''extraordinary circumstances,'' is an overly broad restriction that inhibits a representative's right to withdraw in circumstances where the representative knows that the client no longer has a viable case. Many commenters also argued that forcing representatives to divulge their reasons for withdrawal to justify extraordinary circumstances may violate the attorney-client privilege, if the withdrawal is based on the representative's knowledge that a client may be engaging in fraud. Other commenters stated that if a claimant does not want to attend a hearing but will not release the representative, and the representative cannot withdraw, the administrative law judge (ALJ) will not be able to dismiss the case and will have to hold a hearing, which wastes administrative time and resources. Finally, commenters noted that hearings are sometimes already scheduled by the time representatives are hired. Because representatives cannot view claimants' files until they are appointed, representatives may have to withdraw after reviewing the file even though a hearing has already been scheduled.

Response: The American Bar Association (ABA) Model Rules of Professional Conduct Rule (Model Rule) 1.16 includes requirements for withdrawal similar to this regulation. Some examples of ''extraordinary circumstances'' under which we may allow a withdrawal include (1) serious illness; (2) death or serious illness in the representative's immediate family; or (3) failure to locate a claimant despite active and diligent attempts to contact the claimant.

We are not seeking privileged communications between an attorney and client. If the representative cannot describe why he or she must withdraw without revealing privileged or confidential communications (and if no exceptions to the attorney-client privilege exist, such as the crime-fraud exception), the representative should state this fact, not disclose the privileged or confidential communication, and allow the ALJ to evaluate the request under these circumstances.

Comment: Commenters raised the issue of providing ''prompt and timely communication'' with claimants, stating that this is often difficult with homeless or indigent claimants (proposed §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v)). Some commenters suggested changing this language to ''keep the client reasonably informed of the status of the case'' in accordance with Model Rule 1.4. One commenter requested that we define ''incompetent representation'' and ''reasonable and adequate representation.''

Response: Representatives are responsible for maintaining timely contact with their clients. We expect representatives to have working contact information for all of their clients, but we recognize that it may be difficult to locate homeless or indigent clients in some circumstances. We have changed the language of §§ 404.1740(b)(3)(v) and 416.1540(b)(3)(v) to take into account the difficulty in locating certain claimants despite a representative's best

efforts. We did not provide any definition of ''incompetent representation'' or ''reasonable and adequate representation,'' because these terms do not appear in the rule.

Comment: A number of commenters were concerned with proposed §§ 404.1740(b)(5) and 416.1540(b)(5), which require a representative to disclose certain things in writing when the representative submits a medical or vocational opinion to us. The commenters specifically raised concerns about the disclosure of physician referrals and the disclosure requirement when the medical or vocational opinion was ''drafted, prepared, or issued'' by an employee of the representative or an individual contracting with the representative for services. Commenters also stated that the term ''prepared'' is vague, and it is unclear whether disclosure would be required if a representative discusses the sequential evaluation process with a provider of an opinion or supplies a questionnaire for a provider to complete. Some commenters further maintained that requiring disclosure of physician referrals would violate the attorney-client privilege and that such referrals are irrelevant to the representation of the case. Commenters also requested that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them. Finally, commenters argued that requiring disclosure will ''chill'' referrals for those claimants who need them most.

Response: When a representative submits a medical or vocational opinion to us, he or she has an affirmative duty to disclose to us in writing if the representative or one of the representative's employees or contractors participated in drafting, preparing, or issuing the opinion. For clarity, we consider providing guidance or providing a questionnaire, template or format to fall within the parameters of this rule when the guidance, questionnaire, template or format is used to draft a medical or vocational opinion submitted to us. In response to the concern that the term ''prepared'' is vague, unless the context indicates otherwise, we intend the ordinary meaning of words used in our regulations. We intend the word ''prepared'' here to have its ordinary meaning. Representatives also have an affirmative duty to disclose to us in writing if the representative referred or suggested that the claimant be examined, treated, or assisted by the individual who provided the opinion evidence. However, we are not seeking privileged or confidential communications concerning legal advice between an attorney and client, nor are we requiring disclosure of detailed communications. We are only requiring that representatives disclose the fact that they made a referral or participated in drafting, preparing, or issuing an opinion. *See* Fed. R. of Civ. P. 26(b)(5)(A) (''When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must . . . describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.'') We explain what we mean by the attorney-client and attorney work product privileges more fully in §§ 404.1513(b)(2) and 416.913(b)(2) of our rules. We will interpret the affirmative duty in final §§ 404.1740(b)(5) and 416.1540(b)(5) in light of our interpretation of those privileges in §§ 404.1513(b)(2) and 416.913(b)(2). In response to the request that the regulation clarify that opinions are entitled to the same weight regardless of whether the representative requested them, we have other regulations that govern how we evaluate medical opinion evidence. *See* 20 CFR 404.1520c, 404.1527, 416.920c, and 416.927.

Comment: Some commenters stated that notifying us if a claimant is committing fraud (proposed §§ 404.1740(b)(6) and 416.1540(b)(6)) violates the attorney-client privilege and Model Rule 1.6. Commenters also suggested a more direct adoption of the provisions of Model Rule 3.3, Candor Toward the Tribunal.

Response: We do not believe that our final rule violates either the attorney-client privilege or Model Rule 1.6. Our final rule requires a representative to ''[d]isclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.'' Model Rule 1.6(b)(2)[2] includes an exception to confidentiality ''to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.'' Furthermore, the crime-fraud exception to the attorney-client privilege allows a lawyer to disclose otherwise privileged communications when they are in furtherance of a crime or fraudulent act. When a claimant uses a representative's services in furtherance of the claimant's fraud, there is a reasonable certainty that the fraud will cause substantial injury to the Social Security trust funds. Such fraud also undermines public confidence in our programs. Our proposed and final rules are fully consistent with the exception to confidentiality found in Model Rule 1.6(b)(2). The final rules also address the aim of Model Rule 3.3 to limit false or misleading statements, but within the unique context of the legal and procedural structure of the Social Security programs. Therefore, we are not changing the originally proposed language.

Comment: A few commenters asked us to clarify whether disbarment or disqualification will be an automatic bar to representation, or whether we will address each situation individually (proposed §§ 404.1740(b)(7)–(9) and 416.1540(b)(7)–(9)).

Response: We will address any disclosure made pursuant to §§ 404.1740(b)(7)–(9) and 416.1540(b)(7)–(9) on an individual basis.

Comment: Some commenters stated that proposed § 416.1540(b)(10) is too broad, because representatives often refer Supplemental Security Income (SSI) claimants to special needs trust attorneys, and the proposed language suggests that the representatives would be responsible for the conduct of the trust attorneys. Other commenters recommend that the regulation encompass only those people over whom representatives have supervisory authority.

Response: In response to these comments, we have revised the language in final §§ 404.1740(b)(10) and 416.1540(b)(10) to clarify that the affirmative duty applies ''when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.'' Further, because this requirement is an affirmative duty, we moved language from proposed §§ 404.1740(c)(14) and 416.1540(c)(14) to §§ 404.1740(b)(10) and 416.1540(b)(10), which outlines the affirmative duty to take remedial action when: (i) The representative's employees, assistants, partners, contractors, or other individuals' conduct violates these rules of conduct

[2] Rule 1.6, Confidentiality of information. (2013). In American Bar Association, Center for Professional Responsibility, *Model Rules of Professional Conduct.* Retrieved from *https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html.*

and standards of responsibility, and (ii) the representative has reason to believe a violation of these rules of conduct and standards of responsibility will occur. We revised the language of final §§ 404.1740(c)(14) and 415.1540(c)(14) to prohibit representatives from failing to oversee other individuals working on the claims on which the representative is appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

Comment: Some commenters objected to proposed §§ 404.1740(c)(1) and 416.1540(c)(1), which prohibit ''misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.'' Commenters asked whether it would be misleading if a claimant refers to a non-attorney representative as an attorney, and the representative does not correct them.

Response: Not correcting a known misconception about the representative's status as a non-attorney is ''misleading a claimant,'' as contemplated under this prohibition.

Comment: A few commenters objected to the language of proposed § 404.1740(c)(7)(ii)(B), which prohibits ''[p]roviding misleading information or misrepresenting facts . . . where the representative has or should have reason to believe the information was misleading and the facts would constitute a misrepresentation.'' These commenters stated that many claimants are mentally ill, and it is difficult to ascertain whether a client is providing accurate facts. The commenters also objected to the term ''should,'' stating that it is overly vague. A few commenters believe the standard ''knowingly'' should be added. Commenters also stated that this regulation conflicted with our rule on the submission of evidence, which requires representatives to submit all available evidence.

Response: Based on the comments, we have changed the ''has or should have reason to believe'' language of the proposed rule to ''knows or should have known'' in the final rule. Whether or not a claimant is mentally ill, a representative will violate the standard in the final rule if he or she presents information that he or she knows to be false or circumstances demonstrate that the representative should have known it to be false. This rule does not conflict with our rule requiring representatives to submit all evidence, because a false document is not evidence as contemplated under §§ 404.1513 and 416.913. Further, ''should'' is not an overly broad standard and is a commonly used term in Federal laws and regulations. *See, e.g.,* 42 U.S.C. 1320a–8a(a)(1).

Comment: A few commenters stated that proposed §§ 404.1740(c)(7)(ii)(C) and 416.1540(c)(7)(ii)(C) should clarify that representatives may contact SSA staff regarding matters such as case status, requests for critical case flags, Congressional inquiries, or when SSA staff ask the representative to contact them.

Response: We did not make any changes in response to these comments. The proposed and final rules specifically states that representatives should not communicate with agency staff ''outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).'' Matters such as case status inquiries, requests for critical case flags, and Congressional inquiries are not outside the normal course of business, nor would they be attempts to inappropriately influence the processing or outcome of a claim.

Comment: Some commenters asked whether a representative would be guilty of misleading an ALJ if an ALJ finds that a claimant's statements are ''not fully credible.'' These commenters also recommend adding ''knowingly'' to proposed §§ 404.1740(c)(3) and 416.1540(c)(3). Other commenters stated that requiring representatives to disclose matters of which they do not have actual knowledge would ''chill'' advocacy.

