

FDC date	State	City	Airport	FDC number	SIAP
12/20/00	IL	Dekalb	Dekalb Taylor Muni	FDC 0/5422	NDB RWY 27 AMDT 1
12/28/00	TN	Memphis	Memphis Intl	FDC 0/5584	ILS RWY 18R AMDT 12B
12/21/00	FL	Fort Lauderdale	Fort Lauderdale-Hollywood Intl	FDC 0/5471	ILS RWY 27R AMDT 6
12/21/00	FL	Fort Lauderdale	Fort Lauderdale-Hollywood Intl	FDC 0/5470	LOC RWY 94 AMDT 4
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5456	ILS RWY 4 AMDT 14A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5452	NDB OR GPS RWY 4 AMDT 14A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5451	VOR RWY 4 AMDT 15A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5450	VOR OR GPS RWY 28 AMDT 7A
12/21/00	NC	Fayetteville	Fayetteville Rgnl/Grannis Field	FDC 0/5449	LOC BC RWY 22 AMDT 5B
12/20/00	WA	Renton	Renton Muni	FDC 0/5407	GPS RWY 15 ORIG
12/20/00	WA	Arlington	Arlington Muni	FDC 0/5409	LOC RWY 34 AMDT 4A
12/20/00	WA	Arlington	Arlington Muni	FDC 0/5408	NDB OR GPS RWY 34 AMDT 3

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 401, 402 and 403

RIN 0960-AE95

Testimony by Employees and the Production of Records and Information in Legal Proceedings

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: The Social Security Administration (SSA) is implementing procedures governing testimony by SSA employees and the production of official records and information in legal proceedings to which SSA is not a party. This rule provides procedures, requirements, and information on how SSA will handle these matters and expressly prohibits any production or testimony except as approved by the Commissioner of Social Security or as Federal law otherwise provides. This rule conserves and ensures more efficient use of SSA's resources in meeting the Agency's mission, promotes consistency in decisionmaking, minimizes the possibility of involving SSA in issues not related to its mission, maintains SSA's impartiality, protects sensitive and confidential information and the deliberative processes of SSA, and enhances SSA's ability to respond efficiently to requests for records, information, or testimony in a legal proceeding.

EFFECTIVE DATE: February 12, 2001.

FOR FURTHER INFORMATION CONTACT: Brad Howard, Attorney, Office of General Law, Office of the General Counsel, Room 617 Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 966-1817, for information about this rule. For information on eligibility or claiming

benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778.

SUPPLEMENTARY INFORMATION:

Background

On May 10, 2000, SSA published in the **Federal Register** a notice of proposed rulemaking proposing to establish procedures governing testimony by SSA employees and the production of official records and information in legal proceedings to which SSA is not a party (65 FR 30037-30043). Prior to March 31, 1995, SSA was part of the Department of Health and Human Services (DHHS) and followed the DHHS regulations at 45 CFR part 2 regarding these matters. The Social Security Independence and Program Improvements Act of 1994 (SSIIPIA), Pub. L. 103-296, established SSA as an independent agency in the executive branch of the Federal Government effective March 31, 1995, and vested general regulatory authority in the Commissioner of Social Security (the Commissioner). Under sec. 106(b) of the SSIIPIA, DHHS regulations in effect immediately before March 31, 1995, that relate to functions vested in the Commissioner by reason of SSA's independence, continue to apply to SSA until the Commissioner modifies, suspends, terminates, or repeals them. This rule establishes a new Part 403 of our regulations, which sets forth the SSA rules for responding to requests for information, records, or testimony in legal proceedings. The DHHS regulations at 45 CFR part 2 will no longer apply to SSA.

This rule, issued under the authority of 5 U.S.C. 301, is similar to rules issued by numerous Government agencies and departments. Section 301 of Title 5, the "housekeeping statute," authorizes the head of an executive agency to issue "regulations for the government of his department, the conduct of its employees, the distribution and

performance of its business and the custody, use, and preservation of its records, papers, and property." In *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), the Supreme Court upheld the authority of Federal agencies to establish procedures pursuant to § 301 similar to those established here. Federal courts have consistently held that a person seeking testimony or records from an agency must comply with the agency's "Touhy regulation" before seeking judicial enforcement of a subpoena. In addition, under § 702(a)(5) of the Social Security Act, 42 U.S.C. § 902(a)(5), the Commissioner has authority to promulgate regulations necessary to the efficient administration of SSA functions.

In the notice of proposed rulemaking published in the **Federal Register** on May 10, 2000, SSA requested comments by July 10, 2000. SSA received three comments on the proposed rule.

