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MEMO

to: EDI
from: Ray Cebula
re: Final Regulations: Representative Payment & Penalties for Misleading Statements

The Commissioner of the Social Security Administration has issued final regulations controlling the representative payment program as well as amending regulations concerning penalties for false or misleading statements or the withholding of information. The regulation proposals were published in the Federal Register on October 18, 2006, one year and a day after the publication of proposed regulations. The full text of the regulations can be found on www.socialsecurity.gov and/or in the federal register at www.gpoaccess.gov . The regulations are effective November 17, 2006.

The amendments are consistent with the statutory changes of the Social Security Protection Act of 2004 (SSPA), Public Law 108-203. The changes will add significant protections for those beneficiaries who receive benefits through a representative payee. These changes include additional factors that will disqualify a payee applicant, additional requirements for non-governmental fee-for-service payees, authority to redirect payment for failure to provide accountings, authority to treat misused benefits as an overpayment to the payee as well as financial requirements for certain payees.

The final rules also contain regulatory amendments discussing SSA authority to penalize individuals who knowingly withhold information that is material to the determination of any monthly benefit under Titles II and XVI. These changes are also being made as a result of the passage of the SSPA. The penalty is non-payment for a set number of months under Title II and ineligibility for payments for a set number of months under Title XVI (including state supplementary payments).

After considering public comment from four organizations and one individual most of the original proposed regulations remained in tact. Significant changes were made to the fugitive felon provisions along with some technical changes.

The following chart provides a comparison of the current regulations and the proposals as well as a brief narrative description of each proposed change.

SSDI PROVISIONS

WHO CANNOT SERVE AS A PAYEE

CURRENT REGULATION	NEW REGULATION
20 CFR 404.2022 – Who May Not Serve as a Representative Payee? A representative payee applicant may not serve if he/she: (a) Has been convicted of a violation under section 208, 811 or 1632 of the Social Security Act. (b) Receives title II, VIII, or XVI benefits through a representative payee.	(b) Has been convicted of an offense resulting in imprisonment for more than 1 year. However, we may make an exception to this prohibition, if the nature of the conviction is such that selection of the applicant poses no risk to the beneficiary and the exception is in the beneficiary's best interest.

The amendments to this section of the regulation will make it clear that an individual who has been convicted of an offense resulting in imprisonment for more than 1 year may not serve as a representative payee. SSA can make an exception to this rule if the nature of the conviction poses no risk to the beneficiary and selection of the payee applicant is in the beneficiary's best interest. All references to the fugitive felon issues have been removed from this set of final regulations. However, SSA indicated that once they have finished adjusting existing fugitive felon provisions to b consistent with recent court decisions and administrative changes, new regulatory proposals will be issued.

Should a current payee be determined ineligible to continue due to the new provisions SSA will provide notification and a 10 day period to respond before making any change in payee.

PAYEE RESPONSIBILITIES

CURRENT REGULATION	NEW REGULATION
20 CFR 404.2035 – What are the Responsibilities of Your Representative Payee?	

A representative payee has a responsibility to— (a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary; (b) Notify us of any event that will affect the amount of benefits the beneficiary receives or the right of the beneficiary to receive benefits;	(a) Use the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in your best interests; (b) Keep any benefits received on your behalf separate from his or her own funds and show your ownership of these benefits unless he or she is your spouse or natural or adoptive parent or stepparent and lives in the same household with you or is a State or local government agency for whom we have granted an exception to this requirement;
(c) Submit to us, upon our request, a written report accounting for the benefits received; and (d) Notify us of any change in his or her circumstances that would affect performance of the payee responsibilities.	(c) Treat any interest earned on the benefits as your property; (d) Notify us of any event or change in your circumstances that will affect the amount of benefits you receive, your right to receive benefits, or how you receive them; (e) Submit to us, upon our request, a written report accounting for the benefits received on your behalf, and make all supporting records available for review if requested by us; and (f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities.

Extra protections, in the form of payee duties, have been added to this section of the regulations. SSA is clarifying the requirement that the beneficiary's and the payee's funds must be segregated unless certain, limited circumstances apply. The final regulation contains a statement that any interest earned on funds belonging to the beneficiary, but held by a payee, are to be considered the property of the beneficiary. The payee will clearly be required to report changes in circumstances that could impact the beneficiary's eligibility for benefits or the amount of benefits received to SSA. Notification of any change in circumstances that may impact upon the payee's ability to meet his/her duties as payee must also be made to SSA.

COMPENSATION FOR AGENCIES SERVING AS PAYEE

CURRENT REGULATION	NEW REGULATION
20 CFR 404.2040a – Compensation for qualified organizations serving as representative payees.	