Response: On March 16, 2016, we published Social Security Ruling (SSR) 16–3p, ''Titles II and XVI: Evaluation of Symptoms in Disability Claims'' in the **Federal Register**.[3] In this SSR, we eliminated the use of the term ''credibility'' from our sub-regulatory policy, because our regulations do not use this term. In doing so, we clarified that subjective symptom evaluation is not an examination of an individual's character. Instead, we will more closely follow our regulatory language regarding symptom evaluation. With respect to the commenters' concerns, the regulations include a number of factors that must be considered when evaluating symptoms, but a representative will not be found to be misleading an ALJ based solely on the results of this evaluation. Acknowledging the concern about the standard we will use in evaluating this type of situation, we are changing the ''has or should have reason to believe'' language in the proposed rule to ''knows or should have known'' in the final rule. This provision addresses only situations where the representative knows or should have known that specific statements, evidence, assertions, or representations are false or misleading.

Comment: Commenters objected to the 14-day limit to respond to charges and proposed that the 30-day limit in the current rules should be maintained (proposed §§ 404.1750 and 416.1550).

Response: We did not adopt this suggestion, because we believe that 14 days allows for a more timely resolution of misconduct matters. The 14-day timeframe provides the representative with sufficient time to respond to charges, which typically consists only of affirming or denying various factual allegations. However, in response to the commenters' concerns that the proposed rule did not give representatives adequate time to respond to the charges, we added the term ''business'' to clarify that the time limit is 14 business days.

Comment: One commenter suggested that representatives be suspended from representing clients until the sanction process is complete.

Response: The Social Security Act requires that we give a representative notice and opportunity for a hearing before we suspend or disqualify him or her from practicing before us. We have long allowed representatives to continue to practice before us until there is a final decision on the case. We will continue to impose sanctions only after the administrative sanctions process is completed.

Comment: Some commenters suggested that a representative should not have to show good cause for objecting to the manner of hearing (proposed §§ 404.1765(d) and 416.1565(d)). One commenter stated that a hearing should always be in person unless a party can demonstrate that there is no genuine dispute as to any material fact.

Response: The hearing officer is in the best position to decide how to conduct a particular hearing in the most effective and efficient manner. A ''good cause'' standard for objecting to the manner of the hearing ensures that any objection to this issue is well-founded.

Comment: A few commenters stated that 14 days is insufficient time to request review of a hearing officer's decision (proposed §§ 404.1775 and 416.1575). The commenters requested that the rule clarify whether it refers to business or calendar days.

[3] 81 FR 14166 (March 16, 2016). *https://www.federalregister.gov/documents/2016/03/16/2016-05916/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims.* Corrected at 81 FR 15776 (March 24, 2016). *https://www.federalregister.gov/documents/2016/03/24/2016-06598/social-security-ruling-16-3p-titles-ii-and-xvi-evaluation-of-symptoms-in-disability-claims.*

Response: In response to these and other related comments, we adopted this suggestion and added the word ''business'' to clarify that the 14-day period means 14 business days.

Comment: Some commenters stated that proposed §§ 404.1785 and 416.1585 shift the burden from the Appeals Council to representatives to obtain evidence. They stated that by changing the language from the Appeals Council ''shall require that the evidence be obtained'' to ''the Appeals Council will allow the party with the information to submit the additional evidence,'' the regulation relieves the Appeals Council of the responsibility for obtaining evidence and allows the Appeals Council to ignore evidence submitted by another party.

Response: We changed the language in §§ 404.1785 and 416.1585 for clarity. In the adversarial proceedings to sanction representatives, the obligation to provide evidence to the Appeals Council is, and has always been, on the party with the information. Accordingly, we are not changing the language proposed in the NPRM.

Comment: Some commenters asked that we clarify which decisions we will publish and when we will publish them (proposed §§ 404.1790(f) and 416.1590(f)). They also inquired as to whether the public will have access to the published decisions, and they expressed concern that the decisions might contain personally identifiable information.

Response: On June 16, 2017, the Administrative Conference of the United States (ACUS) adopted Recommendation 2017–1, ''Adjudication Materials on Agency Websites.'' [4] ACUS recommended that ''[a]gencies should consider providing access on their websites to decisions and supporting materials (*e.g.,* pleadings, motions, briefs) issued and filed in adjudicative proceedings.'' ACUS also recommended that ''[a]gencies that adjudicate large volumes of cases that do not vary considerably in terms of their factual contexts or the legal analyses employed in their dispositions should consider disclosing on their websites a representative sampling of actual cases and associated adjudication materials.'' We will work with ACUS with respect to this recommendation, and we will provide details in sub-regulatory guidance of how we will publish decisions after these final rules become effective. In response to the commenters' concerns about privacy, we take concerns regarding personally identifiable information seriously, and the final rule makes clear that we will remove or redact any personally identifiable information from the decisions.

Comment: One commenter stated that proposed § 404.1790 should use a ''preponderance of the evidence'' standard rather than the ''substantial evidence standard.''

Response: The Appeals Council is an appellate body that generally reviews decisions using the substantial evidence standard.[5] Therefore, we are not changing this language.

Comment: Some commenters stated that the word ''may'' should be changed to ''will'' in proposed §§ 404.1790(f) and 416.1590(f), which state, ''Prior to making a decision public, we may remove or redact information from the decision.''

Response: We adopted this comment and changed ''may'' to ''will.'' We will redact any personally identifiable information from the decisions.

Comment: One commenter stated that the 3-year ban on reinstatement after suspension is too harsh.

Response: The 3-year prohibition is actually a 3-year wait to reapply for reinstatement and we believe it is appropriate, because our experience shows that when the Appeals Council denies a request for reinstatement, the representative typically has not taken appropriate action to remedy the violation or does not understand its severity. We are implementing this change to ensure more thoroughly supported requests for reinstatement.

Regulatory Procedures

Executive Order 12866 as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563 and are subject to OMB review.

Executive Order 13771

This rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature and results in no more than de minimis costs.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they affect individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain information collection burdens in §§ 404.1740(b)(5) through (9) and 416.1540(b)(5) through (b)(9) that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). As the PRA requires, we submitted a clearance request to OMB for approval of these sections. We will publish the OMB number and expiration date upon approval.

Further, these final rules contain information collection activities at 20 CFR 404.1750(c) and (e)(2), 404.1765(g)(1), 404.1775(b), 404.1799(d)(2), 416.1550(c) and (e)(2), 416.1565(g)(1), 416.1575(b), and 416.1599(d)(2). However, 44 U.S.C. 3518(c)(1)(B)(ii) exempts these activities from the OMB clearance requirements under the Paperwork Reduction Act of 1995.

We published an NPRM on August 16, 2016 at 81 FR 54520. In that NPRM, we solicited comments under the PRA 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. We received no public comments relating to any of these issues. We will not collect the information referenced in these burden sections until we receive OMB approval.

(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).

Nancy A. Berryhill,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we amend 20 CFR chapter III,

[4] Administrative Conference of the United States, Recommendation 2017–1, *Adjudication Materials on Agency Websites,* 82 FR 31039 (July 5, 2017).

[5] 20 CFR 404.970(a)(3), 416.1470(a)(3).

parts 404 and part 416, as set forth below:

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

Subpart R—[Amended]

■ 1. The authority citation for subpart R of part 404 continues to read as follows:

Authority: Secs. 205(a), 206, 702(a)(5), and 1127 of the Social Security Act (42 U.S.C. 405(a), 406, 902(a)(5), and 1320a–6).

■ 2. Revise § 404.1705(b) to read as follows:

§ 404.1705 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c)) or any crime involving moral turpitude, dishonesty, false statements, misrepresentation, deceit, or theft.

* * * * *

■ 3. Amend § 404.1740 as follows:

■ a. Revise paragraphs (b)(2)(vii) and (b)(3);

■ b. Add paragraphs (b)(5) through (10);

■ c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

■ d. Remove paragraph (c)(7)(iii);

■ e. Revise paragraphs (c)(8) through (13); and

■ f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 404.1740 Rules of conduct and standards of responsibility for representatives.

* * * * *

(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 404.1560 through 404.1569a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 404.936) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.,* because the claimant is homeless) and the representative's efforts to keep that claimant informed.

* * * * *

(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

This includes a duty to take remedial action when:

(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions, or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 404.911(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or by offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title II of the Act, or to exercise the authority of a representative described in § 404.1710.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

■ 4. Amend § 404.1745 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 404.1745 Violations of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 404.1770(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 404.1770(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

■ 5. Amend § 404.1750 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 404.1750 Notice of charges against a representative.

* * * * *

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause, in accordance with § 404.911.

(e) * * *

(2) File the answer with the Social Security Administration, at the address specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 404.1765(g).

■ 6. Revise § 404.1755 to read as follows:

§ 404.1755 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 404.1745(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the

provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 404.1770 and 404.1790. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

■ 7. Amend § 404.1765 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) to read as follows:

§ 404.1765 Hearing on charges.

* * * * *

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer will mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 404.911.

* * * * *

(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

* * * * *

(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 404.1770.

* * * * *

(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

* * * * *

■ 8. Revise § 404.1775(b) to read as follows:

§ 404.1775 Requesting review of the hearing officer's decision.

* * * * *

(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

■ 9. Revise § 404.1780(a) to read as follows:

§ 404.1780 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

* * * * *

■ 10. Revise § 404.1785 to read as follows:

§ 404.1785 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

■ 11. Amend § 404.1790 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 404.1790 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return the case to the hearing officer for further proceedings.

* * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or

redact personally identifiable information from the decision.

■ 12. Amend § 404.1799 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 404.1799 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 404.1776.

* * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 404.1745(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

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

Subpart O—[Amended]

■ 13. The authority citation for subpart O of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1127, and 1631(d) of the Social Security Act (42 U.S.C. 902(a)(5), 1320a–6, and 1383(d)).

■ 14. Revise § 416.1505(b) to read as follows:

§ 416.1505 Who may be your representative.

* * * * *

(b) You may appoint any person who is not an attorney to be your representative in dealings with us if the person—

(1) Is capable of giving valuable help to you in connection with your claim;

(2) Is not disqualified or suspended from acting as a representative in dealings with us;

(3) Is not prohibited by any law from acting as a representative; and

(4) Is generally known to have a good character and reputation. Persons lacking good character and reputation, include, but are not limited to, persons who have a final conviction of a felony (as defined by § 404.1506(c) of this chapter), or any crime involving moral turpitude, dishonesty, false statement, misrepresentations, deceit, or theft.

* * * * *

■ 15. Amend § 416.1540 follows:

■ a. Revise paragraphs (b)(2)(vii) and (b)(3);

■ b. Add paragraphs (b)(5) through (10);

■ c. Revise paragraphs (c)(1) through (6) and (c)(7)(ii);

■ d. Remove paragraph (c)(7)(iii);

■ e. Revise paragraphs (c)(8) through (13); and

■ f. Add paragraph (c)(14).