One commenter raised several issues concerning health and safety in Social Security offices. He essentially recommended that we revise the rule to allow testimony from employees in every case involving the health and safety of our employees. We share the commenter's general concerns about the importance of workplace safety. However, we are not adopting his recommendation because we believe that the rule addresses his concerns.

The commenter first noted that United States Attorneys' Offices may decline prosecution in situations where an employee is threatened or assaulted at work. In such situations, the employee often files charges with the local police and the matter proceeds in state court. He recommended that we clarify that testimony of the employee and employee-witnesses requires no prior approval in such cases. However, section 403.115(b)(7) renders the procedural requirements established in this rule inapplicable to state or local law enforcement proceedings related to threats or acts against SSA or its

employees. In such circumstances, our employees may be released to testify without requiring the prosecutor to make a request pursuant to this rule.

The commenter's next concern involves the situation where an employee is injured outside of work. In this situation, the employee's own testimony would be based on matters unrelated to his or her actual work activities; therefore, no request pursuant to this rule would be necessary for that employee's testimony. However, this rule is intended precisely for the situation where one of the parties to this private lawsuit seeks the testimony of another Social Security employee. If the testimony of the other employee depends on information obtained in the course of Social Security business, we believe it is appropriate for the party requesting such testimony to proceed under this rule.

The commenter also suggested that in situations where an employee is injured and required to go through a Federal workers compensation proceeding, we should routinely allow employee testimony. We believe that this concern is addressed by section 403.115(b)(7), which renders the procedural requirements established in this rule inapplicable in cases where Federal law or regulations require employees to provide testimony. In such cases, our employees can be released to testify without requiring the individual seeking such testimony to make a request pursuant to this rule.

The commenter's final concern was that employees should be allowed to provide testimony in a product liability lawsuit involving equipment used on the job for Social Security. We believe that it is particularly appropriate to apply the procedures established in these regulations to this kind of case. The Commissioner must consider the various factors articulated in this rule and the particular facts surrounding a request for testimony in a case such as this. Whether to provide testimony and the form of that testimony should be left to the Commissioner to decide on a case-by-case basis.

Another commenter, concerned about fraud and misinformation in domestic support cases, suggested that it would always be in SSA's interests to provide records and testimony in legal proceedings where doing so could prevent improper payments of public benefits or improper support payments. SSA places a high premium on preventing program fraud and safeguarding the trust funds. However, as noted in the preamble to the proposed rule, SSA must balance other important interests with the need for

program integrity when assessing a request for testimony or records. Among these interests are minimizing the possibility of involving SSA in issues not related to its mission, maintaining SSA's impartiality, and protecting sensitive and confidential information and the deliberative processes of SSA. To the extent that the commenter is suggesting that SSA should consider fraud prevention and program integrity when it determines whether to release records or authorize testimony, we agree. Current disclosure regulations permit disclosures to law enforcement officials when necessary to investigate or prosecute fraud or other criminal activity involving the social security program. See 20 CFR 401.155(c). Moreover, this final rule already includes among the items the Commissioner will consider when evaluating whether to grant a request for testimony, "Whether you need the testimony to prevent fraud or similar misconduct." 20 CFR 403.130(k). However, if the commenter is suggesting that a general exclusion from these rules should apply to all requests arising out of domestic support cases or any other cases where a party alleges fraud, we disagree. Such an exclusion could harm other important SSA interests, including those listed above. We, therefore, have not made any changes in the regulations to address this comment.

The third commenter noted that § 403.110 includes State agency employees and consultative examiners (CEs) as persons subject to SSA jurisdiction and control and, therefore, covered by this rule. She expressed concern that the rule does not explain the procedures these individuals must follow when they receive a direct request for testimony and suggested that we include provisions directing State agency employees and CEs to forward all requests to SSA. As a general matter, we will provide procedures applicable to various parties affected by this rule through internal program instructions. However, we also note that, while all employees (including State agency personnel and CEs) will be forwarding applications submitted under this rule to SSA headquarters for a decision on whether to permit the testimony, neither SSA nor the Department of Justice can provide State or private personnel with legal representation.

Explanation of Final Rule

SSA administers a wide variety of programs that affect almost 50 million beneficiaries and the general public. SSA maintains records on virtually every individual in the United States. The documents that SSA obtains or

generates and our employees' expertise frequently are sought for use in legal proceedings in which SSA is neither involved nor has an interest. Each year, SSA receives thousands of requests for records and testimony. This rule establishes SSA policies and procedures applicable to requests for official Agency information, records, or testimony in legal proceedings.

