

Rule 14e-3(a) was within the SEC's authority under Section 14(e) because Section 14(e) allows the SEC to "prohibit acts, not themselves fraudulent under the common law or § 10(b), if the prohibition is 'reasonably designed to prevent \* \* \* acts and practices [that] are fraudulent.'" <sup>80</sup> The lesson from both of these cases is that the SEC cannot effect a change in the meaning of specific statutory terms under its comparable Section 206(4) rulemaking authority.

The Adopting Release asserts that, under *O'Hagan*, a negligence standard is a means reasonably designed to prevent fraud. As the Adopting Release notes, conduct outside of the bounds of the statutory prohibition can be prohibited by Commission rule under Section 206(4). The rule that we are adopting here, however, differs markedly from the rules at issue in *O'Hagan* and *Steadman*.<sup>81</sup> Both of those rules were narrowly targeted rules that covered clearly-defined behavior. They were designed to prohibit conduct, that, although outside of the "core activity prohibited" by the statute, were designed to "assure the efficacy" of the statute.<sup>82</sup>

Rule 206(4)-8(a)(2), by contrast, is as broad as the statute itself. It essentially repeats the statutory prohibition. It does not logically follow, therefore, that lowering the standard of care would be the type of "means reasonably designed to prevent" within the contemplation of the regulatory mandate within Section 206(4). Lowering the standard of care is instead an attempt to rewrite the statute by assigning new definitions to the words of the statute. A potential unfortunate consequence of the Adopting Release's change in mental state is that it is now arguably contrary to statute and therefore might interfere with the SEC's ability to use the rule effectively.<sup>83</sup> Congress included a rulemaking directive in order to give the SEC the necessary authority to provide clarity in this area about the types of practices covered by the statute's broad

prohibition,<sup>84</sup> not to alter the standard of care that Congress selected through the language it used.<sup>85</sup> Imposing a negligence standard is particularly improper given that, as the Adopting Release notes, "Rule 206(4)-8 does not create under the Advisers Act a fiduciary duty to investors and prospective investors in a pooled investment vehicle."<sup>86</sup>

Finally, from a purely practical perspective, I dispute the regulatory approach underlying the contention that "by taking sufficient care to avoid negligent conduct, advisers will be more likely to avoid reckless deception."<sup>87</sup> By an extension of that same logic, a strict liability standard would evoke even more care by advisers. Even if the SEC is authorized to pick the standard of care that applies broadly to all "fraudulent, deceptive, or manipulative" acts and practices, arbitrarily selecting a higher standard of care "just to be on the safe side" has the potential of misdirecting enforcement and inspection resources and chilling well-intentioned advisers from serving their investors.

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## SOCIAL SECURITY ADMINISTRATION

### 20 CFR Parts 404 and 416

[Docket No. SSA 2007-0036]

RIN 0960-AG49

#### Amendment to the Attorney Advisor Program

**AGENCY:** Social Security Administration.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** We are announcing this interim final rule to modify, on a temporary basis, the prehearing procedures we follow in claims for Social Security disability benefits or supplemental security income (SSI)

payments based on disability or blindness. Under the interim final rule, we may allow certain attorney advisors, under managerial oversight, to conduct certain prehearing proceedings, and where the documentary record developed as a result of these proceedings warrants, issue decisions that are wholly favorable to the parties to the hearing.

**DATES:** *Effective date:* This rule is effective August 9, 2007. *Comment date:* To be sure that your comments are considered, we must receive them no later than October 9, 2007.