The revisions and additions read as follows:

§ 416.1540 Rules of conduct and standards of responsibility for representatives.

* * * * *

(b) * * *

(2) * * *

(vii) Any other factors showing how the claimant's impairment(s) affects his or her ability to work. In §§ 416.960 through 416.969a, we discuss in more detail the evidence we need when we consider vocational factors.

(3) Conduct his or her dealings in a manner that furthers the efficient, fair, and orderly conduct of the administrative decision-making process, including duties to:

(i) Provide competent representation to a claimant. Competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A representative must know the significant issue(s) in a claim, have reasonable and adequate familiarity with the evidence in the case, and have a working knowledge of the applicable provisions of the Social Security Act, as amended, the regulations, the Social Security Rulings, and any other applicable provisions of law.

(ii) Act with reasonable diligence and promptness in representing a claimant. This includes providing prompt and responsive answers to our requests for information pertinent to processing of the claim.

(iii) When requested, provide us, in a manner we specify, potential dates and times that the representative will be available for a hearing. We will inform the representative how many potential dates and times we require to coordinate the hearing schedule.

(iv) Only withdraw representation at a time and in a manner that does not disrupt the processing or adjudication of a claim and that provides the claimant adequate time to find new representation, if desired. A representative should not withdraw after we set the time and place for the hearing (see § 416.1436) unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as we determine on a case-by-case basis.

(v) Maintain prompt and timely communication with the claimant, which includes, but is not limited to, reasonably informing the claimant of all matters concerning the representation, consulting with the claimant on an ongoing basis during the entire representational period, and promptly responding to a claimant's reasonable requests for information. When we evaluate whether a representative has maintained prompt and timely communication with the claimant, we will consider the difficulty the representative has in locating a particular claimant (*e.g.,* because the claimant is homeless) and the representative's efforts to keep that claimant informed.

* * * * *

(5) Disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:

(i) The representative's employee or any individual contracting with the representative drafted, prepared, or issued the medical or vocational opinion; or

(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of, the individual providing opinion evidence.

(6) Disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us.

(7) Disclose to us whether the representative is or has been disbarred or suspended from any bar or court to which he or she was previously admitted to practice, including instances in which a bar or court took administrative action to disbar or suspend the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disbarment or suspension occurs after the appointment of the representative, the representative will immediately disclose the disbarment or suspension to us.

(8) Disclose to us whether the representative is or has been disqualified from participating in or appearing before any Federal program or agency, including instances in which a Federal program or agency took administrative action to disqualify the representative in lieu of disciplinary proceedings (*e.g.* acceptance of voluntary resignation pending disciplinary action). If the disqualification occurs after the appointment of the representative, the representative will immediately disclose the disqualification to us.

(9) Disclose to us whether the representative has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary. If the removal or suspension occurs after the appointment of the representative, the representative will immediately disclose the removal or suspension to us.

(10) Ensure that all of the representative's employees, assistants, partners, contractors, or any person assisting the representative on claims for which the representative has been appointed, comply with these rules of conduct and standards of responsibility for representatives, when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work. This includes a duty to take remedial action when:

(i) The representative's employees, assistants, partners, contractors or other individuals' conduct violates these rules of conduct and standards of responsibility; and

(ii) The representative has reason to believe a violation of these rules of conduct and standards of responsibility occurred or will occur.

(c) * * *

(1) In any manner or by any means threaten, coerce, intimidate, deceive or knowingly mislead a claimant, or prospective claimant or beneficiary, regarding benefits or other rights under the Act. This prohibition includes misleading a claimant, or prospective claimant or beneficiary, about the representative's services and qualifications.

(2) Knowingly charge, collect or retain, or make any arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representational services in violation of applicable law or regulation. This prohibition includes soliciting any gift or any other item of value, other than what is authorized by law.

(3) Make or present, or participate in the making or presentation of, false or misleading oral or written statements, evidence, assertions, or representations about a material fact or law concerning a matter within our jurisdiction, in matters where the representative knows or should have known that those statements, evidence, assertions or representations are false or misleading.

(4) Through his or her own actions or omissions, unreasonably delay or cause to be delayed, without good cause (see § 416.1411(b)), the processing of a claim at any stage of the administrative decision-making process.

(5) Divulge, without the claimant's consent, except as may be authorized by regulations prescribed by us or as otherwise provided by Federal law, any information we furnish or disclose about a claim or prospective claim.

(6) Attempt to influence, directly or indirectly, the outcome of a decision, determination, or other administrative action by any means prohibited by law, or offering or granting a loan, gift, entertainment, or anything of value to a presiding official, agency employee, or witness who is or may reasonably be expected to be involved in the administrative decision-making process, except as reimbursement for legitimately incurred expenses or lawful compensation for the services of an expert witness retained on a non-contingency basis to provide evidence.

(7) * * *

(ii) Behavior that has the effect of improperly disrupting proceedings or obstructing the adjudicative process, including but not limited to:

(A) Directing threatening or intimidating language, gestures, or actions at a presiding official, witness, contractor, or agency employee;

(B) Providing misleading information or misrepresenting facts that affect how we process a claim, including, but not limited to, information relating to the claimant's work activity or the claimant's place of residence or mailing address in matters where the representative knows or should have known that the information was misleading and the facts would constitute a misrepresentation; and

(C) Communicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s).

(8) Violate any section of the Act for which a criminal or civil monetary penalty is prescribed.

(9) Refuse to comply with any of our rules or regulations.

(10) Suggest, assist, or direct another person to violate our rules or regulations.

(11) Advise any claimant or beneficiary not to comply with any of our rules or regulations.

(12) Knowingly assist a person whom we suspended or disqualified to provide representational services in a proceeding under title XVI of the Act, or to exercise the authority of a representative described in § 416.1510.

(13) Fail to comply with our sanction(s) decision.

(14) Fail to oversee the representative's employees, assistants, partners, contractors, or any other person assisting the representative on claims for which the representative has been appointed when the representative has managerial or supervisory authority over these individuals or otherwise has responsibility to oversee their work.

■ 16. Amend § 416.1545 by revising paragraphs (d) and (e) and adding paragraph (f) to read as follows:

§ 416.1545 Violations of our requirements, rules, or standards.

* * * * *

(d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 416.1570(a));

(e) Has been, by reason of misconduct, disqualified from participating in or appearing before any Federal program or agency (see § 416.1570(a)); or

(f) Who, as a non-attorney, has been removed from practice or suspended by a professional licensing authority for reasons that reflect on the person's character, integrity, judgment, reliability, or fitness to serve as a fiduciary.

■ 17. Amend § 416.1550 by revising paragraphs (c), (d), (e)(2), and (f) to read as follows:

§ 416.1550 Notice of charges against a representative.

* * * * *

(c) We will advise the representative to file an answer, within 14 business days from the date of the notice, or from the date the notice was delivered personally, stating why he or she should not be suspended or disqualified from acting as a representative in dealings with us.

(d) The General Counsel or other delegated official may extend the 14-day period specified in paragraph (c) of this section for good cause in accordance with § 416.1411.

(e) * * *

(2) File the answer with the Social Security Administration, at the address

specified on the notice, within the 14-day time period specified in paragraph (c) of this section.

(f) If the representative does not file an answer within the 14-day time period specified in paragraph (c) of this section (or the period extended in accordance with paragraph (d) of this section), he or she does not have the right to present evidence, except as may be provided in § 416.1565(g).

■ 18. Revise § 416.1555 to read as follows:

§ 416.1555 Withdrawing charges against a representative.

The General Counsel or other delegated official may withdraw charges against a representative. We will withdraw charges if the representative files an answer, or we obtain evidence, that satisfies us that we should not suspend or disqualify the representative from acting as a representative. When we consider withdrawing charges brought under § 416.1545(d) through (f) based on the representative's assertion that, before or after our filing of charges, the representative has been reinstated to practice by the court, bar, or Federal program or Federal agency that suspended, disbarred, or disqualified the representative, the General Counsel or other delegated official will determine whether such reinstatement occurred, whether it remains in effect, and whether he or she is reasonably satisfied that the representative will in the future act in accordance with the provisions of section 206(a) of the Act and our rules and regulations. If the representative proves that reinstatement occurred and remains in effect and the General Counsel or other delegated official is so satisfied, the General Counsel or other delegated official will withdraw those charges. The action of the General Counsel or other delegated official regarding withdrawal of charges is solely that of the General Counsel or other delegated official and is not reviewable, or subject to consideration in decisions made under §§ 416.1570 and 416.1590. If we withdraw the charges, we will notify the representative by mail at the representative's last known address.

■ 19. Amend § 416.1565 by revising paragraphs (b)(1), (c), (d)(1) and (3), and (g)(1) and (3) as follows:

§ 416.1565 Hearing on charges.

* * * * *

(b) *Hearing officer.* (1) The Deputy Commissioner for the Office of Hearings Operations or other delegated official will assign an administrative law judge, designated to act as a hearing officer, to hold a hearing on the charges.

* * * * *

(c) *Time and place of hearing.* The hearing officer shall mail the parties a written notice of the hearing at their last known addresses, at least 14 calendar days before the date set for the hearing. The notice will inform the parties whether the appearance of the parties or any witnesses will be in person, by video teleconferencing, or by telephone. The notice will also include requirements and instructions for filing motions, requesting witnesses, and entering exhibits.

(d) *Change of time and place for hearing.* (1) The hearing officer may change the time and place for the hearing, either on his or her own initiative, or at the request of the representative or the other party to the hearing. The hearing officer will not consider objections to the manner of appearance of parties or witnesses, unless the party shows good cause not to appear in the prescribed manner. To determine whether good cause exists for extending the deadline, we use the standards explained in § 416.1411.

* * * * *

(3) Subject to the limitations in paragraph (g)(2) of this section, the hearing officer may reopen the hearing for the receipt of additional evidence at any time before mailing notice of the decision.

* * * * *

(g) *Conduct of the hearing.* (1) The representative or the other party may file a motion for decision on the basis of the record prior to the hearing. The hearing officer will give the representative and the other party a reasonable amount of time to submit any evidence and to file briefs or other written statements as to fact and law prior to deciding the motion. If the hearing officer concludes that there is no genuine dispute as to any material fact and the movant is entitled to a decision as a matter of law, the hearing officer may grant the motion and issue a decision in accordance with the provisions of § 416.1570.