(a)*** (2) Any community-based nonprofit social service organization founded for religious, charitable or social welfare purposes, that is tax exempt under section 501(c) of the Internal Revenue Code and that is licensed in the State in which it serves as representative payee or bonded.	a) * * * (2) Any community-based nonprofit social service organization founded for religious, charitable or social welfare purposes, which is tax exempt under section 501(c) of the Internal Revenue Code and which is bonded/insured to cover misuse and embezzlement by officers and employees and which is licensed in each State in which it serves as representative payee (if licensing is available in the State). The minimum amount of bonding or insurance coverage must equal the average monthly amount of social security payments received by the organization plus the amount of the beneficiaries' conserved funds (i.e., beneficiaries' saved social security benefits) plus interest on hand. For example, an organization that has conserved funds of $5,000 and receives an average of $12,000 a month in social security payments must be onded/insured for a minimum of $17,000. The license must be appropriate under the laws of the State for the type of services the organization provides. An example of an appropriately licensed organization is a community mental health center holding a State license to provide community mental health services.
(g)*** (6) An authorized organization can collect a fee for providing representative payee services from another source if the total amount of the fee collected from both the beneficiary and the other source does not exceed the amount authorized by us.	(g) * * * (6) Fees for services may not be taken from beneficiary benefits for the months for which we or a court of competent jurisdiction determine(s) that the representative payee misused benefits. Any fees collected for such months will be treated as a part of the beneficiary's misused benefits.

Agencies serving as representative payees and collecting a monthly fee for this purpose will be required to become licensed and bonded. This will provide an added protection for beneficiaries who receive this service and may face a misuse of benefits situation. The final regulations indicate that for any month during which the Commissioner finds that the representative payee has misused benefits, no fee will be allowed for that month.

LIABILITY FOR MISUSE

CURRENT REGULATION	NEW REGULATION
20 CFR 404.2041 – Who is liable if your representative payee misuses your benefits?	
No current section (f)	(f) Any amounts that the representative payee misuses and does not refund will be treated as an overpayment to that representative payee. See subpart F of this part.

Any amount determined to have been misused by a representative payee and not refunded to SSA will be treated as an overpayment to the payee and will make the payee amenable to all SSA collection methods. The representative payee would have access to waiver process.

PAYEE ACCOUNTING

CURRENT REGULATION	NEW REGULATION
20 CFR 404.2065 – How does your representative payee account for the use of benefits?	
A representative payee must account for the use of benefits. We require written reports from your representative payee no less than annually (except for certain State institutions which participate in a separate onsite review program). We may verify how your representative payee used the funds. Your representative payee should keep records of how benefits were used in order to make accounting reports and make those records available upon our request. We may ask your representative payee to give us the following information: (a) Where you lived during the accounting period; (b) Who made the decisions on how your benefits were spent or saved; (c) How your benefit payments were used; and (d) How much of your benefit payments were saved and how the savings were invested.	Your representative payee must account for the use of your benefits. We require written reports from your representative payee at least once a year (except for certain State institutions that participate in a separate onsite review program). We may verify how your representative payee used your benefits. Your representative payee should keep records of how benefits were used in order to make accounting reports and must make those records available upon our request. If your representative payee fails to provide an annual accounting of benefits or other required reports, we may require your payee to receive your benefits in person at the local Social Security field office or a United States Government facility that we designate serving the area in which you reside. The decision to have your representative payee receive your benefits in person may be based on a variety of reasons. Some of these reasons may include the payee's history of past performance or our past difficulty in contacting the payee. We may ask your representative payee to give us the following information:

The final regulation contains language requiring an annual report from individual payees. Excepted from this provision are State institutions that participate in SSA's on site review program. A written report will be required of all non-excepted payees explaining how benefits were used. The failure to file the report may cause SSA to require that benefits be picked up in person by the payee at the local SSA office, or other government facility in the area.

SSI PROVISIONS

The corresponding SSI proposals are identical to those listed above for the SSDI program with the exception of the following:

PAYEE RESPONSIBILITIES

CURRENT REGULATION	NEW REGULATION
20 CFR 416.635 – What are the responsibilities of your representative payee?	
A representative payee has a responsibility to—	A representative payee has a responsibility to--
(a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary;	(a) Use the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines under the guidelines in this subpart, to be in your best interests;
(b) Notify us of any event that will affect the amount of benefits the beneficiary receives or the right of the beneficiary to receive benefits (See subpart G of this part concerning these reporting requirements);	(b) Keep any benefits received on your behalf separate from his or her own funds and show your ownership of these benefits unless he or she is your spouse or natural or adoptive parent or stepparent and lives in the same household with you or is a State or local government agency for whom we have granted an exception to this requirement; (c) Treat any interest earned on the benefits as your property;
(c) Submit to us, upon our request, a written report accounting for the benefits received; (d) Notify us of any change in his or her circumstances that would affect performance of the payee responsibilities; and	(d) Notify us of any event or change in your circumstances that will affect the amount of benefits you receive, your right to receive benefits, or how you receive them;
(e) In cases in which the beneficiary is an individual under age 18 (including cases in which the beneficiary is an individual whose low birth weight is a	(e) Submit to us, upon our request, a written report accounting for the benefits received on your behalf, and make all supporting records available for review if requested by us;

contributing factor material to our determination that the individual is disabled), ensure that the beneficiary is and has been receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits (See §416.994a(i).)	(f) Notify us of any change in his or her circumstances that would affect performance of his/her payee responsibilities; and (g) Ensure that you are receiving treatment to the extent considered medically necessary and available for the condition that was the basis for providing benefits (see Sec. 416.994a(i)) if you are under age 18 (including cases in which your low birth weight is a contributing factor material to our determination that you are disabled).