**ADDRESSES:** You may give us your comments by: Internet through the Federal eRulemaking Portal at <http://www.regulations.gov>; e-mail to [regulations@ssa.gov](mailto:regulations@ssa.gov); telefax to (410) 966-2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235-7703. You may also deliver them to the Office of Regulations, Social Security Administration, 107 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235-6401, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted on the Federal eRulemaking Portal, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

**FOR FURTHER INFORMATION CONTACT:** Marilyn Hull, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041-3260, 703-605-8500 for information about this notice. 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:

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##### Explanation of Changes

We are dedicated to providing high-quality service to the American public. Today and for the foreseeable future, we face significant challenges in our ability to provide the level of service that disability benefit claimants deserve because of the significantly increased number and complexity of these benefit claims. Consequently, we are publishing a temporary modification to the procedures we follow in the administrative law judge (ALJ) hearings process in claims for Social Security disability benefits or SSI payments

<sup>80</sup> *O'Hagan*, 521 U.S. at 672-73.

<sup>81</sup> *O'Hagan* dealt with Rule 14e-3(a), which governed trading on non-public, material information in connection with a tender offer. *Steadman* dealt with Rule 206(4)-2, the investment advisor custody rule.

<sup>82</sup> *O'Hagan*, 521 U.S. at 673-74.

<sup>83</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The Adopting Release states: "Since the Commission is clearly authorized to prescribe [sic] conduct that goes beyond fraud as a means reasonably designed to prevent fraud, prohibiting deceptive conduct done negligently is a way to accomplish this objective." Adopting Release at Section II.D. This does not answer the question, however, of whether "fraudulent, deceptive, or manipulative" conduct can arise from negligent acts.

<sup>84</sup> Up until now under Section 206(4), we have done exactly this. We have adopted rules covering advertisements [17 CFR 275.206(4)-1], custody of client funds and securities [17 CFR 275.206(4)-2], cash payments for client solicitations [17 CFR 275.206(4)-3], disclosure of financial and disciplinary information [17 CFR 275.206(4)-4], proxy voting [17 CFR 275.206(4)-6], and compliance procedures [17 CFR 275.206(4)-7].

<sup>85</sup> See H.R. Rep. No. 2179 at 7 (1960) (identifying as the "problem" that Section 206(4) was intended to remedy: "there has always been a question as to the scope of the fraudulent and deceptive activities which are prohibited and the extent to which the Commission is limited in this area by common law concepts of fraud and deceit.").

<sup>86</sup> Adopting Release at Section II.D.

<sup>87</sup> Adopting Release at Section II.D.

based on disability or blindness. This temporary modification will help us provide accurate and timely service to claimants for Social Security disability benefits and SSI payments based on disability or blindness. With this modification, we are permitting attorney advisors, under managerial oversight, to conduct certain prehearing proceedings to help develop claims, and issue fully favorable decisions in appropriate claims before a hearing is conducted. We expect that this change will help us reduce the very high number of pending cases at the hearing level by enhancing claims development before the hearing and by permitting attorney advisors to issue fully favorable decisions in appropriate claims. This temporary modification applies only to claims processed under parts 404 and 416 of our regulations; it does not apply to claims processed under part 405 of our regulations, which concerns only disability claims filed in the Boston region after July 31, 2006. Parts 404 and 416 of our regulations concern disability cases in every area outside the Boston region and non-disability cases in every location.

Generally, when a claim is filed for Social Security disability benefits or SSI payments based on disability or blindness, a State agency makes the initial and reconsideration disability determination for us. ALJs conduct hearings after we have made a reconsideration determination. Under this interim final rule, attorney advisors who serve as decision writers or managers within the hearing operation may conduct certain prehearing proceedings and, where appropriate, issue decisions that are wholly favorable to claimants and any other party to the hearing.

Attorney advisors have performed these duties in the past. In June 1995, we announced final rules establishing the attorney advisor program for a limited period of 2 years. 60 FR 34126 (June 30, 1995). The program's success prompted us to extend the program several times, until it finally ended in April 2001. 62 FR 35073 (June 30, 1997), 63 FR 35515 (June 30, 1998), 64 FR 13677, 64 FR 51892.