* * * * *

(3) The hearing officer will make the hearing open to the representative, to the other party, and to any persons the hearing officer or the parties consider necessary or proper. The hearing officer will inquire fully into the matters being considered, hear the testimony of witnesses, and accept any documents that are material.

* * * * *

■ 20. Revise § 416.1575(b) to read as follows:

§ 416.1575 Requesting review of the hearing officer's decision.

* * * * *

(b) *Time and place of filing request for review.* The party requesting review will file the request for review in writing with the Appeals Council within 14 business days from the date the hearing officer mailed the notice. The party requesting review will certify that a copy of the request for review and of any documents that are submitted have been mailed to the opposing party.

■ 21. Revise § 416.1580(a) to read as follows:

§ 416.1580 Appeals Council's review of hearing officer's decision.

(a) Upon request, the Appeals Council will give the parties a reasonable time to file briefs or other written statements as to fact and law, and to request to appear before the Appeals Council to present oral argument. When oral argument is requested within the time designated by the Appeals Council, the Appeals Council will grant the request for oral argument and determine whether the parties will appear at the oral argument in person, by video teleconferencing, or by telephone. If oral argument is not requested within the time designated by the Appeals Council, the Appeals Council may deny the request.

* * * * *

■ 22. Revise § 416.1585 to read as follows:

§ 416.1585 Evidence permitted on review.

(a) *General.* Generally, the Appeals Council will not consider evidence in addition to that introduced at the hearing. However, if the Appeals Council finds the evidence offered is material to an issue it is considering, it may consider that evidence, as described in paragraph (b) of this section.

(b) *Individual charged filed an answer.* (1) When the Appeals Council finds that additional evidence material to the charges is available, and the individual charged filed an answer to the charges, the Appeals Council will allow the party with the information to submit the additional evidence.

(2) Before the Appeals Council admits additional evidence into the record, it will mail a notice to the parties, informing them that evidence about certain issues was submitted. The Appeals Council will give each party a reasonable opportunity to comment on the evidence and to present other evidence that is material to an issue it is considering.

(3) The Appeals Council will determine whether the additional

evidence warrants a new review by a hearing officer or whether the Appeals Council will consider the additional evidence as part of its review of the case.

(c) *Individual charged did not file an answer.* If the representative did not file an answer to the charges, the representative may not introduce evidence that was not considered at the hearing.

■ 23. Amend § 416.1590 by revising paragraph (a) and adding paragraph (f) to read as follows:

§ 416.1590 Appeals Council's decision.

(a) The Appeals Council will base its decision upon the evidence in the hearing record and any other evidence it may permit on review. The Appeals Council will affirm the hearing officer's decision if the action, findings, and conclusions are supported by substantial evidence. If the hearing officer's decision is not supported by substantial evidence, the Appeals Council will either:

(1) Reverse or modify the hearing officer's decision; or

(2) Return a case to the hearing officer for further proceedings.

* * * * *

(f) The Appeals Council may designate and publish certain final decisions as precedent for other actions brought under its representative conduct provisions. Prior to making a decision public, we will remove or redact personally identifiable information from the decision.

■ 24. Amend § 416.1599 by revising paragraphs (a), (d)(2), and (f) to read as follows:

§ 416.1599 Reinstatement after suspension or disqualification—period of suspension not expired.

(a) After more than one year has passed, a person who has been suspended or disqualified may ask the Appeals Council for permission to serve as a representative again. The Appeals Council will assign and process a request for reinstatement using the same general procedures described in § 416.1576.

* * * * *

(d) * * *

(2) If a person was disqualified because he or she had been disbarred, suspended, or removed from practice for the reasons described in § 416.1545(d) through (f), the Appeals Council will grant a request for reinstatement as a representative only if the criterion in paragraph (d)(1) of this section is met and the disqualified person shows that he or she has been admitted (or readmitted) to and is in good standing with the court, bar, Federal program or agency, or other governmental or professional licensing authority from which he or she had been disbarred, suspended, or removed from practice.

* * * * *

(f) If the Appeals Council decides not to grant the request, it will not consider another request before the end of 3 years from the date of the notice of the previous denial.

[FR Doc. 2018–13989 Filed 6–29–18; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2018–0626]

RIN 1625–AA08

Special Local Regulation; Wyandotte Invites, Detroit River, Trenton Channel, Wyandotte, MI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for certain navigable waters of the Detroit River, Trenton Channel, Wyandotte, MI. This action is necessary and is intended to ensure safety of life on navigable waters immediately prior to, during, and immediately after the Wyandotte Invites event.

DATES: This temporary final rule is effective from 8 a.m. until 12:30 p.m. on July 15, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2018–0626 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or email Tracy Girard, Prevention Department, Sector Detroit, Coast Guard; telephone 313–568–9564, or email *Tracy.M.Girard@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking
§ Section
COTP Captain of the Port
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The Coast Guard just recently received the final details of this rowing event, Wyandotte Invites, which does not provide sufficient time to publish an NPRM prior to the event. Thus, delaying the effective date of this rule to wait for a comment period to run would be contrary to public interest because it would inhibit the Coast Guard's ability to protect participants, mariners and vessels from the hazards associated with this event. It is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would inhibit the Coast Guard's ability to protect participants, mariners and vessels from the hazards associated with this event.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. The Captain of the Port Detroit (COTP) has determined that the likely combination of recreation vessels, commercial vessels, and an unknown number of spectators in close proximity to a youth rowing regatta along the water pose extra and unusual hazards to public safety and property. Therefore, the COTP is establishing a special local regulation around the event location to help minimize risks to safety of life and property during this event.

IV. Discussion of the Rule

This rule establishes a temporary special local regulation from 8 a.m. until 12:30 p.m. on July 15, 2018. In light of the aforementioned hazards, the COTP has determined that a special local regulation is necessary to protect

List of Subjects in 20 CFR Part 401

Privacy and disclosure of official records and information.

Nancy A. Berryhill,

Acting Commissioner of Social Security.

For the reasons stated in the preamble, we propose to amend part 401 of title 20 of the Code of Federal Regulations as set forth below:

PART 401—PRIVACY AND DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

■ 1. The authority citation for part 401 continues to read as follows:

Authority: Secs. 205, 702(a)(5), 1106, and 1141 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306, and 1320b-11); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 26 U.S.C. 6103; 30 U.S.C. 923.

■ 2. Amend § 401.85 by revising paragraph (b)(2)(iii)(A) and removing and reserving paragraph (b)(2)(iii) (B):

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(A) Security and Suitability Files.

* * * * *

[FR Doc. 2018–24851 Filed 11–14–18; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. 2017–0015]

RIN 0960–AI09

Setting the Manner for the Appearance of Parties and Witnesses at a Hearing

AGENCY: Social Security Administration.

ACTION: Notice of proposed rule making.

SUMMARY: We propose to revise our rules to explain that the agency retains the right to determine how parties and witnesses will appear at a hearing before an administrative law judge (ALJ) at the hearing level of our administrative review process, and we will set the time and place for the hearing accordingly. We also propose to revise our rules to explain the State agency or the Associate Commissioner for Disability Determinations, or his or her delegate, will determine how parties and witnesses will appear, and will set the time and place for a hearing, before a disability hearing officer (DHO) at the reconsideration level in continuing disability review (CDR) cases. At both levels, we propose to schedule the parties to a hearing to appear by video teleconference (VTC), in person, or, in limited circumstances, by telephone. We propose that parties to a hearing will not have the option to opt out of appearing by the manner of hearing we choose. We also propose rules that explain how we will determine the manner of a party's or a witness's appearance. We expect these proposed changes would improve our service to the public by increasing the efficiency of our hearings processes and reducing the amount of time it takes us to schedule and hold hearings.

DATES: To ensure that your comments are considered, we must receive them no later than January 14, 2019.

ADDRESSES: You may submit comments by any one of three methods—internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA–2017–0015 so that we may associate your comments with the correct rule.

CAUTION: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. *Internet:* We strongly recommend that you submit your comments via the internet. Please visit the Federal eRulemaking portal at *http://www.regulations.gov.* Use the *Search* function to find docket number SSA–2017–0015. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. *Fax:* Fax comments to (410) 966–2830.

3. *Mail:* Mail your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at *http://www.regulations.gov* or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Susan Swansiger, Office of Hearings Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–8500. 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 site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION:

Background

When we determine whether you are disabled under the old-age, survivors, and disability insurance program under title II of the Social Security Act (Act) or the Supplemental Security Income (SSI) program under title XVI of the Act, we follow an administrative review process that usually consists of the following steps: [1] An initial determination, a reconsideration,[2] a hearing before an ALJ, and Appeals Council review. If you are dissatisfied with the initial determination of your disability claim(s), you may request reconsideration. In most cases, the reconsideration step of the administrative review process, which is technically the first level of appeal in the administrative review process for Social Security disability claims in most States,[3] consists of a case review by Disability Determination Services (DDS) personnel who were not involved in the initial determination. If you are dissatisfied with your reconsidered determination, you may request a hearing, which is held by an ALJ.[4] If you are dissatisfied with an ALJ's decision, you may ask the Appeals Council to review that decision. After you have completed these steps of the administrative review process, you may request judicial review of our final decision by filing a civil action in a Federal district court.

Once you are receiving benefits under title II or XVI of the Act, we are required to conduct CDRs periodically to determine whether your disability continues.[5] When we make a medical cessation determination that you are no longer disabled because your medical impairment(s) has ceased, did not exist,

[1] 20 CFR 404.902, 416.1402; 20 CFR 404.909, 416.1409; 20 CFR 404.933, 416.1433; 20 CFR 404.968, 416.1468.

[2] In certain States, which we refer to as ''prototype States,'' we modified the disability determination process by eliminating the reconsideration step of the administrative review process. If an individual in a prototype State is dissatisfied with the initial determination on his or her disability claim(s), he or she may request a hearing before an ALJ. 20 CFR 404.906(b)(4), 416.1406(b)(4). Beginning January of 2019, this prototype process is being phased out, and the reconsideration step reinstated in ten states. Reconsideration reinstatement will be complete by mid Fiscal Year 2020.

[3] The exception would be the prototype States.

[4] 20 CFR 404.930, 416.1430.

