

(2) At the applicable times specified in paragraphs (h)(2)(i) and (h)(2)(ii) of this AD.

(i) For Groups 1 and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003: At the latest of the times specified in paragraphs (h)(2)(i)(A) and (h)(2)(i)(B) of this AD.

(A) Before the accumulation of 20,000 total flight cycles or 85,000 total flight hours, whichever is first.

(B) Within 12 months after the effective date of this AD.

(ii) For Group 2 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003: At the latest of the times specified in paragraphs (h)(2)(ii)(A) and (h)(2)(ii)(B) of this AD.

(A) Before the accumulation of 22,000 total flight cycles or 95,000 total flight hours, whichever is first.

(B) Within 12 months after the effective date of this AD.

Additional Requirements of This AD

Repetitive Inspections for Zone B: Groups 4 Through 6

(i) For Groups 4, 5, and 6 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003: At the later of the times specified in paragraphs (i)(1) and (i)(2) of this AD, do the Zone B inspections as specified in paragraph (g)(2) of this AD. Repeat the applicable inspection at the applicable time specified in Sheet 3 of Figure 1 of the service bulletin.

(1) Before the accumulation of 20,000 total flight cycles or 85,000 total flight hours, whichever is first.

(2) Within 12 months after the effective date of this AD.

Repetitive Inspections for Zone C: Groups 1 Through 3

(j) For Groups 1, 2, and 3 airplanes identified in paragraph 1.A. Effectivity of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003: Within 18 months after the effective date of this AD, do a detailed inspection to determine if fasteners common to the horizontal stabilizer outboard and center section upper chords at the hinge fitting halves and the splice plates are magnetic, related investigative actions (includes ultrasonic, magnetic particle, or fluorescent particle inspections for any cracked or fractured Maraging or H-11 steel fastener), and corrective actions by accomplishing all the actions specified in Part 5 of the Work Instructions of the service bulletin, except as provided by paragraph (n) of this AD.

(k) If, during the actions required by paragraph (j) of this AD, any fastener is found to be magnetic and is not cracked or fractured, repeat the related investigative actions and corrective actions specified in paragraph (j) of this AD at the time specified in Sheet 4 of Figure 1 of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003.

Optional High Frequency Eddy Current (HFEC) Inspections for Zone A

(l) In lieu of the detailed inspection specified in paragraph (f) of this AD: Do an HFEC inspection for cracking of the upper skin of the horizontal stabilizer center section and the rear spar upper chord, in accordance with Part 2 of the Work Instructions of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003. Repeat the HFEC inspection thereafter at intervals not to exceed 2,700 flight cycles or 15,000 flight hours, whichever comes first.

Repair

(m) If any discrepancy (cracking or damage) is found during any inspection or related investigative action required by paragraphs (f), (g), (i), or (l) of this AD: Before further flight, repair in accordance with the Work Instructions of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003, except as provided by paragraph (n) of this AD. Where the service bulletin specifies to contact the manufacturer for appropriate action: Before further flight, repair according to a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or according to data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

Parts Installation

(n) As of the effective date of this AD, no person may install any Maraging or H-11 steel fasteners in the locations specified in this AD. Where Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003, specifies to install H-11 bolts (kept fasteners), this AD requires installation of Inconel bolts.

Alternative Methods of Compliance (AMOCs)

(o)(1) The Manager, Seattle ACO, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

(3) AMOCs, approved previously per AD 2002-06-02 or AD 2003-13-09, are approved as AMOCs for the corresponding provisions of this AD, for the repaired area only.

Material Incorporated by Reference

(p) You must use Boeing Alert Service Bulletin 747-55A2050, dated February 28, 2002; or Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise.

(1) On July 15, 2003 (68 FR 38583, June 30, 2003), the Director of the Federal Register

approved the incorporation by reference of Boeing Alert Service Bulletin 747-55A2050, Revision 1, dated May 1, 2003.

(2) On April 3, 2002 (67 FR 12464, March 19, 2002), the Director of the Federal Register approved the incorporation by reference of Boeing Alert Service Bulletin 747-55A2050, dated February 28, 2002.

(3) Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124-2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Room PL-401, Nassif Building, Washington, DC; on the Internet at <http://dms.dot.gov>; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741-6030, or go to http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

Issued in Renton, Washington, on May 8, 2006.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

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SOCIAL SECURITY ADMINISTRATION

20 CFR Part 498

RIN 0960-AG08

Civil Monetary Penalties, Assessments and Recommended Exclusions

AGENCY: Office of the Inspector General (OIG), Social Security Administration (SSA).

ACTION: Final rules.

SUMMARY: These final rules reflect provisions of Public Law 106-169, the Foster Care Independence Act of 1999, and Public Law 108-203, the Social Security Protection Act of 2004, to provide new and amended procedures for SSA's civil monetary penalty cases filed pursuant to sections 1129 and 1140 of the Social Security Act.

These final rules implement amendments to section 1129 of the Social Security Act (42 U.S.C. 1320a-8) to provide for the imposition of civil monetary penalties and/or assessments: against representative payees who convert Social Security benefits for a use other than for the use or benefit of the beneficiary; against those who withhold disclosure of material statements to SSA; and, against those who make false or misleading statements or representations or omissions of a material fact with respect to benefits or payments under title VIII of the Social Security Act.