Scope

With some limited exceptions, this rule applies to all requests arising out of a legal proceeding for:

- (1) SSA information or records; or
- (2) Testimony from SSA employees concerning information acquired while performing official duties or because of the employees' official capacity.

A request for both testimony and records or other information is treated as two separate requests—one for testimony and one for records or other information—because some procedures apply only to requests for testimony.

This rule applies to a broad range of legal proceedings. It adopts the definition of "record" found in SSA disclosure regulations; clarifies that "testimony" encompasses all types of sworn statements; and expands the definition of SSA "employee" to include past employees, persons acting on the Agency's behalf, and persons subject to the Agency's disclosure regulations.

Note: These definitions do not expand the Federal Government's obligation to provide legal representation.

This rule explains that SSA employees may disclose records or other information only as permitted under the Agency's disclosure regulations and explains that SSA employees may provide testimony (even testimony related to records that the Agency may disclose) only with the Commissioner's explicit approval. The Commissioner may delegate this authority.

This rule does not apply to requests for testimony:

- In an SSA administrative proceeding;
- Related to a case to which SSA is a party;
- From the United States Department of Justice;
- In a criminal proceeding to which the United States is a party;
- In a legal proceeding initiated by state or local authorities arising from an investigation or audit initiated by, or conducted in cooperation with, SSA's Office of the Inspector General;
- From either house of Congress;
- In a law enforcement proceeding related to threats or acts against SSA, its employees, or its operations; or

- Where Federal law or regulations expressly require a Federal employee to provide testimony.

These exceptions refine those listed in the DHHS regulations to focus more on specific SSA goals. For example, instead of the broad exceptions related to criminal or civil proceedings where the United States or any Federal agency is a party (45 CFR § 2.1(d)(1)), we provide more specific exceptions related to cases where SSA is a party, requests from the Department of Justice, and criminal proceedings to which the United States is a party. These changes address SSA's goals of full participation in cases when it is a party, and full cooperation and comity with the Agency's legal representatives (the Department of Justice). At the same time, the more narrowly tailored exceptions advance SSA goals of: (1) Not providing any unfair advantage to private litigants related to SSA testimony, and (2) making a full and fair evaluation of each applicant's need for testimony. Similarly, we have not included the exceptions found in the DHHS regulations that concern DHHS agencies and employees, and we have clarified the relationship between this rule and SSA's disclosure regulations (20 CFR parts 401 and 402) and added exceptions to enhance our ability to assist those protecting and furthering the interests of SSA.

Certification

Because we can certify copies of records in SSA's possession, the Commissioner generally will not authorize testimony intended only to authenticate those records. We have adopted certification rules different from those in the DHHS regulations to explain that SSA will not certify copies of records that have been released previously or have been otherwise outside SSA's control.

Fees

We charge a fee for production of records or information and certification. The fee schedules for these services are established in 20 CFR §§ 401.95, 402.155–185, as appropriate. We will also charge for testimony. These fees will be calculated to reimburse the Federal Government for the full cost of providing testimony, such as, but not limited to, salary or wages of the witness for time needed to prepare for testimony, any necessary travel time, and the cost of travel and attendance at the legal proceeding.

Relation to SSA Disclosure Regulations (20 CFR parts 401 and 402)

The DHHS regulations at 45 CFR part 2 do not apply to matters covered in the SSA disclosure regulations at 20 CFR part 401. See 45 CFR § 2.1(d)(6). Part 403 applies to such matters to the extent necessary to ensure that requests for testimony related to records receive the same treatment as other requests for testimony and to provide notice to requesters or courts when current law prohibits the disclosure of a requested record.

Nothing in this rule affects the application of the rules in SSA's disclosure regulations. As provided in § 403.105, if you request records or information in any legal proceeding covered by this rule, SSA employees will not disclose the requested records or information unless authorized by SSA disclosure regulations. If the disclosure is not authorized, the decision to deny the request would be made by the appropriate SSA official under the SSA disclosure regulations. However, if disclosure is not authorized and your request states that a response is due on a particular date, we will make every reasonable effort to provide you with the written notification described in § 403.145 on or before the specified date. We will also send you any notices required by part 401 or 402. If disclosure of records or information is authorized by the disclosure regulations but you request testimony concerning those matters, your request will be subject to the process for applying for testimony described in §§ 403.120 through 403.140. By focusing a requestor on the disclosure regulations (which usually require the consent of the individual to whom the requested record pertains) and the procedures for obtaining the Commissioner's permission for testimony, this rule emphasizes the most efficient means for obtaining information, records, or testimony.