[5] Section 221(i) of the Act, 42 U.S.C. 421(i) and 1614(a)(4) of the Act, 42 U.S.C. 1382c.

or is no longer disabling, you may appeal that determination. The steps in the CDR administrative review process parallel those in the initial disability determination administrative appeals cycle in that both contain some type of: An initial determination, a reconsideration, a hearing before an ALJ, and Appeals Council review. In the CDR administrative review process, however, an evidentiary hearing before a DHO is held at the reconsideration step for a CDR. Specifically, when we make an initial CDR determination and you want to contest our determination that you are no longer disabled, you may request an evidentiary hearing before a DHO [6] on reconsideration; if you are dissatisfied with your reconsidered determination, you may request a hearing before an ALJ; and if you are dissatisfied with the ALJ's decision, you may ask the Appeals Council to review that decision. When you have completed the administrative review process, you may request judicial review of our final decision by filing a civil action in a Federal district court.

Since Congress established Social Security in 1935, the size and scope of the programs we administer have grown tremendously. During the 1940s and 1950s, Congress extended coverage under title II to nearly the entire American workforce. In the 1950s, Congress revised the Act and created the disability insurance program, and in the 1970s, Congress created the Supplemental Security Income (SSI) program, both of which greatly expanded the size and scope of our programs. The aging of the baby boomers and the changing demographics of our nation have also significantly affected the size and scope of our workloads. The Supreme Court has aptly observed that we are ''probably the largest adjudicative agency in the western world,'' where ''[t]he need for efficiency is self-evident.'' [7]

When we began our hearings process in 1940, we handled a comparatively small number of claims involving retirement and survivors insurance, and received only about 16,000 hearing requests in our first decade.[8] At present, we continue to face an unprecedented service challenge with nearly 860,000 individuals waiting an average of 19 months for a hearing before an ALJ.[9] We currently process several hundred thousand hearing requests before an ALJ each year through an extensive network of 164 hearing offices, 5 National Hearing Centers (NHCs) and several hundred remote sites. Due to factors inherent to managing a nationwide program, including differences in the number of hearing requests received and the availability of administrative resources in a hearing office service area, we have a significant disparity in wait times for a hearing across the nation. For example, in fiscal year (FY) 2018, the average wait time for a hearing before an ALJ was 595 days. However, 76% of our hearing offices had average wait times between 500 and 700 days, 10% of our offices had average wait times over 700 days, and 14% of our offices had wait times below 500 days.[10]

We face the same workload challenges with regard to the reconsideration disability hearings before a DHO for CDRs. According to our internal data sources, from 2007 to 2018 the number of requests for a disability hearing at the reconsideration level increased from 19,898 to 82,604.[11] With this tremendous increase in the number of pending disability hearing requests, the length of time it takes us to conduct a disability hearing has increased as well. Our internal data shows that, nationally, the average processing time from the date we receive a request for disability hearing before a DHO to the date the DHO issues a reconsidered determination was 194 days.[12] Additionally, nearly 10.5% of disability hearings at the reconsideration level have been pending for 240 to 359 days, and 14.9% have been pending for 360 or more days.[13] Increased processing times for disability hearings at the reconsideration level correlate to increased overpayments due to the individual's right to continue to receive disability benefits under title II, or disability or blindness payments under title XVI, while their claims are pending at the reconsideration or ALJ hearing level.[14]

Our Office of the Inspector General (OIG) evaluated the financial impact of individuals continuing to receive benefit payments during CDR appeals. In 2006, OIG found that individuals waited an average of 648 days (in title II cases) and 694 days (in title XVI cases) from the time they requested reconsideration of an initial medical cessation determination and the time they received an ALJ decision.[15] By May 2017, the average processing time for medical cessation appeals had increased to 766 days (title II) and 831 days (title XVI) for sampled recipients.[16] To reduce or avoid overpayments resulting from continued benefit payments, OIG recommended that we enhance our business process to allow more timely determinations and decisions on medical cessation appeals.[17]

Efficiently managing these workloads while preserving the accuracy and fundamental fairness of our hearings has required, and continues to require, creative thinking and strategic planning. Since the mid-1990s, we have recognized that electronic service delivery, based on proven secure technology, can provide our customers with new ways to conduct business with us. These new ways of conducting business with us are both convenient for claimants and efficient for claimants and us. We have continuously explored expanding the service options available to our customers in new and innovative ways as technological advances allow.[18]

For about 20 years we have explored the use of VTC to conduct fair and accurate hearings more efficiently. In the late 1990s, we tested our capacity to conduct ALJ hearings by VTC in Iowa. We received positive feedback from participants, and test data showed that processing times for VTC hearings were substantially lower than the processing time for in-person hearings held by ALJs at remote locations during the same

[6] 20 CFR 404.913(b), 404.914 and 416.1413(d), 416.1414.

[7] *Barnhart* v. *Thomas,* 540 U.S. 20, 28–29 (2003) (internal quotation marks omitted).

[8] ''Appeals Under Old-Age and Survivors Insurance,'' *Social Security Bulletin,* vol. 15, no. 1, p. 15 (January 1952) (*https://www.ssa.gov/policy/docs/ssb/v15n1/v15n1p15.pdf*).

[9] Hearings and Appeals Homepage, Public Data files, *http://www.ssa.gov/appeals/*; See: Age distribution of pending hearings FY 2014–FYTD 2018 Quarter 2.

[10] Hearing Office Average Processing Time Ranking Report FY 2017 (For reporting purposes: 10/01/2016 through 09/29/2017), available at: *https://www.ssa.gov/appeals/DataSets/archive/05_FY2018/05_September_Average_Processing_Time_Report.html.*

[11] *Source:* Disability Operational Data Store (DIODS), an SSA internal data storage system. The supporting documentation describing DIODS is available at *www.regulations.gov,* under ''supporting and related material'' for this docket, SSA–2017–0015.

[12] *Source:* Executive Management Information System (EMIS) MI Central, an SSA internal data storage system. The supporting documentation describing EMIS is available at *www.regulations.gov,* under ''supporting and related material'' for this docket, SSA–2017–0015.

[13] *Source:* Disability Operational Data Store (DIODS), an SSA internal data storage system. The supporting documentation describing DIODS is available at *www.regulations.gov,* under ''supporting and related material'' for this docket, SSA–2017–0015.

[14] 20 CFR 404.1597a, 416.996.

[15] SSA, OIG, Statutory Benefit Continuation During the Appeals Process for Medical Cessations, A–07–17–50127 (May 2017), at 6, available *https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-17-50127.pdf.*

[16] *Id.* at 3.

[17] *Id.*

[18] See Social Security Ruling 96–10p.

period.[19] In 2003, we published rules that directed ALJs to schedule hearings by VTC in any case where VTC technology was available, it was more efficient to do so, and no circumstance in the case prevented the use of VTC technology.[20] Under these rules, the claimant could opt out of a VTC hearing at any time, including the day of the hearing.[21]

As we gained experience with VTC for hearings before an ALJ, we and others have studied the efficacy of these hearings; those studies have found that the use of VTC provides us a number of benefits, including additional flexibility, especially with respect to aged and backlogged hearing requests, improved case processing times, and reduced ALJ travel.[22] For example, in 2011, our OIG found that the most important capability provided by the use of VTC hearings is the ease with which pending cases can be reassigned from heavily backlogged offices to virtually any video-equipped ALJ anywhere in the country who has excess hearing capacity.[23] OIG identified several concrete instances in which VTC improved the functioning of our hearings process. We have also observed that VTC technologies offer expanded service options for parties, especially for geographically and otherwise isolated claimants.

The Administrative Conference of the United States (ACUS), an independent, nonpartisan Federal agency that studies and recommends improvements to administrative process and procedures, also has noted a number of advantages to the use of VTC hearings before an ALJ.[24] In 2011, ACUS adopted its Recommendation 2011–4,[25] which noted that agencies with high volume caseloads were likely to receive the most benefit or cost savings (or both) from the use of VTC. ACUS therefore encouraged all agencies (including those with lower volume caseloads) to consider whether the use of VTC would be beneficial as a way to improve efficiency and reduce costs, while also preserving the fairness and participant satisfaction. In 2015, ACUS also published a Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings. This handbook provides many recommendations regarding physical space, lighting, and technology. We will consult ACUS's recommendations as we continue to modernize our infrastructure, and ensure we are up to date on the latest technology available.[26]

As we continue to seek ways to improve the efficiency of our hearings process, we also are mindful of recommendations from our Inspector General. For example, in 2012, our OIG studied the operation of our National Hearing Centers (NHC), which primarily use VTC to conduct hearings, and raised concerns that claimants were opting out of VTC hearings after they had already been scheduled, sometimes even on the day of the hearing, and that representatives were opting out to avoid appearing before certain ALJs.[27] In response, we revised our regulations in 2014 to provide that claimants, or their representatives, must object to appearing by VTC within 30 days after receiving a notice acknowledging receipt of their hearing request, unless they had good cause for failing to meet that deadline.[28] While this regulatory change allowed us to forestall last-minute cancellation of VTC hearings, the percentage of claimants who choose an in person hearing over the VTC option remains high. In FY 2015, approximately 30% of claimants who requested an ALJ hearing that year objected to appearing by VTC[29]. In FY 2017, approximately 32% of claimants who requested an ALJ hearing that year objected to appearing by VTC.[30]

At the reconsideration level at CDR, our rules state we will set the time and place of a disability hearing,[31] but do not specifically set out the manner in which parties and witnesses will appear. We currently conduct disability hearings at the reconsideration level before a DHO in person, by VTC, and, in limited circumstances, by telephone.[32] Similar to the ALJ hearing level, we have used VTC to conduct disability hearings at the reconsideration level for approximately 20 years. However, before a DHO may conduct a disability hearing by VTC, we currently require a beneficiary or recipient sign and return a statement to the DHO stating that he or she voluntarily elects to appear by VTC.[33] This policy causes delays in scheduling disability hearings and results in increased case processing times.

When an individual objects to appearing by VTC at an ALJ hearing or does not elect to appear by VTC at a reconsideration hearing before a DHO at CDR, the efficiency of our hearings process is set back without any corresponding increase in the fairness of the process, and the individual may wait longer for an in person hearing. At the ALJ hearing level, the number of ALJs available to conduct an in person hearing is generally limited to those ALJs stationed at, or geographically close to, the assigned hearing office or within travel distance to one of our permanent remote sites. Requiring an ALJ to travel to a remote hearing site for an in person hearing reduces the amount of time the ALJ can devote to holding other hearings and issuing decisions from his or her assigned hearing office. We expect the ten-year savings due to decreased reimbursements for all ALJ hearings

[19] 68 FR 5210, 5211 (2003). At approximately the same time, we also tested our capacity to conduct ALJ hearings by VTC between the Huntington, West Virginia hearing office and its Prestonburg, Kentucky remote location and between the Albuquerque, New Mexico hearing office and its El Paso, Texas remote location. 66 FR 1059, 1060 (2001). However, participation rates at these other test sites were too low for us to draw inferences about customer service or satisfaction. *Id.*

[20] 68 FR 5210 (2003), 68 FR 69003 (2003).