These final rules also implement amendments to section 1140 of the Social Security Act (42 U.S.C. 1320b-10) to: Add to the list of enumerated terms that may give rise to a violation of section 1140; and, provide for the imposition of civil monetary penalties against those who charge fees for products or services, otherwise provided free of charge by SSA, unless the offers provide sufficient notice that the product or service can be obtained free of charge from SSA.

DATES: These final rules are effective June 16, 2006, except that § 498.102(d) will be effective December 16, 2006.

Applicability Date: Section 498.102(a)(3), as it relates to the withholding of information from, or failure to disclose information to, SSA, will be applicable upon implementation of the centralized computer file described in section 202 of Public Law 108-203. If you want information regarding the applicability date of this provision, call or write the SSA contact person. SSA will publish a document announcing the applicability date in a subsequent **Federal Register** document. The remainder of § 498.102(a)(3), currently in effect, is unaffected by this delay.

FOR FURTHER INFORMATION CONTACT: Kathy A. Buller, Chief Counsel to the Inspector General, Social Security Administration, Office of the Inspector General, Room 3-ME-1, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-2827 or TTY (410) 966-5609. 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 Web site, *Social Security Online*, at www.socialsecurity.gov.

SUPPLEMENTARY INFORMATION:

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

Background

We published a notice of proposed rulemaking (NPRM) in the **Federal Register** on March 23, 2005 (70 FR 14603), that proposed to amend the civil monetary penalty (CMP) and assessment procedures in order to implement and reflect changes made to sections 1129 and 1140 of the Social Security Act (42 U.S.C. 1320a-8 and 1320b-10) by the Foster Care Independence Act of 1999, Public Law 106-169, and the Social Security Protection Act of 2004, Public Law 108-203.

Changes Required by Public Law 106-169

Section 251(a) of Public Law 106-169, the Foster Care Independence Act of 1999, enacted December 14, 1999, added title VIII, Special Benefits for Certain World War II Veterans, to the Social Security Act. Title VIII provides that individuals who qualify under section 802 of the Social Security Act (42 U.S.C. 1002) will be entitled to a monthly benefit paid by SSA for each month after September 2000 (or an earlier date if determined by SSA) the individual resides outside the United States. Section 251(b)(6) of Public Law 106-169 amended section 1129 to include reference to title VIII. This change will subject an individual to the possible imposition of a civil monetary penalty and/or assessment for making false or misleading statements or representations or omissions of a material fact with respect to benefits or payments under title VIII.

Changes Required by Public Law 108-203

Sections 111, 201(a)(1), 204, and 207 of Public Law 108-203, the Social Security Protection Act of 2004, enacted March 2, 2004, amended sections 1129 and 1140 of the Social Security Act (42 U.S.C. 1320a-8 and 1320b-10). These changes expand and enhance our enforcement authority for violations of sections 1129 and 1140 of the Social Security Act, as set out in more detail in the preceding *Summary* section. These additional enforcement authorities will better protect SSA's programs and operations from waste, fraud and abuse, as well as protect citizens, many elderly, who may be misled by solicitations/advertisements to believe that SSA has endorsed or authorized the solicitation/advertisement.

Civil Monetary Penalties and Assessments for False Statements, Conversions, and Withholding

The two amendments to section 1129 broaden the scope of the civil monetary penalty program by adding new categories for civil monetary penalties and/or assessments (1) against representative payees with respect to conversions and (2) against individuals who withhold the disclosure of material facts to SSA.

The first amendment to section 1129 extends the civil monetary penalty and assessment provisions to representative payees of individuals entitled to benefits. The final rule implements this amendment by subjecting representative payees who convert a payment, or any

part thereof, made under title II, title VIII or title XVI of the Social Security Act, intended for a Social Security beneficiary to a use other than for the use and benefit of the beneficiary to a civil monetary penalty of up to \$5,000 and/or an assessment in lieu of damages for each such conversion. Our final rule applies to any person (including any organization, agency, or other entity) who receives benefits on behalf of another individual for the purpose of distributing the benefits with the beneficiary's best interests in mind. Previously, representative payees could elude civil monetary penalties and/or assessments under section 1129 for such actions, as section 1129 did not extend to representative payees who converted lawfully issued payments intended for a beneficiary unless the representative payee had either made false or misleading statements or representations or omitted from a statement a material fact regarding a beneficiary's initial or continuing right to, or the amount of, monthly Social Security benefits or payments. In addition, the representative payee must have known or should have known that the statements or representations or omissions of material facts were false or misleading.

The second amendment under section 1129 extends the civil monetary penalty and/or assessment provisions to individuals who withhold from SSA disclosure of material facts that are used in determining an individual's initial or continuing eligibility for, or amount of, benefits or payments under title II, title VIII or title XVI of the Social Security Act.

Our final rule implements this amendment by providing for civil monetary penalties and/or assessments in lieu of damages to be imposed for the failure to come forward and notify SSA of changed circumstances that affect eligibility or benefit amounts when the individual knew or should have known that the withheld fact was material and that the failure to come forward was misleading.