Subpoenas Duces Tecum

Under the DHHS regulations, subpoenas *duces tecum* were deemed to be requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and were to be processed under the DHHS FOIA regulations. See 45 CFR 2.5. SSA has concluded that a more useful approach given the nature of SSA's records and operations is to treat subpoenas *duces tecum* as requests for records within the scope of this rule. Accordingly, SSA will apply the procedures in this rule in responding to such subpoenas *duces tecum*. We are deleting the last sentence of the

definition of "request" in 20 CFR 402.30 to clarify that subpoenas will not be treated as FOIA requests.

Procedures for Requesting Testimony

In § 403.120, we explain the process for requesting testimony. We have changed the procedures used under the DHHS regulations for requesting testimony from an SSA employee to standardize the procedures and to make them more administratively efficient.

To obtain the testimony of an SSA employee in a legal proceeding, you must file a written application. As in the DHHS regulations, this rule requires that the application set out the nature of the testimony sought, explain why the information is not available by other means, and explain why it is in SSA's interest to provide the testimony. In addition, this rule requires you to explain in the application the relevance of the testimony to the issues involved in the legal proceeding and state the date and time when you need the testimony and the location where the testimony would be presented. Another change from the DHHS regulations is that this rule requires you to submit the application for testimony to us at least 30 days in advance of the date when you need the testimony, or explain in your application why your application is not timely and why it is in SSA's interest to review the untimely application. Failure to submit a complete and timely application could result in the denial of the application or could delay the decision on the application.

Unlike the DHHS regulations, this rule establishes a central address for all applications for testimony by SSA employees for use in legal proceedings. This rule requires that all applications (except applications involving the Office of the Inspector General) be sent to our Office of the General Counsel in Baltimore, Maryland. By using a central location, we can issue quicker responses and handle applications more efficiently and consistently.

Deciding Whether To Approve an Application for Testimony—Factors We Consider

Once we receive a complete application for testimony under this rule, the Commissioner will consider whether to approve it. The Office of the General Counsel or another component of SSA may review your application. In consultation with these offices, the Commissioner will make a final decision on your application and notify you of that decision. See § 403.135. To decide whether to approve the application, and therefore to authorize

an SSA employee to provide testimony, the Commissioner will consider a number of factors, such as:

- Whether providing the testimony would violate a statute, Executive Order, or regulation;
- Whether providing the testimony will put confidential, sensitive, or privileged information at risk;
- Whether providing the testimony would unduly expend for private purposes the resources of the United States (including the time of SSA employees otherwise needed for official duties);
- Whether the testimony is available in a less burdensome form or from another source;
- Whether the testimony sought is limited to the purpose of the request;
- Whether you previously have requested the same testimony in the same or a related proceeding;
- Whether providing the testimony is in SSA's interest;
- Whether providing the testimony is consistent with SSA's policy of impartiality among private litigants;
- Whether another government agency is involved in the proceeding;
- Whether you need the testimony to prevent fraud or similar misconduct; and
- Whether providing the testimony sought is necessary to prevent a miscarriage of justice or to preserve the rights of an accused individual to due process in a criminal proceeding.

See § 403.130.

Under this rule, if the Commissioner approves your application, the Commissioner decides the form by which SSA will provide the testimony. For example, if the Commissioner decides that SSA can meet your needs satisfactorily with a sworn written statement, he or she will not authorize oral testimony.

Procedures When the Commissioner Has Not Approved the Application for Testimony or When Disclosure Is Not Authorized

Under the DHHS regulations, if the Agency head denied approval for an employee to comply with a subpoena for testimony, or did not act by the return date in the subpoena, the employee was to appear at the stated time and place unless advised by the Office of the General Counsel that responding to the subpoena would be inappropriate. The only actions the employee was authorized to take at this appearance were to provide a copy of the regulations and to respectfully decline to testify or produce any documents. See 45 CFR § 2.4(b). Our experience suggests that under the prior

procedures, SSA incurred the substantial cost of sending individuals to hearings, and that these appearances did not provide any significant service or information to the tribunal or the parties involved.

Section 403.145 provides that, in cases where the Commissioner has not authorized testimony or SSA cannot respond to a request by the date specified in the application, SSA will make every reasonable effort to provide a statement to the requesting party and/or the court or other tribunal conducting the proceeding by the specified date. The statement will explain the following: compliance with the request is not authorized without the Commissioner's approval and approval has not yet been given; the requirements for obtaining approval; and, if the request complies with § 403.120, the estimated time necessary for reaching a decision.

If 20 CFR part 401 or 402 does not authorize disclosure of the requested records or information, the statement will explain the requirements for disclosure. Generally, if a response to a request for information, records, or testimony is due before the conditions of this Part or 20 CFR part 401 or 402 are met, no SSA employee will appear before the tribunal or the parties involved in the proceeding.

