

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):

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(b) * * *
(2) * * *
(iii) * * *

(A) Security and Suitability Files.

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SOCIAL SECURITY ADMINISTRATION**20 CFR Parts 404 and 416**

[Docket No. 2017–0015]

RIN 0960–A109

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 DHO⁶ 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

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.

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>).

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 Conferencing 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 Conferencing 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/lrx/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.

* * * * *

■ 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