This amendment extends the coverage of section 1129. Previously, under section 1129, the OIG was able to impose a civil monetary penalty and/or assessment only against individuals who either made false or misleading statements or representations or omitted from a statement a material fact regarding an individual's initial or continuing right to, or the amount of, monthly Social Security benefits or payments. In addition, the individual must have known or should have known that the statements or

representations or omissions of material facts were false or misleading.

Therefore, a civil monetary penalty and/or assessment could not be imposed against an individual who should have known to come forward and notify the SSA of changed circumstances that affected that individual's or another individual's eligibility or benefit amount but failed to do so. The amendment addresses this issue. As stated at page 14 in Senate Report 108-176, accompanying Public Law 108-203, this amendment is intended to cover situations that "include (but are not limited to) the following: (1) An individual who has a joint bank account with a beneficiary in which the SSA direct deposited the beneficiary's Social Security checks; upon the death of the beneficiary, this individual fails to disclose the death of the beneficiary to SSA, instead spending the proceeds from the deceased beneficiary's Social Security checks; and (2) an individual who is receiving benefits under one SSN while working under another SSN."

This final rule allows the OIG to impose a penalty of up to \$5,000 and/or an assessment in lieu of damages for each individual payment of Social Security benefits received while withholding disclosure of such material fact from the SSA.

Senate Committee Report 108-176 also states in its analysis of the amendment, at pages 13-14, that this amendment is not intended to apply against individuals whose failure to come forward was not for the purpose of improperly obtaining or continuing to receive benefits.

This amendment is effective only for violations occurring after the date on which the Commissioner implements the centralized computer file described in section 202 of Public Law 108-203 to record the date of submission of information by a disabled beneficiary (or representative) regarding a change in the beneficiary's work or earnings status. SSA will announce when it has implemented the centralized computer file in a subsequent **Federal Register** notice.

This amendment strengthens the deterrence factor of section 1129 by enabling the OIG to pursue civil monetary penalties and/or assessments against individuals who withhold disclosure of material facts in order to receive benefits to which they are not entitled. The OIG will continue to impose reasonable civil monetary penalties and assessments, as applicable, on a case-by-case basis by applying the five enumerated factors employed in other section 1129 cases, as set out at 20 CFR 498.106(a).

Civil Monetary Penalties and Assessments for Misuse of SSA's Words or Emblems

Section 1140 prohibits individuals and groups from using in a solicitation, advertisement or other communication specific terms related to Social Security that could be interpreted or construed as conveying the impression either that the item is approved, endorsed, or authorized by SSA or that such person has some connection with, or authorization from, SSA. Section 1140 is aimed at protecting consumers, especially senior citizens who rely on SSA and are some of our most vulnerable stakeholders, from being victimized by misleading solicitors or direct marketers who improperly use Social Security symbols or emblems in order to suggest they have some connection with, or authorization from, SSA.

The first amendment to section 1140 authorizes the Commissioner to impose a civil monetary penalty against certain individuals or groups who offer to assist an individual in obtaining products or services for a fee that SSA provides free of charge. If the individual or group charges a fee for such product or service, the solicitation/ mailing for the product or service must include a written notice stating that the product or service is available from SSA free of charge. Section 204 of Public Law 108-203 authorizes the Commissioner to set the standards for the notice with respect to content, placement and legibility. Pursuant to this authority, our final rule requires clear and prominent display of the notice. By drawing the attention of the reader, the notice would help protect consumers. The goal of this regulation is to prevent advertisements or other communication that embed such notices within other text or place the notice in small type face in an attempt to hide the fact that the products or services are available from SSA free of charge.

Consistent with the amendment, our final rule provides exceptions for persons serving as a claimant representative in connection with a claim arising under title II, title VIII or title XVI of the Social Security Act and for persons assisting individuals in a plan with the goal of supporting themselves without Social Security disability benefits. As specified in section 204(b) of the SSPA, this rule applies to offers of assistance made six months after these final regulations are issued.

The second amendment to section 1140 adds certain words and phrases to the statute and prohibits the use of these

words and phrases, or any combination or variation of such words, in a misleading manner. Specifically, the amendment expands section 1140 to include: "Death Benefits Update," "Federal Benefit Information," "Funeral Expenses," and "Final Supplemental Program." These words and phrases have been used by solicitors/marketers to give the false impression that their solicitations/mailings or other items are connected to or authorized by the SSA or that the solicitors/marketers have some connection with, or authorization from, SSA.

We have made some non-substantive, technical changes to the Notice of Proposed Rulemaking (NPRM) including:

(1) Section 498.100 (b)(1) was modified to state, "Make or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits or payments under title VIII or title XVI of the Social Security Act; * * *" We believe that the addition of "or otherwise withhold the disclosure of a material fact" to section (b)(1) accurately reflects the amendment to section 1129 of the Social Security Act made by section 201 of Public Law 108-203. The phrase "otherwise withhold disclosure" is defined in § 498.101.

(2) Section 498.100(b)(2) was modified to state, "Convert any payment, or any part of a payment, received under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, while acting in the capacity of a representative payee for that individual, to a use that such person knew or should have known was other than for the use and benefit of such other individual; or * * *." We believe that this more accurately tracks the amendment to section 1129 by section 111 of Public Law 108-203 and clarifies that a civil monetary penalty and/or assessment, may be imposed if the payment, or any part of the payment, in question was made to the representative payee for the use and benefit of another person. We changed the word "beneficiary" at the end of the section to "such other individual" as this change more accurately track the language of the legislation.