Waiving the Requirements of This Rule

Under certain circumstances, this rule permits the Commissioner to grant an exception from any requirement related to your application for testimony. For example, § 403.120(b) provides that if you apply for testimony by an SSA employee, you must submit the application at least 30 days before the date the testimony is needed. If, however, the Commissioner believes that a waiver of this requirement would be in SSA's interests or would be necessary to prevent a miscarriage of justice, he or she may grant an exception. In addition, SSA employees may resolve requests for information informally (as they currently do in the ordinary course of business) by writing letters to claimants or other members of the public explaining procedures or other matters encompassed by the Social Security Act. Such letters may include information about an individual, if that person has provided written consent to disclosure as required in 20 CFR part 401. Such informal activity is not a waiver of the procedures described in this rule since it does not involve a sworn statement by an SSA employee, but is an alternative means of assisting a person without providing employee testimony.

Requests Involving the Office of the Inspector General

This rule provides that if you seek records or information of the Office of the Inspector General or the testimony of an employee of the Office of the Inspector General, the regulations in Part 403 apply with two exceptions. The Inspector General or his or her designee will make any determination that the Commissioner would make. A separate address is provided for requests for Office of the Inspector General records or information or applications for the testimony of an employee of the Office of the Inspector General.

Procedural Nature of the Regulations

This rule is procedural, not substantive. Nevertheless, failure to comply with the procedures may be a basis for denying a request. This rule does not create a right to obtain information, records, or the testimony of an SSA employee nor does it create any additional right or privilege not already available to SSA to deny such a request. Furthermore, this rule creates no independent right of action against SSA or any of its employees.

Changes to 20 CFR Part 401

We are adding a new paragraph (c) to 20 CFR 401.180. That regulation contains SSA's rules on disclosure of information about individuals under court order or subpoena. New paragraph (c) contains a cross-reference to the new regulations contained in Part 403.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this rule does not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, it was not subject to OMB review. We have also determined that this rule meets the plain language requirement of Executive Order 12866 and the President's Memorandum of June 1, 1998.

Regulatory Flexibility Act

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

Paperwork Reduction Act

These regulations contain reporting requirements in section 403.120(a), (b), and (c), which establish the requirements for applying for the

testimony of an SSA employee. We have the clearance from the Office of Management and Budget (OMB) under the requirements of 44 U.S.C. 3507, as amended by section 2 of the Paperwork Reduction Act of 1995, to collect this information. The OMB clearance number is 0960-0619. The clearance expires on September 30, 2003. (Catalog of Federal Domestic Assistance Program Nos. 93.773 Medicare-Hospital Insurance; 93.774 Medicare-Supplementary Medical Insurance; 96.001 Social Security-Disability Insurance; 96.002 Social Security-Retirement Insurance; 96.003 Special Benefits for Persons Aged 72 and Over; 96.004 Social Security-Survivors Insurance; 96.005 Special Benefits for Disabled Coal Miners; and 96.006 Supplemental Security Income)

List of Subjects

20 CFR Part 401

Administrative practice and procedure, Freedom of information, Privacy

20 CFR Part 402

Administrative practice and procedure, Freedom of information

20 CFR Part 403

Courts, Government employees

Dated: January 4, 2001.

Kenneth S. Apfel,

Commissioner of Social Security.

For reasons set out in the preamble, Chapter III of Title 20 of the Code of Federal Regulations is amended as follows:

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. Section 401.180 is amended by adding paragraph (c) to read as follows:

§ 401.180 Courts.

* * * * *

(c) *Other regulations on testimony and production of records in legal proceedings.* See Part 403 of this chapter for additional rules covering disclosure of information and records governed by this part and requested in connection with legal proceedings.

PART 402—AVAILABILITY OF INFORMATION AND RECORDS TO THE PUBLIC

3. The authority citation for Part 402 continues to read as follows:

Authority: Secs. 205, 702(a)(5), and 1106 of the Social Security Act (42 U.S.C. 405, 902(a)(5), 1306); 5 U.S.C. 552 and 552a; 8 U.S.C. 1360; 18 U.S.C. 1905; 26 U.S.C. 6103; 30 U.S.C. 923b; 31 U.S.C. 9701; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235.

4. Section 402.30 is amended by revising the definition of request to read as follows:

§ 402.30 [Amended]

Request means asking for records, whether or not you refer specifically to the FOIA. Requests from Federal agencies and court orders for documents are not included within this definition.