[21] If a party objected to appearing by VTC, he or she was required only to notify the ALJ at the earliest possible opportunity before the time set for the hearing. 68 FR 69003, 69006 (2003).

[22] OIG, *Congressional Response Report: Current and Expanded Use of Video Hearings,* A–05–12–21287, at 3 (June 18, 2012), available at: *https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-21287.pdf*; OIG, *Use of Video Hearings to Reduce the Hearing Case Backlog,* A–05–08018079, at 3 (April 22, 2011), available at: *https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf.*

[23] SSA, OIG, *Use of Video Hearings to Reduce the Hearing Case Backlog,* A–05–08–18070, at 12–13 (April 2011), available at: *https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf.*

[24] ACUS, *Memorandum on the History of Agency Video Teleconferencing Adjudications,* at 20–21 (November 26, 2014), available at: *https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History_FINAL.pdf* (noting that agencies use VTC hearings for a number of reasons, including lowering direct and indirect costs, improving efficiency, decreasing processing time, and providing greater flexibility in scheduling hearings).

[25] ACUS Recommendation 2011–4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion,* 76 FR 48789, 48795 (2011), available at: *https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion.*

[26] ACUS, *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings* (Dec. 22, 2015), available at *https://www.acus.gov/sites/default/files/documents/handbook-on-best-practices-for-using-VTC-in-adjudicatory-hearings.pdf.*

[27] OIG, *The Role of National Hearing Centers in Reducing the Hearings Backlog,* A–12–11–111147, at 11 (Apr. 3, 2012), available at: *http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-11-11147_0.pdf.*

[28] 79 FR 35926 (June 25, 2014).

[29] Video Hearing (VH) Opt-Out Numbers and Rates for Hearing Requests Received FY 2015, available at: *http://www.ssa.gov/appeals/DataSets/archive/00_FY2015/00_September_A01_VH_Opt-Out.html.*

[30] Video Hearing (VH) Opt-Out Numbers and Rates for Hearing Requests Received FY 2017, available at: *http://www.ssa.gov/appeals/DataSets/A01_VH_Opt-Out.html.*

[31] See 20 CFR 404.914, 416.1414.

[32] Program Operations Manual System (POMS) DI 33025.080 available at: *https://secure.ssa.gov/poms.nsf/lnx/0433025080*; DI 33025.085 available at: *https://secure.ssa.gov/apps10/poms.nsf/lnx/0433025085.*

[33] POMS DI 33025.080 available at: *https://secure.ssa.gov/poms.nsf/lnx/0433025080.*

participants, including ALJs, representatives, claimants, and contractors, to be $67.2M. At the reconsideration level for CDRs, scheduling an in person hearing may require significant travel by the DHO and the beneficiary or recipient, along with the time and costs associated with such travel. An in person reconsideration hearing requires additional time for the DHO and reduces the time available for the DHO to hold other hearings and issue determinations.

We expect that expanding our use of VTC technology will help us in two ways. First, increased use of VTC technology will reduce these discrepancies in the wait time among the hearing offices. Second, increased use of VTC will allow us to decrease the total number of cases pending at the ALJ hearing level by allowing us to shift cases from overburdened hearing offices to hearing offices with fewer requests for hearing pending per ALJ. Balancing our workloads by using VTC has been key to addressing our oldest pending cases, and it has allowed us to act quickly as service needs arise from unanticipated emergencies, *e.g.,* by transferring cases to another part of the country.

As documented in ACUS's studies and in feedback from multiple other sources, our use of VTC has been widely accepted as an important tool that increases our ability to hold hearings and improve public service. For example, in 2006, the Social Security Advisory Board (SSAB), a bipartisan, independent body that advises the President, Congress, and the Commissioner of Social Security on matters of policy and administration of the disability insurance and Supplemental Security Income programs,[34] reported receiving overwhelmingly positive comments on the use of VTC hearings.[35] In 2011, OIG received mostly positive comments about the role of VTC in the hearings process from representatives from the National Organization of Social Security Claimants' Representatives and the National Association of Disability Representatives.[36] In 2012, in a report estimating the cost savings of VTC hearings in the Social Security context, OIG estimated annual cost savings of $5.2 to 10.9 million.[37]

Moreover, there is no evidence that the use of VTC technology adversely affects the outcome of the decision making process. An internal report prepared in FY 2017 by our Office of Quality Review (OQR) showed there was not a significant difference in outcome or policy compliance for VTC and in person hearings. OQR found a high degree of policy compliance and quality for both types of hearings. We included this report as part of the rulemaking docket, which is publicly available at *www.regulations.gov,* and we invite comments on it.

We also have made great strides in increasing our video capabilities in order to improve our business processes. Since 2016, we have refreshed all VTC equipment and infrastructure, which has resulted in better technological quality of video hearings. Additionally, the dramatic reduction in the number of cases that involve paper claims folders over the past ten years has allowed for smoother workload balancing, ensuring consistent service on a national level. With the infrastructure and equipment we have in place, the use of VTC technology ensures that we can deliver service in a modern, seamless, and flexible manner. All video hearings rooms are section 504 compliant based on the capacity for individuals attending a hearing, providing equal access to hearings for claimants with disabilities.

We expect that this proposed rule will ensure that as we expand our ability to conduct appearances by VTC, we are able to schedule hearings more fairly and efficiently. The preferred methods for conducting hearings are by VTC and in person. However, an ALJ or DHO may conduct a hearing by telephone under two circumstances: (1) When it is physically impossible to conduct the hearing by VTC or in person, such as incarceration in a facility without VTC ability; and (2) extraordinary circumstances, such as when a natural disaster occurs and our VTC facilities are unavailable.[38] When using a telephone to conduct a hearing, the telephone technology used must allow for the beneficiary or recipient and his or her representative to hear and respond to all testimony presented at the hearing.[39]

Changes

To increase our ability to schedule hearings more fairly, flexibly, and efficiently and address the unprecedented service challenges we face at the reconsideration and ALJ hearing levels of our administrative review process, we propose the following changes to our rules:

- We propose to revise and unify some of the rules that govern how, where, and when individuals appear for hearings before an ALJ at the hearings level and before a DHO at the reconsideration level of our administrative review process.
- At the hearings level, we will determine the time and place of a hearing before an ALJ and determine how parties and witnesses will appear at the hearing.
- At the reconsideration level for CDRs, the State agency or the Associate Commissioner for Disability Determinations, or his or her delegate, will determine the time and place of a hearing before a DHO and determine how parties and witnesses will appear at the hearing. Under the proposed rules, while we will evaluate the specific circumstances of each claimant's or beneficiary's case to determine what is the most efficient and appropriate manner of hearing, we would not permit individuals to object to appearing by the manner of hearing we choose.
- At both the CDR reconsideration and ALJ levels of our administrative review process, when we schedule a hearing, we propose that we will determine the manner in which the parties to the hearing will appear: By VTC, in person, or, under the limited circumstances specified here, by telephone. In determining whether a party will appear by VTC or in person, we would consider whether VTC technology is available; whether it would be more efficient for an individual to appear by VTC or in person; and whether there are circumstances in the case that provide a good reason to schedule an individual to appear by VTC or in person. Under the proposed rules, we would not permit individuals to opt out of or objecting to appearing by the manner of hearing we chose.
- We also propose that we would determine the manner in which witnesses to a hearing will appear. In general, we would schedule witnesses to appear at hearings by VTC or telephone, unless VTC or telephone equipment are not available; we determine that it would be more efficient for a witness to appear in

[34] Section 703 of the Act, 42 U.S.C. 903.

[35] SSAB, *Improving the Social Security Administration's Hearing Process,* at 21 (2006), available at: *http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/HearingProcess_2006.pdf.*

[36] SSA, OIG, *Use of Video Hearings to Reduce the Hearing Case Backlog,* A–05–08–18070, at 10 (April 2011), available at: *https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-08-18070.pdf.*

[37] SSA, OIG, *Current and Expanded Use of Video Hearings,* A–05–12–21287, at 3 (June 2012), available at: *http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-12-21287.pdf.*

[38] 20 CFR 404.936(c)(1).

[39] 20 CFR 404.936(c)(1), 416.1436(c)(1); POMS DI 33025.085 available at: *https://secure.ssa.gov/apps10/poms.nsf/lnx/0433025085.*

person; or there are circumstances in the case that provide a good reason to schedule a witness to appear in person.

- We also propose that an ALJ may continue to identify case-specific facts that affect which manner of appearance is most efficient. However, the agency will have the final responsibility to determine in which manner the individual must appear.
- At the Appeals Council level, if the Appeals Council grants an individual's request to appear to present oral argument, the individual will appear before the Appeals Council by VTC or in person, or, when the circumstances described in § 404.936(c)(2) exist, by telephone.

We believe that we can best serve individuals involved in our disability program by maximizing the case processing efficiencies and flexibility allowed by VTC hearings. Supporting this, OIG and ACUS have repeatedly recommended that we increase use of VTC hearings for greater efficiency. The SSAB has also recommended we eliminate the ability to object to appearing by VTC.[40] The SSAB has stated that allowing a claimant to opt out of a VTC hearing reduces the hearing process's productivity and delays processing of not only that individual's case, but also others who are waiting for their opportunity for a hearing.[41]

The changes we propose will provide us with the flexibility we need to address the ongoing service challenges we face by balancing our hearing workloads in a way that we expect will reduce overall wait and processing times across the country and reduce the processing time disparities that exist from region to region.

In addition to the changes we propose for setting the manner for appearing at a hearing, we also propose to make one clarification to our rules regarding the notice of hearing at the ALJ hearings level. Under our current rules, we send a notice of hearing at least 75 days prior to the date of the scheduled hearing to all parties and their representatives, if any.[42] In addition to setting the time and place of a hearing, the notice has additional information, including the issues to be decided, the right to representation, how to request a change in the time of the hearing, and who will be present at the hearing, such as any expert witnesses we call. We propose to clarify that when we send an amended notice of hearing updating any information, we will send the amended notice at least 20 days prior to the hearing.