(3) Section 498.100(b)(3) was previously section (b)(2) but was renumbered due to the amendments to sections 1129 and 1140. In addition, because we added a new section (b)(4), the word "or" was added to the end of § 498.100(b)(3).

(4) Section 498.100(b)(4) was added to state, "With limited exceptions, charges a fee for a product or service that is available from SSA free of charge without including a written notice stating the product or service is available from SSA free of charge." We believe that separating section § 498.100(b)(3) as it appeared in the NPRM into sections (b)(3) and (b)(4) more clearly and accurately reflects the amendment to section 1140 by section 204 of Public Law 108-203 to address anyone who charges a fee for a product or service that is available from SSA free of charge without including a written notice so stating.

(5) Section 498.101, we deleted the phrase "title XVI" and inserted the phrase "title VIII or title XVI" in the definition of "material fact." The definition now reads, "*Material fact* means a fact which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under title VIII or title XVI of the Social Security Act." We made this change to be consistent with other sections of the regulations wherein both title VIII and title XVI are mentioned together.

(6) Section 498.102(a)(1)(ii), we inserted the word "title" before "XVI" to be consistent with the other sections of the regulations wherein title VIII and title XVI are mentioned together.

(7) Section 498.102(c), we changed the word "whom" to "who" to be grammatically correct. We also deleted the phrase "an advertisement or other item" and inserted the phrase "a solicitation, advertisement, or other communication" before the phrase "was authorized, approved, or endorsed * * *"

(8) Section 498.102(d), we deleted the phrase "products or services" after the word "obtaining" and inserted the phrase "a product or service" in order to be consistent with the use of the terms "product or service" in the remainder of subsection (d). We also deleted the word "that" before the phrase "the Social Security Administration * * *"

(9) Section 498.102(d)(1), we moved the phrase "before the product or service is provided to the individual" from the end of the sentence to after the phrase "sufficient notice." The sentence now reads, "the person provides sufficient notice before the product or service is provided to the individual that the product or service is available free of charge and:"

(10) Section 498.102(d)(1)(i), we deleted the phrase "in printed solicitations or advertisements," and

inserted the phrase "in a printed solicitation, advertisement or other communication." We believe this is consistent with similar language in § 498.102(c).

(11) Section 498.102(d)(1)(ii), we deleted "must be" after the phrase "such notice" and inserted "is" after the phrase "such notice." This parallels current section (i) that precedes this section.

(12) Section 498.102(d)(2), we deleted the introductory phrase "Paragraph (d) of this section shall not apply to offers—" and inserted the phrase, "Civil monetary penalties will not be imposed under paragraph (d) of this section with respect to offers—* * *" We believe this modification parallels the language in 498.102(c)(2).

(13) Section 498.102(d)(2)(i), we inserted the word "title" before "VIII" and before "XVI" to be consistent with the other sections of the regulations wherein title II, title VIII and title XVI are mentioned together.

(14) Section 498.103(b), we deleted the word "wrongfully" and inserted the phrase "or any part thereof" after the phrase "converts such payment." We believe this accurately reflects the amendment to section 1129 by section 111 of Public Law 108-203 and is parallel to § 498.102(b). The section now reads, "Under § 498.102(b), the Office of the Inspector General may impose a penalty of not more than \$5,000 against a representative payee for each time the representative payee receives a payment under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, and who converts such payment, or any part thereof, to a use that such representative payee knew or should have known was other than for the use and benefit of such other individual."

(15) Section 498.103(c), we separated the section included in the NPRM into two sections, (c) and (d). We renumbered previous § 498.103(d) as (e). We believe that this clarifies the sections and is now parallel to § 498.100(b), which states the purpose of the regulations. Section 498.103(c) now reads, "Under § 498.102(c), the Office of the Inspector General may impose a penalty of not more than \$5,000 for each violation resulting from the misuse of Social Security Administration program, words, letters, symbols, or emblems relating to printed media and a penalty of not more than \$25,000 for each violation in the case that such misuse related to a broadcast or telecast." Section 498.103(d) now reads, "Under § 498.102(d), the Office of the Inspector General may impose a penalty of not more than \$5,000 for each

violation resulting from insufficient notice relating to printed media regarding products or services provided free of charge by the Social Security Administration and a penalty of not more than \$25,000 for each violation in the case that such insufficient notice relates to a broadcast or telecast." We have also deleted the word "in" before "printed media," in § 498.103(d) and inserted the phrase "relating to" before "printed media." This parallels § 498.103(c).

(16) Section 498.103(e) (1), we deleted the word "or" between "solicitation" and "advertisement" and inserted the phrase "or other communication" after advertisement. This parallels the use of this phrase in § 498.102(c) and § 498.102(d)(1)(i). Also, in § 498.103(e) (1) and (2), we inserted "or (d)" after the phrase "§ 498.102(c)." We made this change to accurately reflect the amendment to section 1140 by section 204 of the SSPA to address anyone who charges a fee for a product or service that is available from SSA free of charge without including a written notice so stating.