* * * * *

5. A new part 403 is added to read as follows:

PART 403—TESTIMONY BY EMPLOYEES AND THE PRODUCTION OF RECORDS AND INFORMATION IN LEGAL PROCEEDINGS

Sec.

403.100 When can an SSA employee testify or produce information or records in legal proceedings?

403.105 What is the relationship between this part and 20 CFR parts 401 and 402?

403.110 What special definitions apply to this part?

403.115 When does this part apply?

403.120 How do you request testimony?

403.125 How will we handle requests for records, information, or testimony involving SSA's Office of the Inspector General?

403.130 What factors may the Commissioner consider in determining whether SSA will grant your application for testimony?

403.135 What happens to your application for testimony?

403.140 If the Commissioner authorizes testimony, what will be the scope and form of that testimony?

403.145 What will SSA do if you have not satisfied the conditions in this part or in 20 CFR part 401 or 402?

403.150 Is there a fee for our services?

403.155 Does SSA certify records?

Authority: Secs. 702(a)(5) and 1106 of the Act, (42 U.S.C. 902(a)(5) and 1306); 5 U.S.C. 301; 31 U.S.C. 9701.

§ 403.100 When can an SSA employee testify or produce information or records in legal proceedings?

An SSA employee can testify concerning any function of SSA or any information or record created or acquired by SSA as a result of the discharge of its official duties in any legal proceeding covered by this part

only with the prior authorization of the Commissioner. An SSA employee can provide records or other information in a legal proceeding covered by this part only to the extent that doing so is consistent with 20 CFR parts 401 and 402. A request for both testimony and records or other information is considered two separate requests—one for testimony and one for records or other information. SSA maintains a policy of strict impartiality with respect to private litigants and seeks to minimize the disruption of official duties.

§ 403.105 What is the relationship between this part and 20 CFR parts 401 and 402?

(a) *General.* Disclosure of SSA's records and information contained in those records is governed by the regulations at 20 CFR parts 401 and 402. SSA employees will not disclose records or information in any legal proceeding covered by this part except as permitted by 20 CFR parts 401 and 402.

(b) *Requests for information or records that do not include testimony.*

(1) If you do not request testimony, §§ 403.120–403.140 do not apply.

(2) If 20 CFR part 401 or 402 permits disclosure to you of any requested record or information, we will make every reasonable effort to provide the disclosable information or record to you on or before the date specified in your request.

(3) If neither 20 CFR part 401 nor 402 permits disclosure of information or a record you request, we will notify you as provided in § 403.145. We will also send you any notices required by part 401 or 402.

§ 403.110 What special definitions apply to this part?

The following definitions apply:

(a) *Application* means a written request for testimony that conforms to the requirements of § 403.120.

(b)(1) *Employee* includes—

(i) Any person employed in any capacity by SSA, currently or in the past;

(ii) Any person appointed by, or subject to the supervision, jurisdiction, or control of SSA, the Commissioner of Social Security, or any other SSA official, currently or in the past; and

(iii) Any person who is not described elsewhere in this definition but whose disclosure of information is subject to the regulations at 20 CFR part 401, currently or in the past.

(2) For purposes of this paragraph (b), a person subject to SSA's jurisdiction or control includes any person hired as a contractor by SSA, any person

performing services for SSA under an agreement (such as an officer or employee of a State agency involved in determining disability for SSA), and any consultant (including medical or vocational experts or medical services or consultative examination providers), contractor, or subcontractor of such person. Such a person would also include any person who has served or is serving in any advisory capacity, formal or informal.

(3) For purposes of this paragraph (b), a person employed by SSA in the past is considered an employee only when the matter about which the person would testify is one in which he or she was personally involved while at SSA; where the matter concerns official information that the employee acquired while working, such as sensitive or confidential agency information; where the person purports to speak for SSA; or where significant SSA resources would be required to prepare the person to testify. Such a person would not be considered an employee when the person will rely only on expertise or general knowledge he or she acquired while working at SSA.

(c) *Commissioner* means the Commissioner of Social Security or his or her designee(s).

(d) *Legal proceeding* includes any pretrial, trial, and post-trial stage of any existing or reasonably anticipated judicial or administrative action, hearing, investigation, or similar proceeding before a court, commission, board, agency, or other tribunal, authority or entity, foreign or domestic. *Legal proceeding* also includes any deposition or other pretrial proceeding, including a formal or informal request for testimony by an attorney or any other person.

(e) *Record* has the same meaning as "record" in 20 CFR 402.30.