If we need to change the date of a hearing, the date we choose will always be at least 75 days from the date we first sent the claimant a notice of hearing, unless the claimant has waived his or her right to advance notice. We believe sending an amended notice of hearing at least 20 days prior to the hearing would give the individual ample time to fully prepare for the hearing because the individual would have already received the initial notice of hearing, sent at least 75 days before the hearing. In many cases, sending an amended notice of hearing at least 75 days before the date of the hearing would require us to reschedule and unnecessarily delay the hearing, which would inhibit us from providing better public service by having a hearing as soon as we can do so. Therefore, we propose to send an amended notice of hearing at least 20 days prior to the hearing, which is the same amount of advance notice we used to provide most claimants before we implemented the 75-day notice period. Similarly, if we schedule a supplemental hearing, after the initial hearing was continued by the assigned ALJ, we will send a notice of hearing at least 20 days before the date of the hearing.

Regulatory Procedures

Clarity of These Rules

Executive Order 12866 as supplemented by Executive Order 13563 requires each agency to write all rules in plain language. In addition to your substantive comments on this NPRM, we invite your comments on how to make rules easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, *e.g.,* grouping and order of sections, use of headings, paragraphing?

Executive Order 12866 as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the requirements for a significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563. Thus, OMB reviewed these proposed rules.

Executive Order 13771 and Cost Information

This proposed rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature.

SSA's Office of the Chief Actuary estimates that the actuarial impact of the rule will be de minimis.

SSA's Office of Budget estimates that the proposal, if implemented, will result in administrative savings of $118 million over a 10-year period. These savings stem from reduced costs of claimant and representative travel, a reduced number of workyears needed, and fewer forms processed.

Regulatory Flexibility Act

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

Paperwork Reduction Act

These proposed rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

(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).

Nancy A. Berryhill,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend 20 CFR

[40] SSAB, *Improving the Social Security Administration's Hearing Process,* at 21 (Sep. 2006), available at: *http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/HearingProcess_2006.pdf.*

[41] *Id.*

[42] 20 CFR 404.938(a), 416.1438(a).

chapter III, parts 404 and 416, as set forth below:

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

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. Amend § 404.914 by revising paragraphs (c), (d), and (e) and adding paragraphs (f), (g), and (h) to read as follows:

§ 404.914 Disability hearing-general.

* * * * *

(c) *Combined issues.* If a disability hearing is available to you under paragraph (a), and you file a new application for benefits while your request for reconsideration is still pending, we may combine the issues on both claims for the purpose of the disability hearing and issue a combined initial and reconsideration determination which is binding with respect to the common issues on both claims.

(d) *Definition.* For purposes of the provisions regarding disability hearings (§§ 404.914 through 404.918) *we, us* or *our* means the Social Security Administration or the State agency.

(e) *Notice of disability hearing.* We will send you a notice of the time and place of your disability hearing at least 20 days before the date of the hearing. The notice of hearing will tell you the scheduled time and place of the hearing and will notify you whether your appearance will be by video teleconference, in person, or by telephone. You may be expected to travel to your disability hearing. (See §§ 404.999a through 404.999d regarding reimbursement for travel expenses.)

(f) *Time and place for a disability hearing.* (1) *General.* Either the State agency or the Associate Commissioner for Disability Determinations or his or her delegate, as appropriate, will set the time and place of your disability hearing. We may change the time and place of the hearing, if it is necessary and there is good cause for doing so.

(2) *Where we hold hearings.* The ''place'' of the hearing is the office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the disability hearing officer by video teleconferencing, in person, or, when the circumstances described in paragraph (f)(4) of this section exist, by telephone.

(3) *When we will schedule your hearing by video teleconferencing or in person.* We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(4) *When we will schedule your appearance by telephone.* Subject to paragraph (f)(5), we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(5) *Scheduling a hearing when you or any other party to the hearing is incarcerated or otherwise confined.* If you are incarcerated or otherwise confined and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(6) *How witnesses will appear.* Witnesses may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing them to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(g) *Objecting to the time of the hearing.*

(1) *General.* If you wish to object to the time of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing; and

(ii) State the reason(s) for your objection to the time of the hearing and state the time you want the hearing to be held.

(2) If you notify us that you object to the time of the hearing less than 5 days before the date set for the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing the deadline, we use the standards explained in § 404.911.

(h) *Whether good cause exists for changing the time of the hearing.* We will determine whether good cause exists for changing the time of your scheduled hearing. If we find good cause, we will set the time of the new hearing. A finding that good cause exists to reschedule the time of your hearing will generally not change the assignment of the designated adjudicator or how you or any party to the hearing will appear at the hearing, unless we determine a change will promote more efficient administration of the hearing process.

(1) Determining good cause for changing the time of the hearing. We will find good cause to change the time of your hearing if we determine that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) *Determining good cause in other circumstances.* When we determine whether good cause exists to change the time of your hearing, in circumstances other than those set out in paragraph (h)(1) of this section, we will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to,

the effect on processing other scheduled hearings, delays that may occur in rescheduling your hearing, and whether we previously granted any changes to the time of the hearing.

(3) Examples of such other circumstances that you might give for requesting a change in the time of the hearing include, but are not limited to the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 20 days of the scheduled hearing and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 3. Revise § 404.929 to read as follows:

§ 404.929 Hearing before an administrative law judge-general.

If you are dissatisfied with one of the determinations or decisions listed in § 404.930, you may request a hearing. The Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 404.936(c)(1)(i) through (iii), and in the limited circumstances described in § 404.936(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935, any new evidence that may have been submitted for consideration.

■ 4. Revise § 404.936 to read as follows:

§ 404.936 Time and place for a hearing before an administrative law judge.

(a) *General.* We set the time and place for any hearing. We may change the time and place, if it is necessary. After sending you reasonable notice of the proposed action, the administrative law judge may adjourn or postpone the hearing or reopen it to receive additional evidence any time before he or she notifies you of a hearing decision.

(b) *Where we hold hearings.* We hold hearings in the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands. The ''place'' of the hearing is the hearing office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the administrative law judge by video teleconferencing, in person or, when the circumstances described in paragraph (c)(2) of this section exist, by telephone.

(c) We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person.

(1) When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(2) Subject to paragraph (c)(3) of this section, we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(3) If you are incarcerated and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(4) We will generally direct any person we call as a witness, other than you or any other party to the hearing, including a medical expert or a vocational expert, to appear by telephone or by video teleconferencing. Witnesses you call will appear at the hearing pursuant to § 404.950(e). If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing them to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(d) *Objecting to the time of the hearing.* (1) If you wish to object to the time of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing or 30 days after receiving notice of the hearing, whichever is earlier; and

(ii) State the reason(s) for your objection and state the time you want the hearing to be held. If the administrative law judge finds you have good cause, as determined under paragraph (e) of this section, we will change the time of the hearing.

(2) If you notify us that you object to the time of hearing less than 5 days before the date set for the hearing or, if earlier, more than 30 days after receiving notice of the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing this deadline, we use the standards explained in § 404.911.

(e) *Good cause for changing the time.* The administrative law judge will determine whether good cause exists for changing the time of your scheduled hearing. If the administrative law judge finds that good cause exists, we will set the time of the new hearing. A finding that good cause exists to reschedule the time of your hearing will generally not change the assignment of the administrative law judge or how you or another party will appear at the hearing, unless we determine a change will

promote efficiency in our hearing process.

(1) The administrative law judge will find good cause to change the time of your hearing if he or she determines that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) In determining whether good cause exists in circumstances other than those set out in paragraph (e)(1) of this section, the administrative law judge will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on the processing of other scheduled hearings, delays that might occur in rescheduling your hearing, and whether we previously granted you any changes in the time of your hearing. Examples of such other circumstances that you might give for requesting a change in the time of the hearing include, but are not limited to, the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 30 days of the scheduled hearing and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 5. Amend § 404.938 by revising paragraphs (b)(3), (b)(5), and (c) and adding paragraph (d) to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

* * * * *

(b) * * *

(3) How to request that we change the time of your hearing;

* * *

(5) Whether your appearance or that of any other party or witness is scheduled to be made by video teleconferencing, in person, or, when the circumstances described in § 404.936(c)(2) exist, by telephone. If we have scheduled you to appear by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

* * * * *

(c) *Acknowledging the notice of hearing.* The notice of hearing will ask you to return a form to let us know that you received the notice. If you or your representative do not acknowledge receipt of the notice of hearing, we will attempt to contact you for an explanation. If you tell us that you did not receive the notice of hearing, an amended notice will be sent to you by certified mail.

(d) *Amended notice of hearing.* If we need to send you an amended notice of hearing, we will mail or serve the notice at least 20 days before the date of the hearing. Similarly, if we schedule a supplemental hearing, after the initial hearing was continued by the assigned administrative law judge, we will mail or serve a notice of hearing at least 20 days before the date of the hearing.

■ 6. Amend § 404.950 by revising paragraphs (a) and (e) to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

(a) *The right to appear and present evidence.* Any party to a hearing has a right to appear before the administrative law judge, either by video teleconferencing, in person, or, when the conditions in § 404.936(c)(2) exist, by telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance by video teleconferencing, in person, or, when the conditions in § 404.936(c)(2) exist, by telephone.

* * * * *

(e) *Witnesses at a hearing.* Witnesses you call may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, they may appear as prescribed in § 404.936(c)(4). Witnesses called by the administrative law judge will appear in the manner prescribed in § 404.936(c)(4). They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

* * * * *

■ 7. Amend § 404.976 by revising paragraph (b) to read as follows:

§ 404.976 Procedures before the Appeals Council on review.

* * * * *

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. You will appear before the Appeals Council by video teleconferencing or in person, or, when the circumstances described in § 404.936(c)(2) exist, we may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 404.936(c)(4).

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

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 8. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 9. Amend § 416.1414 by revising paragraphs (c), (d), and (e) and adding paragraphs (f), (g), and (h) to read as follows:

§ 416.1414 Disability hearing-general.

* * * * *

(c) *Combined issues.* If a disability hearing is available to you under paragraph (a), and you file a new application for benefits while your request for reconsideration is still pending, we may combine the issues on both claims for the purpose of the disability hearing and issue a combined initial and reconsideration determination which is binding with respect to the common issues on both claims.

(d) *Definition.* For purposes of the provisions regarding disability hearings (§§ 416.1414 through 416.1418) *we, us* or *our* means the Social Security Administration or the State agency.