(17) Section 498.104, we separated the first sentence of the NPRM into two sentences. We believe the revised language states more clearly the instances when an assessment may be imposed more closely tracks the language of the legislation. Now the section reads: "A person subject to a penalty determined under § 498.102(a) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments paid under title II, title VIII or title XVI of the Social Security Act as a result of the statement, representation, omission, or withheld disclosure of a material fact which was the basis for the penalty. A representative payee subject to a penalty determined under § 498.102(b) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments received by the representative payee for the use and benefit of another individual and converted to a use other than for the use and benefit of such other individual. An assessment is in lieu of damages sustained by the United States because of such statement, representation, omission, withheld disclosure of a material fact, or conversion, as referred to in §§ 498.102(a) and (b)." In the sentence regarding representative payee, we also deleted the word "person" and inserted "individual" in its place, inserted the phrase "use and" before the word "benefit" and deleted the word "the" before "individual" and inserted the phrase "such other" in its place. We

believe this more closely tracks the language of the legislation.

(18) Section 498.106(b), we deleted “§ 498.103(c),” and inserted “§§ 498.103(c) and (d).” This is consistent with and parallels the modifications we made to section § 498.103(c) from the NPRM wherein we separated § 498.103(c) into subsections (c) and (d).

(19) Section 498.109(a)(2), we deleted the word “or” before “other actions.” We believe the deletion of these terms more clearly expresses the intent of the legislation.

(20) Section 498.128(c)(1), we added an “s” to “Violation” to make the term grammatically correct. We also deleted “and” in the phrase “under § 498.102(c) and (d)” and inserted “under §§ 498.102(c) or (d).” We believe this modification addresses potential confusion arising from the section as previously written regarding the scope of the section and reflects the intent of the SSPA to provide authority to the Commissioner to compromise and collect a penalty imposed under either §§ 498.102(c) or (d).

Public Comments

The 60-day public comment period closed on May 23, 2005. We received comments on the NPRM from 2 organizations, the National Organization of Social Security Claimants’ Representatives (NOSSCR) and the Disability Law Center, Inc. Both commenters raised similar concerns that the regulations were overly broad and that there were unaddressed problems which would increase the likelihood of an overbroad application of these rules to claimants and their representatives. For the reasons discussed below, the public comments we received in response to the NPRM have not led us to make substantive, non-technical changes in these final rules.

Comment: The commenters raised concerns that the proposed regulations were overbroad in defining when a person may be subject to a civil monetary penalty and assessment, as applicable, for withholding the disclosure of a fact which the person knows or should know is material to the determination of any initial or continuing right to Social Security benefits if the person knows or should know, that the withholding of the disclosure is misleading. The commenters are concerned that this proposed rule could conflict with State Bar rules regarding the attorney’s duty of confidentiality to the client and not to act in a way that is adverse to the client’s interest, presenting a dilemma for attorney representatives. The

commenters recommended that we eliminate to the extent possible the potential for such conflicts.

Response: We understand the commenters’ concern of placing attorney representatives in the potential position of risking sanctions for violating State Bar rules or facing the imposition of a civil monetary penalty and/or assessment under these rules. However, after careful review of the commenters’ comments, we do not believe further modification of the rules is warranted.

As acknowledged in NOSSCR’s comments, representatives of claimants before SSA operate under a “Prohibited Action” in SSA’s Standards of Conduct not to “* * * knowingly make or present, or participate in the making or representation of, false or misleading oral or written statements, assertions or representations about a material fact or law concerning a matter within our jurisdiction * * *.” See 20 CFR 404.1740(c)(3) and 416.1540(c)(3). Furthermore, while attorney representatives are also bound by State codes of professional conduct that mandate affirmative duties, such as the duties to maintain client confidentiality and provide zealous representation, those rules are not intended to enable an attorney to violate the law.

One of the commenters referred to SSA’s final rules issued in 1998 governing the conduct of all claimants’ representatives, both attorneys and non-attorneys, who appear before SSA. At that time, SSA received public comments questioning SSA’s authority to issue such regulations because standards regulating the conduct of attorneys were already set out in State laws. In its response, SSA noted that in *Sperry v. State of Florida*, 373 U.S. 379 (1963), a case involving State bar membership rules, the Supreme Court held that the Federal government had pre-emptive powers over States’ legislative and judicial authorities when acting under valid Federal regulations. Accordingly, SSA disagreed with the contention that it lacked authority to issue the regulations and stated that its regulations “would supersede any inconsistent State or local rules.” See 63 Fed. Reg. 41404, 41408 (August 4, 1998). We believe that SSA’s 1998 response addresses the comments regarding the current rules.

Further, in 2000, the Department of Justice, Immigration and Naturalization Service (INS), promulgated a final rule to amend “the rules and procedures concerning professional conduct for attorneys and representatives (practitioners) who appear before the Executive Office for Immigration

Review (EOIR) and/or the Immigration and Naturalization Service (the Service).” See 65 FR 39513–39534 (June 27, 2000). Several commenters on the INS notice of proposed rulemaking indicated that it was “inappropriate for Federal agencies to unilaterally impose a national disciplinary scheme where states should have sole jurisdiction and, further that Federal regulations concerning discipline [would] cause confusion and uncertainty with regard to State rules. Others objected that the rule subject[ed] practitioners to being disciplined twice for the same conduct—once by the Federal government and once by the State bar. Others believed that this rule [was] an unnecessary and impermissible intrusion into the state law licensure process and ‘to bar a lawyer from practice before an agency [was] unheard of.’”