This final regulation requires a representative payee to ensure that a low birth weight infant is receiving medically necessary treatment available for the condition that provided the basis for qualifying for SSI payments. In the case of an infant receiving SSI it is highly likely that the parent will be the representative payee. Special care should be taken for children with agency payees.

PENALITIES FOR MAKING FALSE OR MISLEADING STATEMENTS OR WITHHOLDING INFORMATION

CURRENT REGULATION	NEW REGULATION
20 CFR 404.459 – Penalty for making false or misleading statements or withholding information. a) *Why would SSA penalize me?* You will be subject to a penalty if you make, or cause to be made, a statement or representation of a material fact for use in determining any initial or continuing right to, or the amount of, monthly insurance benefits under title II or benefits or payments under title XVI and: (1) You know or should know that the statement or representation— (i) Is false or misleading; or (ii) Omits a material fact; or (2) You make the statement with a	(a) Why would SSA penalize me? You will be subject to a penalty if: (1) You make, or cause to be made, a statement or representation of a material fact, for use in determining any initial or continuing right to, or the amount of, monthly insurance benefits under title II or benefits or payments under title XVI, that you know or should know is false or misleading; or (2) You make a statement or representation of a material fact for use as described in paragraph (a)(1) of this section with knowing

knowing disregard for the truth. (b) *What is the penalty?* The penalty is nonpayment of benefits under title II that we would otherwise pay you and ineligibility for cash benefits under title XVI (including State supplementary payments made by SSA according to §416.2005). (c) *How long will the penalty last?* The penalty will last— (1) Six consecutive months the first time we penalize you; (2) Twelve consecutive months the second time we penalize you; and (3) Twenty-four consecutive months the third or subsequent time we penalize you. (e) *How will SSA make its decision to penalize me?* In order to impose a penalty on you, we must find that you knowingly (knew or should have known or acted with knowing disregard for the truth) made a false or misleading statement or omitted a material fact. We will base our decision to penalize you on the evidence and the reasonable inferences that can be drawn from that evidence, not on speculation or suspicion. Our decision to penalize you will be documented with the basis and rationale for that decision. In determining whether you knowingly made a false or misleading statement or omitted a material fact so as to justify imposition of the penalty, we will consider all evidence in the record, including any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have had at the time. In determining whether you acted knowingly, we will also consider the significance of the false or misleading statement or omission in	disregard for the truth; or (3) You omit from a statement or representation made for use as described in paragraph (a)(1) of this section, or otherwise withhold disclosure (for example, fail to come forward to notify us) of, a fact which you know or should know is material to the determination of any initial or continuing right to, or the amount of, monthly insurance benefits under title II or benefits or payments under title XVI, if you know, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading. (e) How will SSA make its decision to penalize me? In order to impose a penalty on you, we must find that you knowingly (knew or should have known or acted with knowing disregard for the truth) made a false or misleading statement or omitted or failed to report a material fact if you knew, or should have known, that the omission or failure to disclose was misleading. We will base our decision to penalize you on the evidence and the reasonable inferences that can be drawn from that evidence, not on speculation or suspicion. Our decision to penalize you will be documented with the basis and rationale for that decision. In determining whether you knowingly made a false or misleading statement or omitted or failed to report a material fact so as to justify imposition of the penalty, we will consider all evidence in the record, including any physical, mental, educational, or

terms of its likely impact on your benefits.	linguistic limitations (including any lack of facility with the English language) which you may have had at the time. In determining whether you acted knowingly, we will also consider the significance of the false or misleading statement or omission or failure to disclose in terms of its likely impact on your benefits.

Note that the SSI proposal is identical to the SSDI proposal.

This final regulation is extremely important to any SSI or Title II beneficiary who is considering returning, or has returned, to work. It will allow SSA to penalize any beneficiary who knowingly fails to provide information necessary to the determination of benefits eligibility and/or payment amounts as well as to those who are determined to have made misleading statements. Ultimately, the failure to report work activity could result in a penalty to the beneficiary. The penalty will be a period of nonpayment of Title II or SSI benefits otherwise payable, including any state supplementary payments. The nonpayment period can be 6, 12, or 24 months.

The regulation does set forth standards for the Commissioner when making this type of determination. Evidence considered when determining if a beneficiary "knowingly" withheld information or made misleading statements must include the physical, mental, educational, and linguistic limitations of the beneficiary.