(e) *Notice of disability hearing.* We will send you a notice of the time and place of your disability hearing at least 20 days before the date of the hearing. The notice of hearing will tell you the scheduled time and place of the hearing and will notify you whether your appearance will be by video teleconference, in person, or by telephone. You may be expected to travel to your disability hearing. (See §§ 416.1499a through 416.1499d regarding reimbursement for travel expenses.)

(f) *Time and place for a disability hearing.* (1) *General.* Either the State agency or the Associate Commissioner for Disability Determinations or his or her delegate, as appropriate, will set the time and place of your disability hearing. We may change the time and place of the hearing, if it is necessary and there is good cause for doing so.

(2) *Where we hold hearings.* The ''place'' of the hearing is the office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the disability hearing officer by video teleconferencing, in person, or, when the circumstances described in paragraph (f)(4) of this section exist, by telephone.

(3) *When we will schedule your hearing by video teleconferencing or in person.* We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(4) *When we will schedule your appearance by telephone.* Subject to paragraph (f)(5), we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(5) *Scheduling a hearing when you or any other party to the hearing is incarcerated or otherwise confined.* If you are incarcerated or otherwise confined and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(6) *How witnesses will appear.* Witnesses may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing them to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(g) *Objecting to the time of the hearing.* (1) *General.* If you wish to object to the time of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing; and

(ii) State the reason(s) for your objection to the time of the hearing and state the time you want the hearing to be held.

(2) If you notify us that you object to the time of the hearing less than 5 days before the date set for the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing the deadline, we use the standards explained in § 416.1411.

(h) *Whether good cause exists for changing the time of the hearing.* We will determine whether good cause exists for changing the time of your scheduled hearing. If we find good cause, we will set the time of the new hearing. A finding that good cause exists to reschedule the time of your hearing will generally not change the assignment of the designated adjudicator or how you or any other party to the hearing will appear at the hearing, unless we determine a change will promote more efficient administration of the hearing process.

(1) *Determining good cause for changing the time of the hearing.* We will find good cause to change the time of your hearing if we determine that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) *Determining good cause in other circumstances.* When we determine whether good cause exists to change the time of your hearing, in circumstances other than those set out in paragraph (h)(1) of this section, we will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on processing other scheduled hearings, delays that may occur in rescheduling your hearing, and whether we previously granted any changes to the time of the hearing. Examples of such other circumstances that you might give for requesting a change in the time of the hearing include, but are not limited to the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 20 days of the scheduled hearing and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 10. Revise § 416.1429 to read as follows:

§ 416.1429 Hearing before an administrative law judge.

If you are dissatisfied with one of the determinations or decisions listed in § 416.1430, you may request a hearing.

The Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 416.1436(c)(1)(i) through (iii), and in the limited circumstances described in § 416.1436(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration.

■ 11. Revise § 416.1436 to read as follows:

§ 416.1436 Time and place for a hearing before an administrative law judge.

(a) *General.* We set the time and place for any hearing. We may change the time and place, if it is necessary. After sending you reasonable notice of the proposed action, the administrative law judge may adjourn or postpone the hearing or reopen it to receive additional evidence any time before he or she notifies you of a hearing decision.

(b) *Where we hold hearings.* We hold hearings in the 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, the Commonwealth of Puerto Rico, and the United States Virgin Islands. The ''place'' of the hearing is the hearing office or other site(s) at which you and any other parties to the hearing are located when you make your appearance(s) before the administrative law judge by video teleconferencing, in person or, when the circumstances described in § 416.1436(c)(2) exist, by telephone.

(c) We will generally schedule you or any other party to the hearing to appear either by video teleconferencing or in person.

(1) When we determine whether you will appear by video teleconferencing or in person, we consider the following factors:

(i) The availability of video teleconferencing equipment to conduct the appearance;

(ii) Whether use of video teleconferencing to conduct the appearance would be less efficient than conducting the appearance in person; and

(iii) Any facts in your particular case that provide a good reason to schedule your appearance by video teleconferencing or in person.

(2) Subject to paragraph (c)(3) of this section, we will schedule you or any other party to the hearing to appear by telephone when we find an appearance by video teleconferencing or in person is not possible or other extraordinary circumstances prevent you from appearing by video teleconferencing or in person.

(3) If you are incarcerated and video teleconferencing is not available, we will schedule your appearance by telephone, unless we find that there are facts in your particular case that provide a good reason to schedule your appearance in person, if allowed by the place of confinement, or by video teleconferencing or in person upon your release.

(4) We will generally direct any person we call as a witness, other than you or any other party to the hearing, including a medical expert or a vocational expert, to appear by telephone or by video teleconferencing. Witnesses you call will appear at the hearing pursuant to § 416.1450(e). If they are unable to appear with you in the same manner as you, we will generally direct them to appear by video teleconferencing or by telephone. We will consider directing them to appear in person only when:

(i) Telephone or video teleconferencing equipment is not available to conduct the appearance;

(ii) We determine that use of telephone or video teleconferencing equipment would be less efficient than conducting the appearance in person; or

(iii) We find that there are facts in your particular case that provide a good reason to schedule this individual's appearance in person.

(d) *Objecting to the time of the hearing.* (1) If you wish to object to the time of the hearing, you must:

(i) Notify us in writing at the earliest possible opportunity, but not later than 5 days before the date set for the hearing or 30 days after receiving notice of the hearing, whichever is earlier; and

(ii) State the reason(s) for your objection and state the time you want the hearing to be held. If the administrative law judge finds you have good cause, as determined under paragraph (e) of this section, we will change the time of the hearing.

(2) If you notify us that you object to the time of hearing less than 5 days before the date set for the hearing or, if earlier, more than 30 days after receiving notice of the hearing, we will consider this objection only if you show you had good cause for missing the deadline. To determine whether good cause exists for missing this deadline, we use the standards explained in § 416.1411.

(e) *Good cause for changing the time.* The administrative law judge will determine whether good cause exists for changing the time of your scheduled hearing. If the administrative law judge finds that good cause exists, we will set the time of the new hearing. A finding that good cause exists to reschedule the time of your hearing will generally not change the assignment of the administrative law judge or how you or another party will appear at the hearing, unless we determine a change will promote efficiency in our hearing process.

(1) The administrative law judge will find good cause to change the time of your hearing if he or she determines that, based on the evidence:

(i) A serious physical or mental condition or incapacitating injury makes it impossible for you or your representative to travel to the hearing, or a death in the family occurs; or

(ii) Severe weather conditions make it impossible for you or your representative to travel to the hearing.

(2) In determining whether good cause exists in circumstances other than those set out in paragraph (e)(1) of this section, the administrative law judge will consider your reason(s) for requesting the change, the facts supporting it, and the impact of the proposed change on the efficient administration of the hearing process. Factors affecting the impact of the change include, but are not limited to, the effect on the processing of other scheduled hearings, delays that might occur in rescheduling your hearing, and whether we previously granted you any changes in the time of your hearing. Examples of such other circumstances that you might give for requesting a change in the time of the hearing include, but are not limited to, the following:

(i) You unsuccessfully attempted to obtain a representative and need additional time to secure representation;

(ii) Your representative was appointed within 30 days of the scheduled hearing

and needs additional time to prepare for the hearing;

(iii) Your representative has a prior commitment to be in court or at another administrative hearing on the date scheduled for the hearing;

(iv) A witness who will testify to facts material to your case would be unavailable to attend the scheduled hearing and the evidence cannot be otherwise obtained;

(v) Transportation is not readily available for you to travel to the hearing; or

(vi) You are unrepresented, and you are unable to respond to the notice of hearing because of any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have.

■ 12. Amend § 416.1438 by revising paragraphs (b)(3), (b)(5), and (c) and adding paragraph (d) to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

* * * * *

(b) * * *

(3) How to request that we change the time of your hearing;

* * * * *

(5) Whether your appearance or that of any other party or witness is scheduled to be made by video teleconferencing, in person, or, when the circumstances described in § 416.1436(c)(2) exist, by telephone. If we have scheduled you to appear by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

* * * * *

(c) *Acknowledging the notice of hearing.* The notice of hearing will ask you to return a form to let us know that you received the notice. If you or your representative do not acknowledge receipt of the notice of hearing, we will attempt to contact you for an explanation. If you tell us that you did not receive the notice of hearing, an amended notice will be sent to you by certified mail.

(d) *Amended notice of hearing.* If we need to send you an amended notice of hearing, we will mail or serve the notice at least 20 days before the date of the hearing. Similarly, if we schedule a supplemental hearing, after the initial hearing was continued by the assigned administrative law judge, we will mail or serve a notice of hearing at least 20 days before the date of the hearing.

■ 13. Amend § 416.1450, by revising paragraphs (a) and (e) to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

(a) *The right to appear and present evidence.* Any party to a hearing has a right to appear before the administrative law judge, either by video teleconferencing, in person, or, when the conditions in § 416.1436(c)(2) exist, by telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance by video teleconferencing, in person, or, when the conditions in § 416.1436(c)(2) exist, by telephone.

* * * * *

(e) *Witnesses at a hearing.* Witnesses you call may appear at a hearing with you in the same manner in which you are scheduled to appear. If they are unable to appear with you in the same manner as you, they may appear as prescribed in § 416.1436(c)(4). Witnesses called by the administrative law judge will appear in the manner prescribed in § 416.1436(c)(4). They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

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■ 15. Amend § 416.1476, by revising paragraph (b) to read as follows:

§ 416.1476 Procedures before the Appeals Council on review.

* * * * *

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. You will appear before the Appeals Council by video teleconferencing or in person, or, when the circumstances described in § 416.1436(c)(2) exist, we may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 416.1436(c)(4).

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 50, 312, and 812

[Docket No. FDA–2018–N–2727]

RIN 0910–AH52

Institutional Review Board Waiver or Alteration of Informed Consent for Minimal Risk Clinical Investigations

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) is proposing to amend its regulations to implement a provision of the 21st Century Cures Act (Cures Act). This proposed rule, if finalized, would allow an exception from the requirement to obtain informed consent when a clinical investigation poses no more than minimal risk to the human subject and includes appropriate safeguards to protect the rights, safety, and welfare of human subjects. The proposed rule, if finalized, would permit an Institutional Review Board (IRB) to waive or alter certain informed consent elements or to waive the requirement to obtain informed consent, under limited conditions, for certain FDA-regulated minimal risk clinical investigations.

DATES: Submit either electronic or written comments on this proposed rule by January 14, 2019.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before January 14, 2019. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 14, 2019. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your