In its response, the INS cited to the 1998 SSA regulations discussed above and the case of *Sperry v. State of Florida*, 373 U.S. 379 (1963), to support the promulgation of its rules. In part, INS stated as follows:

For the reasons explained in SSA’s supplementary information to their disciplinary rule, EOIR and the Service should not be expected or required to apply numerous local rules, or local interpretations of the rules, to problems that require national uniformity. Applying local rules or local interpretations in lieu of a national standard would leave immigration attorneys in one State subject to discipline, while possibly exempting immigration attorneys in another State.

65 FR 39513, 39524 (June 27, 2000).

INS further stated, “[s]imilar to the SSA program, practice before EOIR and the Service is not limited to attorneys, but includes non-attorneys who may not be subject to State bar rules. EOIR and the Service believe that all practitioners, attorneys and non-attorneys alike, must be held to uniform standards of professional conduct in immigration proceedings * * *.” *Id.* We believe the INS’s response to these comments also applies to the comments to our rule.

We would also note that section 1129 provides that a civil monetary penalty and assessment, as applicable, may be imposed against “any person (including an organization, agency, or other entity) * * *” “Person” is defined in section 1101(a)(3) of the Social Security Act (42 U.S.C. 1301(a)(3)) as “an individual, a trust or estate, a partnership, or a corporation.” The Social Security Act does not exempt attorneys from this definition.

As discussed above, State bar rules differ in specific language and format among the 50 States, the District of

Columbia, and Puerto Rico. The intent of these regulations is to provide uniform guidance. We do not believe these rules will unduly burden the attorney representative by placing him/her in the position of either risking sanctions under the appropriate State Bar or facing the imposition of a civil monetary penalty and assessment in lieu of damages. As is stated in Rule 1.2(d) of the American Bar Association's Model Rules of Professional Conduct,

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Moreover, Rule 3.3 of the American Bar Association's Model Rules of Professional Conduct provides that a lawyer must be candid toward the tribunal. Rule 3.3(a)(1) states that "a lawyer shall not knowingly * * * make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer * * *."

In determining whether to impose a civil monetary penalty and/or assessment and, if so, the amount, the OIG will take into account the five factors listed in 20 CFR 498.106(a), which include the degree of culpability of the person committing the offense and such other matters as justice may require. In making this determination, the OIG may consider, to the extent relevant, actions taken by an attorney representative pursuant to a State Bar code of professional conduct.

Comment: The commenters also raised concerns that the proposed regulations were overbroad and would harm claimants whose failure to notify SSA of information was not done for the purpose of improperly obtaining benefits but resulted simply from not understanding the rules. In this vein, one commenter stated that we should provide guidance for determining whether the person "knew or should have known," because knowledge is a critical factor for determining whether there is a basis for imposing a civil monetary penalty. See proposed rule § 498.102(a)(2) and (3). It was suggested that we include a provision that requires consideration of physical or mental limitation and educational or linguistic limitation, including lack of facility with the English language.

Response: We agree that whether the person "knew or should have known" is a critical factor in determining whether

there is a basis for imposing a civil monetary penalty. Senate Committee Report 108-176, accompanying Public Law 108-203, states in its analysis of this amendment, at pages 13-14, that this amendment is not intended to apply against individuals whose failure to come forward was not for the purpose of improperly obtaining or continuing to receive benefits.

In determining whether to impose a civil monetary penalty and/or assessment in lieu of damages and if so, the amount, of any civil monetary penalty and assessment, the OIG will take into account the following five factors: (1) The nature of the statements and representations and the circumstances under which they occurred; (2) the degree of culpability; (3) the history of prior offenses; (4) the financial condition of the person who committed the offense; and (5) such other matters as justice may require. See 20 CFR 498.106(a). These factors would include consideration of any information suggesting that the person's failure to disclose information was not done for the purpose of improperly obtaining benefits, such as any physical or mental limitations and educational or linguistic limitations, including lack of facility with the English language. We believe this addresses the concerns of the commenters and is consistent with the analysis of the amendment in the Senate Committee Report 108-176. Therefore, we believe the regulations are not overbroad and that additional guidance is not necessary.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules meet the requirements for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, the rules were subject to OMB review.

Regulatory Flexibility Act

We have determined that no regulatory impact analysis is required for these regulations. While the penalties and assessments which the OIG could impose as a result of the amendments to sections 1129 and 1140 of the Act might have a slight impact on small entities, we do not anticipate that a substantial number of small entities will be significantly affected by these rules. Based on our determination, the Inspector General certifies that these final regulations will not have a significant impact on a substantial number of small business entities. These

final rules reflect legislative amendments to previously existing sections 1129 and 1140 of the Act and do not substantially alter the effect of these sections on small business entities. Therefore we have not prepared a regulatory flexibility analysis.

Paperwork Reduction Act

These final regulations impose no new reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001 Social Security-Disability Insurance, 96.002 Social Security-Retirement Insurance, 96.003 Social Security-Survivors Insurance, 96.006 Supplemental Security Income, 96.020 Special Benefits for Certain World War II Veterans)

List of Subjects in 20 CFR Part 498

Administrative practice and procedure, Fraud, Penalties.