(f) *Request* means any attempt to obtain the production, disclosure, or release of information, records, or the testimony of an SSA employee, including any order, subpoena, or other command issued in a legal proceeding as well as any informal or other attempt (by any method) by a party or a party's representative.

(g) *SSA* means the Social Security Administration.

(h) *Testimony* includes any sworn statement (oral or written), including (but not limited to)—

(1) Any statement provided through personal appearance; deposition; or recorded interview; or provided by telephone, television, or videotape;

(2) Any response during discovery or other similar proceedings that would

involve more than the mere physical production of records; and

(3) Any declaration made under penalty of perjury or any affidavit.

(i) *We* or *our* means the Social Security Administration.

(j) *You* or *your* means an individual or entity that submits a request for records, information or testimony.

§ 403.115 When does this part apply?

(a) Except as specified in paragraph (b) of this section, this part applies to any request in connection with any legal proceeding for SSA records or other information or for testimony from SSA or its employees. This part applies to requests for testimony related to SSA's functions or to any information or record created or acquired by SSA as a result of the discharge of its official duties.

(b) This part does not apply to requests for testimony—

(1) In an SSA administrative proceeding;

(2) In a legal proceeding to which SSA is a party ("SSA" here includes the Commissioner and any employee acting in his or her official capacity);

(3) From the United States Department of Justice;

(4) In a criminal proceeding in which the United States is a party;

(5) In a legal proceeding initiated by state or local authorities arising from an investigation or audit initiated by, or conducted in cooperation with, SSA's Office of the Inspector General;

(6) From either house of Congress;

(7) In a law enforcement proceeding related to threats or acts against SSA, its employees, or its operations ("SSA" here includes the Commissioner and any employee acting in his or her official capacity); or

(8) Where Federal law or regulations expressly require a Federal employee to provide testimony.

§ 403.120 How do you request testimony?

(a) You must submit a written application for testimony of an SSA employee. Your application must—

(1) Describe in detail the nature and relevance of the testimony sought in the legal proceeding;

(2) Include a detailed explanation as to why you need the testimony, why you cannot obtain the information you need from an alternative source, and why providing it to you would be in SSA's interest; and

(3) Provide the date and time that you need the testimony and the place where SSA would present it.

(b) You must submit a complete application to SSA at least 30 days in advance of the date that you need the

testimony. If your application is submitted fewer than 30 days before that date, you must provide, in addition to the requirements set out above, a detailed explanation as to why—

(1) You did not apply in a timely fashion; and

(2) It is in SSA's interest to review the untimely application.

(c) You must send your application for testimony to: Office of the General Counsel, Social Security Administration, Post Office Box 17706, Baltimore, MD 21235-7760, Attn: Touhy Officer. (If you are requesting testimony of an employee of the Office of the Inspector General, send your application to the address in § 403.125.)

(d) The Commissioner has the sole discretion to waive any requirement in this section.

(e) If your application does not include each of the items required by paragraph (a) of this section, we may return it to you for additional information. Unless the Commissioner waives one or more requirements, we will not process an incomplete or untimely application.

§ 403.125 How will we handle requests for records, information, or testimony involving SSA's Office of the Inspector General?

A request for records or information of the Office of the Inspector General or the testimony of an employee of the Office of the Inspector General will be handled in accordance with the provisions of this part, except that the Inspector General or the Inspector General's designee will make those determinations that the Commissioner otherwise would make. Send your request for records or information pertaining to the Office of the Inspector General or your application for testimony of an employee of the Office of the Inspector General to: Office of the Inspector General, Social Security Administration, 300 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235-6401.

§ 403.130 What factors may the Commissioner consider in determining whether SSA will grant your application for testimony?

In deciding whether to authorize the testimony of an SSA employee, the Commissioner will consider applicable law and factors relating to your need and the burden to SSA. The considerations include, but are not limited to, the following:

(a) *Risk of law violation or compromise of Government privilege.*

(1) Would providing the testimony violate a statute (such as 26 U.S.C. 6103 or section 1106 of the Social Security

Act, 42 U.S.C. 1306), Executive Order, or regulation (such as 20 CFR part 401)?

(2) Would providing the testimony put confidential, sensitive, or privileged information at risk?

(b) *Burden on SSA.* (1) Would granting the application unduly expend for private purposes the resources of the United States (including the time of SSA employees needed for official duties)?

(2) Would the testimony be available in a less burdensome form or from another source?

(3) Would the testimony be limited to the purpose of the request?

(4) Did you previously request the same testimony in the same or a related proceeding?

(c) *Interests served by allowing testimony.* (1) Would providing the testimony serve SSA's interest?

(2) Would providing the testimony maintain SSA's policy of impartiality among private litigants?