Requests for hearings have significantly increased in recent years, and we expect even more such requests in the future due to the projected increase in disability claims as the baby boomers move into their disability-prone years. Additionally, the very high number of pending cases at the hearing level has grown to an alarming level. We plainly must do everything that we can to address this workload. This interim final rule is an important part of our

efforts designed to help us decide these cases more efficiently.

These regulations will allow us to expedite the processing of cases pending at the hearing level without infringing on the right of a claimant to a hearing before an ALJ. The attorney advisor's conduct of certain prehearing proceedings will not delay the scheduling of a hearing before an ALJ. If the prehearing proceedings are not concluded before the hearing date, the case will be sent to the ALJ unless a decision wholly favorable to the claimant and all other parties is in process, or the claimant and all other parties to the hearing agree in writing to delay the hearing until the prehearing proceedings are completed.

Prehearing proceedings may be conducted by the attorney advisor under this interim final rule if one of the following criteria is met: new and material evidence is submitted, there is an indication that additional evidence is available, there is a change in the law or regulations, or there is an error in the file or some other indication that a wholly favorable decision could be issued. A decision by an attorney advisor will be mailed to all parties. The notice of decision will state the basis for the decision and advise the parties that an ALJ will dismiss the hearing request unless a request to proceed with the hearing is made by a party within 30 days after the date the notice of the decision was mailed.

These procedures will remain in effect for a period of time not to exceed 2 years from the effective date of this interim final rule, unless we terminate or extend them by publication of a final rule in the **Federal Register**. If we publish such a final rule, we need not request further public comment.

#### Clarity of These Rules

Executive Order 12866, as amended, requires each agency to write all rules in plain language. In addition to your substantive comments on these interim final rules, we invite your comments on how to make them easier to understand.

##### *For example:*

Have we organized the material to suit your needs?

Are the requirements in the rules clearly stated?

Do the rules contain technical language or jargon that isn't clear?

Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?

Would more (but shorter) sections be better?

Could we improve clarity by adding tables, lists, or diagrams?

What else could we do to make the rules easier to understand?

#### Regulatory Procedures

Pursuant to sections 205(a), 702(a)(5), and 1631(d)(1) of the Social Security Act, 42 U.S.C. 405(a), 902(a)(5), and 1383(d)(1), we follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in the development of our regulations. The APA provides exceptions to its prior notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest.

We have determined that, under 5 U.S.C. 553(b)(B), good cause exists for issuing this regulatory change as an interim final rule. However, we are inviting public comment on the interim final rule and will consider any responsive comments we receive within 60 days of the publication of the interim final rule.

We are not changing the substantive provisions of the attorney advisor program, which still appear in the regulations. We are merely re-enacting the provisions that we have used in the past. The substantive rules were promulgated with notice and public comment procedures, with a notice of proposed rulemaking published on April 14, 1995 (60 FR 19008) and final rules published on June 30, 1995 (60 FR 34126). Accordingly, we find that an additional opportunity for public comment prior to re-enactment of this program is unnecessary.

We also find that it would be contrary to the public interest not to effectuate these rules as quickly as we can. The attorney advisor program will help, along with a series of other initiatives that we are contemplating, reduce the pending hearing requests to a manageable level. We must address the hearing backlog as quickly as possible. If we do not address this issue now, the situation could easily worsen, possibly resulting in over one million cases awaiting a hearing within 3 years. Of course, such a state of affairs is acceptable neither to us nor to the public at large. For these reasons, we believe we must take swift action and implement this rule as quickly as possible.

#### *Executive Order 12866, as Amended*

We have consulted with the Office of Management and Budget (OMB) and determined that this rule meets the criteria for a significant regulatory action under Executive Order 12866, as

amended. Thus, it was reviewed by OMB.

#### *Regulatory Flexibility Act*

We certify that this interim final rule will not have a significant economic impact on a substantial number of small entities as it affects only States and individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

#### *Paperwork Reduction Act*

This rule will impose no additional reporting or recordkeeping requirements requiring OMB clearance.