Dated: May 10, 2006.

Patrick P. O'Carroll, Jr.,
Inspector General, Social Security Administration.

■ For the reasons set out in the preamble, we are amending part 498 of chapter III of title 20 of the Code of Federal Regulations as follows:

PART 498—CIVIL MONETARY PENALTIES, ASSESSMENTS AND RECOMMENDED EXCLUSIONS

■ 1. The authority citation for part 498 continues to read as follows:

Authority: Secs. 702(a)(5), 1129 and 1140 of the Social Security Act (42 U.S.C. 902(a)(5), 1320a-8 and 1320b-10).

■ 2. Section 498.100 is amended by revising paragraph (b)(1); by redesignating paragraph (b)(2) as paragraph (b)(3) and adding " ; or " at the end of newly designated paragraph (b)(3); and by adding new paragraphs (b)(2) and (b)(4) to read as follows:

§ 498.100 Basis and purpose.

* * * * *

(b) * * *

(1) Make or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits or payments under title VIII or title XVI of the Social Security Act;

(2) Convert any payment, or any part of a payment, received under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, while acting in the capacity of a representative payee for that individual, to a use that such person knew or should have known was

other than for the use and benefit of such other individual; or

* * * * *

(4) With limited exceptions, charge a fee for a product or service that is available from SSA free of charge without including a written notice stating the product or service is available from SSA free of charge.

■ 3. Section 498.101 is amended by revising the definition of "Material fact" and adding the new definition for "Otherwise withhold disclosure" in alphabetical order to read as follows:

§ 498.101 Definitions.

* * * * *

Material fact means a fact which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under title VIII or title XVI of the Social Security Act.

Otherwise withhold disclosure means the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person.

* * * * *

■ 4. Section 498.102 is revised to read as follows:

§ 498.102 Basis for civil monetary penalties and assessments.

(a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—

(1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:

(i) Monthly insurance benefits under title II of the Social Security Act; or

(ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and

(2)(i) Knew, or should have known, that the statement or representation was false or misleading, or

(ii) Made such statement with knowing disregard for the truth; or

(3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

(b) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any representative payee who receives a payment under title II, title VIII, or title XVI for the use and benefit of another individual and who converts such payment, or any part thereof, to a use that such representative payee knew or should have known was other than for the use and benefit of such other individual.

(c) The Office of the Inspector General may impose a penalty against any person who it determines in accordance with this part has made use of certain Social Security program words, letters, symbols, or emblems in such a manner that the person knew or should have known would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that a solicitation, advertisement or other communication was authorized, approved, or endorsed by the Social Security Administration, or that such person had some connection with, or authorization from, the Social Security Administration.

(1) Civil monetary penalties may be imposed for misuse, as set forth in paragraph (c) of this section, of—

(i) The words "Social Security," "Social Security Account," "Social Security Administration," "Social Security System," "Supplemental Security Income Program," "Death Benefits Update," "Federal Benefit Information," "Funeral Expenses," "Final Supplemental Program," or any combination or variation of such words; or

(ii) The letters "SSA," or "SSI," or any other combination or variation of such letters; or

(iii) A symbol or emblem of the Social Security Administration (including the design of, or a reasonable facsimile of the design of, the Social Security card, the check used for payment of benefits under title II, or envelopes or other stationery used by the Social Security Administration) or any other combination or variation of such symbols or emblems.

(2) Civil monetary penalties will not be imposed against any agency or instrumentality of a State, or political subdivision of a State, that makes use of any words, letters, symbols or emblems of the Social Security Administration or instrumentality of the State or political subdivision.

(d) The Office of the Inspector General may impose a penalty against any person who offers, for a fee, to assist an individual in obtaining a product or service that the person knew or should have known the Social Security

Administration provides free of charge, unless:

(1) The person provides sufficient notice before the product or service is provided to the individual that the product or service is available free of charge and:

(i) In a printed solicitation, advertisement or other communication, such notice is clearly and prominently placed and written in a font that is distinguishable from the rest of the text;

(ii) In a broadcast or telecast such notice is clearly communicated so as not to be construed as misleading or deceptive.

(2) Civil monetary penalties will not be imposed under paragraph (d) of this section with respect to offers—

(i) To serve as a claimant representative in connection with a claim arising under title II, title VIII, or title XVI; or

(ii) To prepare, or assist in the preparation of, an individual's plan for achieving self-support under title XVI.

(e) The use of a disclaimer of affiliation with the United States Government, the Social Security Administration or its programs, or any other agency or instrumentality of the United States Government will not be considered as a defense in determining a violation of section 1140 of the Social Security Act.

■ 5. Section 498.103 is revised to read as follows:

§ 498.103 Amount of penalty.

(a) Under § 498.102(a), the Office of the Inspector General may impose a penalty of not more than \$5,000 for each false statement or representation, omission, or receipt of payment or benefit while withholding disclosure of a material fact.

(b) Under § 498.102(b), the Office of the Inspector General may impose a penalty of not more than \$5,000 against a representative payee for each time the representative payee receives a payment under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, and who converts such payment, or any part thereof, to a use that such representative payee knew or should have known was other than for the use and benefit of such other individual.