(3) Is another government agency involved in the proceeding?

(4) Do you need the testimony to prevent fraud or similar misconduct?

(5) Would providing the testimony be necessary to prevent a miscarriage of justice or to preserve the rights of an accused individual to due process in a criminal proceeding?

§ 403.135 What happens to your application for testimony?

(a) If 20 CFR part 401 or 402 does not permit disclosure of information about which you seek testimony from an SSA employee, we will notify you under § 403.145.

(b) If 20 CFR part 401 or 402 permits disclosure of the information about which you seek testimony,

(1) The Commissioner makes the final decision on your application;

(2) All final decisions are in the sole discretion of the Commissioner; and

(3) We will notify you of the final decision on your application.

§ 403.140 If the Commissioner authorizes testimony, what will be the scope and form of that testimony?

The employee's testimony must be limited to matters that were specifically approved. We will provide testimony in the form that is least burdensome to SSA unless you provide sufficient information in your application for SSA to justify a different form. For example, we will provide an affidavit or declaration rather than a deposition and a deposition rather than trial testimony.

§ 403.145 What will SSA do if you have not satisfied the conditions in this part or in 20 CFR part 401 or 402?

(a) We will provide the following information, as appropriate, to you or

the court or other tribunal conducting the legal proceeding if your request states that a response is due on a particular date and the conditions prescribed in this part, or the conditions for disclosure in 20 CFR part 401 or 402, are not satisfied or we anticipate that they will not be satisfied by that date:

(1) A statement that compliance with the request is not authorized under 20 CFR part 401 or 402, or is prohibited without the Commissioner's approval;

(2) The requirements for obtaining the approval of the Commissioner for testimony or for obtaining information, records, or testimony under 20 CFR part 401 or 402; and

(3) If the request complies with § 403.120, the estimated time necessary for a decision. We will make every reasonable effort to provide this information in writing on or before the date specified in your request.

(b) Generally, if a response to a request for information, records, or testimony is due before the conditions of this Part or the conditions for disclosure in 20 CFR part 401 or 402 are met, no SSA employee will appear.

(c) SSA will seek the advice and assistance of the Department of Justice when appropriate.

§ 403.150 Is there a fee for our services?

(a) *General.* Unless the Commissioner grants a waiver, you must pay fees for our services in providing information, records, or testimony. You must pay the fees as prescribed by the Commissioner. In addition, the Commissioner may require that you pay the fees in advance as a condition of providing the information, records, or testimony. Make fees payable to the Social Security Administration by check or money order.

(b) *Records or information.* Unless the Commissioner grants a waiver, you must pay the fees for production of records or information prescribed in 20 CFR §§ 401.95 and 402.155 through 402.185, as appropriate.

(c) *Testimony.* Unless the Commissioner grants a waiver, you must pay fees calculated to reimburse the United States Government for the full cost of providing the testimony. Those costs include, but are not limited to—

(1) The salary or wages of the witness and related costs for the time necessary to prepare for and provide the testimony and any travel time, and

(2) Other travel costs.

(d) *Waiver or reduction of fees.* The Commissioner may waive or reduce fees for providing information, records, or testimony under this Part. The rules in 20 CFR § 402.185 apply in determining whether to waive fees for the production

of records. In deciding whether to waive or reduce fees for testimony or for production of information that does not constitute a record, the Commissioner may consider other factors, including but not limited to—

(1) The ability of the party responsible for the application to pay the full amount of the chargeable fees;

(2) The public interest, as described in 20 CFR § 402.185, affected by complying with the application;

(3) The need for the testimony or information in order to prevent a miscarriage of justice;

(4) The extent to which providing the testimony or information serves SSA's interest; and

(5) The burden on SSA's resources required to provide the information or testimony.

§ 403.155 Does SSA certify records?

We can certify the authenticity of copies of records we disclose pursuant to 20 CFR parts 401 and 402, and this part. We will provide this service only in response to your written request. If we certify, we will do so at the time of the disclosure and will not certify copies of records that have left our custody. A request for certified copies of records previously released is considered a new request for records. Fees for this certification are set forth in 20 CFR 402.165(e).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8934]

RIN 1545-AX60

Reopenings of Treasury Securities and Other Debt Instruments; Original Issue Discount

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the federal income tax treatment of debt instruments issued in certain reopenings. The final regulations provide guidance to holders and issuers of these debt instruments.

DATES: *Effective Date:* These regulations are effective March 13, 2001.

Applicability Dates: For dates of applicability, see §§ 1.163-7(f), 1.1275-1(f), 1.1275-2(d), and 1.1275-2(k)(5).