#### *Federalism Impact and Unfunded Mandates Impact*

We have reviewed this rule under the threshold criteria of Executive Order 13132 and the Unfunded Mandates Reform Act and have determined that it does not have substantial direct effects on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among the various levels of government, or on imposing any costs on State, local, or tribal governments. This rule does not affect the roles of the State, local, or tribal governments. However, the rule takes administrative notice of existing statutes governing the roles and relationships of the State agencies and SSA with respect to disability determinations under the 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; 96.006, Supplemental Security Income.)

#### **List of Subjects**

##### *20 CFR Part 404*

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

##### *20 CFR Part 416*

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

Dated: May 22, 2007.

**Michael J. Astrue,**  
*Commissioner of Social Security.*

■ For the reasons set out in the preamble, we are amending subpart J part 404 and subpart N of part 416 as set forth below:

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

#### **Subpart J—[Amended].**

■ 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 § 404.942 by revising the first sentence of paragraph (a) and paragraph (g) to read as follows:

#### **§ 404.942 Prehearing proceedings and decisions by attorney advisors.**

(a) *General.* After a hearing is requested but before it is held, an attorney advisor may conduct prehearing proceedings as set out in paragraph (c) of this section. \* \* \*

\* \* \* \* \*

(g) *Sunset provision.* The provisions of this section will no longer be effective on August 10, 2009, unless we terminate them earlier or extend them beyond that date by notice of a final rule in the **Federal Register**.

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

#### **Subpart N—[Amended]**

■ 3. The authority citation for subpart N 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).

■ 4. Amend § 416.1442 by revising the first sentence of paragraph (a) and paragraph (g) to read as follows:

#### **§ 416.1442 Prehearing proceedings and decisions by attorney advisors.**

(a) *General.* After a hearing is requested but before it is held, an attorney advisor may conduct prehearing proceedings as set out in paragraph (c) of this section. \* \* \*

\* \* \* \* \*

(g) *Sunset provision.* The provisions of this section will no longer be effective on August 10, 2009, unless we terminate them earlier or extend them beyond that date by notice of a final rule in the **Federal Register**.

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### **SOCIAL SECURITY ADMINISTRATION**

#### **20 CFR Parts 404 and 416**

[Docket No. SSA 2006–0097]

RIN 0960–AG35

#### **Temporary Extension of Attorney Fee Payment System to Title XVI; 5-Year Demonstration Project Extending Fee Withholding and Payment Procedures to Eligible Non-Attorney Representatives; Definition of Past-Due Benefits; and Assessment for Fee Payment Services**

**AGENCY:** Social Security Administration.

**ACTION:** Final rules.

**SUMMARY:** We are issuing these final rules to adopt without change the interim final rules published on April 5, 2007 to reflect in our regulations three self-implementing statutory provisions in the Social Security Protection Act of 2004 (SSPA) and three related self-implementing provisions in earlier legislation. These earlier provisions are in the Omnibus Budget Reconciliation Act of 1990 (OBRA), the Social Security Independence and Program Improvements Act of 1994 (SSPIA), and the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA).

**DATES:** The interim rule published on April 5, 2007, is confirmed as final effective August 9, 2007.

**FOR FURTHER INFORMATION CONTACT:** Marg Handel, Supervisory Social Insurance Specialist, Office of Income Security Programs, Social Security Administration, 239 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–4639. 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:**

##### **Electronic Version**

The electronic file of this document is available on the date of publication in the **Federal Register** at <http://www.gpoaccess.gov/fr/index.html>.

##### **Background**

Sections 206(a) and 1631(d) of the Social Security Act (Act) direct the Commissioner of Social Security (Commissioner) to determine the maximum fees representatives may charge claimants for services that they perform in claims before the Social Security Administration (SSA) under title II or title XVI of the Act. For claims under title II in which the claimant is