(c) Under § 498.102(c), the Office of the Inspector General may impose a penalty of not more than \$5,000 for each violation resulting from the misuse of Social Security Administration program words, letters, symbols, or emblems relating to printed media and a penalty of not more than \$25,000 for each violation in the case that such misuse related to a broadcast or telecast.

(d) Under § 498.102(d), the Office of the Inspector General may impose a penalty of not more than \$5,000 for each violation resulting from insufficient notice relating to printed media regarding products or services provided free of charge by the Social Security Administration and a penalty of not more than \$25,000 for each violation in the case that such insufficient notice relates to a broadcast or telecast.

(e) For purposes of paragraphs (c) and (d) of this section, a violation is defined as—

(1) In the case of a mailed solicitation, advertisement, or other communication, each separate piece of mail which contains one or more program words, letters, symbols, or emblems or insufficient notice related to a determination under § 498.102(c) or (d); and

(2) In the case of a broadcast or telecast, each airing of a single commercial or solicitation related to a determination under § 498.102(c) or (d).

■ 6. Section 498.104 is revised to read as follows:

§ 498.104 Amount of assessment.

A person subject to a penalty determined under § 498.102(a) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments paid under title II, title VIII or title XVI of the Social Security Act as a result of the statement, representation, omission, or withheld disclosure of a material fact which was the basis for the penalty. A representative payee subject to a penalty determined under § 498.102(b) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments received by the representative payee for the use and benefit of another individual and converted to a use other than for the use and benefit of such other individual. An assessment is in lieu of damages sustained by the United States because of such statement, representation, omission, withheld disclosure of a material fact, or conversion, as referred to in § 498.102(a) and (b).

■ 7. Section 498.106 is amended by revising paragraphs (a) introductory text, (a)(1), and (b) introductory text to read as follows:

§ 498.106 Determinations regarding the amount or scope of penalties and assessments.

(a) In determining the amount or scope of any penalty and assessment, as applicable, in accordance with § 498.103(a) and (b) and 498.104, the Office of the Inspector General will take into account:

(1) The nature of the statements, representations, or actions referred to in § 498.102(a) and (b) and the circumstances under which they occurred;

* * * * *

(b) In determining the amount of any penalty in accordance with § 498.103(c) and (d), the Office of the Inspector General will take into account—

* * * * *

■ 8. Section 498.109 is amended by revising paragraph (a)(2) to read as follows:

§ 498.109 Notice of proposed determination.

(a) * * *

(2) A description of the false statements, representations, other actions (as described in § 498.102(a) and (b)), and incidents, as applicable, with respect to which the penalty and assessment, as applicable, are proposed;

* * * * *

■ 9. Section 498.114 is amended by revising paragraph (a) to read as follows:

§ 498.114 Collateral estoppel.

* * * * *

(a) Is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*) of a Federal or State crime; and

* * * * *

■ 10. Section 498.128 is amended by revising paragraphs (b), (c)(1), and (d)(1) to read as follows:

§ 498.128 Collection of penalty and assessment.

* * * * *

(b) In cases brought under section 1129 of the Social Security Act, a penalty and assessment, as applicable, imposed under this part may be compromised by the Commissioner or his or her designee and may be recovered in a civil action brought in the United States District Court for the district where the violation occurred or where the respondent resides.

(c) * * *

(1) Violations referred to in § 498.102(c) or (d) occurred; or

* * * * *

(d) * * *

(1) Monthly title II, title VIII, or title XVI payments, notwithstanding section 207 of the Social Security Act as made applicable to title XVI by section 1631(d)(1) of the Social Security Act;

* * * * *

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 6, 7, and 18

RIN 1219-AB42

Evaluation of International Electrotechnical Commission's Standards for Explosion-Proof Enclosures

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Final rule; equivalency determination.

SUMMARY: MSHA reviewed the requirements of the International Electrotechnical Commission's (IEC) standards for Electrical Apparatus for Explosive Gas Atmospheres to determine if they are equivalent to the Agency's applicable product approval requirements or can be modified to provide at least the same degree of protection as those requirements. MSHA has determined that the IEC's standards for explosion-proof enclosures, with modifications, provide the same degree of protection as MSHA's applicable product approval requirements. Applicants may request that MSHA grant product approval for explosion-proof (flameproof) enclosures based on compliance with the IEC standards provided MSHA's specified list of modifications is also addressed in the submitted design.

DATES: *Effective Date:* This final rule is effective May 17, 2006. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of May 17, 2006.

FOR FURTHER INFORMATION CONTACT: For information concerning the technical content of the rule, contact David C. Chirdon, Chief Electrical Safety Division, Approval and Certification Center, MSHA, R.R. 1, Box 251 Industrial Park Road, Triadelphia, West Virginia 26059. Mr. Chirdon can be reached at chirdon.david@dol.gov (e-mail), 304-547-2026 (voice), or 304-547-2044 (facsimile). For information concerning the rulemaking process, contact Patricia W. Silvey, Acting Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Blvd., Arlington, Virginia 22209-3939. Ms. Silvey can be reached at (202) 693-9440.

MSHA maintains a listserv on the Agency's Web site that enables subscribers to receive e-mail notification when MSHA publishes rulemaking documents in the **Federal Register**.