



NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS'
REPRESENTATIVES
ESTABLISHED 1979

161 Airport Executive Park • Nanuet, NY 10954
Telephone: (845) 682-1880 • Fax: (845) 517-2277 • email: nosscr@nosscr.org
Government Affairs Office: 1025 Connecticut Avenue, NW Suite 709 • Washington, DC 20036
Telephone: (202) 457-7775 • Fax: (202) 457-7773

Executive Director
Barbara Silverstone

October 7, 2020

Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Interim Final Rule on Waiver of Recovery of Certain Overpayment Debts Accruing During the COVID-19 Pandemic Period, 85 Fed. Reg. 52909 (August 27, 2020), Docket No. SSA-2020-0045

Dear Commissioner Saul:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). NOSSCR is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of about 3,000 members from the private and nonprofit sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

We believe that SSA should, to the greatest extent possible, simply waive overpayments caused by SSA's pause in certain workloads without requiring beneficiaries to request waivers. This is the most efficient method for SSA and for beneficiaries and it is the approach of the Fairness for Seniors and People with Disabilities During COVID-19 Act (H.R. 7830), which NOSSCR has endorsed. If SSA chooses to take a narrower approach, we hope that the comments below will be useful in managing requests for waivers.

We appreciate SSA's efforts to streamline the processing of requests for waivers of overpayments and reduce the harm of overpayments for SSI and Title II beneficiaries. The interim final rule ("IFR") is an

important step towards increasing agency efficiency and maintaining beneficiaries' financial stability. However, we recommend several changes to the rule to make it more efficient and equitable. We also have questions and concerns about the IFR that should be answered in an amended final rule or subregulatory guidance.

Overpayments Identified after December 2020

The IFR only applies streamlined procedures for pandemic-related overpayments identified before December 31, 2020. This arbitrary standard is inappropriate and should be eliminated. The overpayments were caused by SSA's decision to pause certain workloads, rather than by anything within the beneficiary's control. Beneficiaries also cannot control when SSA identifies and addresses their overpayments.

It seems infeasible that SSA will identify all the overpayments so quickly while simultaneously re-starting numerous other tasks that have all developed significant backlogs since March and may have had backlogs even before the pandemic.¹ As the IFR says in another context, "we expect—due to resuming the workloads we suspended in March 2020—to have to process a significantly higher amount of work over the coming months than comparable periods in the past." If SSA is going to identify all the overpayments that occurred in a six-month period in less than four months, the agency will be distracted from other important workloads, such as preventing new overpayments, correcting underpayments, providing expedited reinstatement for people with disabilities who tried to work, or effectuating benefits for newly-awarded beneficiaries.

Improving Efficiency

SSA should waive all identified overpayments that qualify for the streamlined procedures without the need for beneficiaries to request a waiver. This is much more efficient than the agency identifying overpayments, sending notices about the overpayments, receiving and logging in waiver requests, determining whether waiver requests should be processed using normal or streamlined procedures, processing the requests, sending notices with decisions about waiver requests, and handling appeals when requests for waivers are denied. If SSA adopts our recommendation, the agency would simply have to send a single notice informing claimants that they were overpaid and the overpayment was waived. It is unlikely that anyone would appeal such an action.

Another option, which would be less costly but also provide fewer gains in efficiency, would be to automatically waive all identified overpayments where the streamlined procedures would apply and the identified overpayment is \$1,000 or less. This is the amount in POMS SI 02260.030.B.2 for which SSA administratively discontinues waiver development. It might also benefit SSA to consider increasing that threshold for an administrative waiver in all overpayment cases, because it has not changed since 2008.

¹ Beginning August 31, SSA re-started the following workloads: Supplemental Security Income (SSI) Redeterminations; Limited Issues involving SSI entitlement; SSI and Title II Post-eligibility changes; Medical CDR Decisions (Cessations); Work CDR Decisions (Cessations); Age 18 Redeterminations; Disability Hearing Unit Determinations; certain Insufficient Evidence Determinations; Expedited Reinstatement; Non-disability hearings; and late filing and failure to appear dismissals.

Broadening the Kinds of Overpayments Where Streamlined Procedures Can Be Used

SSA should not distinguish between overpayments from workloads that were officially halted during the early months of the pandemic and those that were allowed to continue. Even if SSA staff were allowed to work on a given workload, they may not have done so, or may have delayed doing so. The transition to remote work caused delays in performing even allowed workloads. So did the need to prioritize workloads that ensured beneficiaries continued to receive benefits over workloads that would have led to overpayments.

Workloads based on data sharing with agencies outside of SSA may have been less accurate during the pandemic. Many employees of housing authorities; jails and prisons; payroll processors; hospitals and nursing homes; and state welfare, child support, workers compensation, and unemployment agencies were forced to switch to remote work on short notice, often without adequate technology. Others were faced with a sudden and significant change to their other workloads. Either of these could have affected how frequently and accurately information was conveyed to SSA. If SSA did receive this information, its staff were also transitioning to telework and prioritizing other workloads. This reduced the agency's ability to review automated reports and do the development required to determine if a change in benefits was appropriate and send the proper notices to beneficiaries.

The IFR gives an example of an SSI recipient who “failed to timely report receipt of VA compensation (not based on need) that began in March 2020, during the pandemic period. In July 2020, [SSA] identified the receipt VA compensation through our automated processes and updated to the SSI record, creating an overpayment in the pandemic period. In this example, the overpayment debt will be subject to our existing overpayment debt waiver process.” This example illustrates why SSA should apply streamlined waiver rules more broadly:

- The IFR assumes the SSI recipient “failed” to report VA compensation, but in the time period in which he was supposed to do so, SSA field offices were closed for in-person visits and varied tremendously in their ability to accept and process mail and faxes. The teleservice centers had wait times of well over an hour, and many callers got busy signals or were disconnected. It is very possible that the beneficiary submitted a report or made every reasonable attempt to do so, and SSA failed in its ability to receive or record the report. The beneficiary in this situation should be considered without fault, and it would also be against equity and good conscience to collect and overpayment from him. Therefore, SSA should issue subregulatory guidance stating “any report that a beneficiary or representative payee submitted or attempted to submit to the agency any evidence or reports that would have avoided or reduced the overpayments, where SSA was unable to receive or take action, or did not process the information or record the receipt of the information, shall be considered to be without fault. In such cases, a beneficiary or representative payee asserting or attesting to these facts will qualify under the new interim final rule for streamlined waiver processing and we will find no fault and therefore find that collection of the overpayment would be against equity and good conscience.”
- Additionally, while SSA updated the SSI record in July in the example, there will undoubtedly be situations where agency staff did not complete this work by September 30. The beneficiary has no control over whether his local field office processes automated reports quickly or slowly, so this arbitrary distinction should not matter to whether his request for waiver is processed using streamlined procedures. As discussed in the next section, the “pandemic

period” described in the IFR should be expanded.

Expanding the “Pandemic Period”

SSA should apply streamlined procedures to overpayments that exist due to agency delays for months past September 2020 because:

- SSA field offices are still not open to the public² and most staff continue to work remotely;
- The United States Postal Service is experiencing significant delays;³
- SSA’s teleservice centers continue to experience low average speed of answer and high busy rates;⁴
- There is still a COVID-19 national public health emergency;⁵ and many states have restrictions on where people can travel or how businesses and other services can operate.

These limitations all make it difficult for people to report changes to SSA and for the agency to process reports of changes. SSA should apply the streamlined procedures at least until the month following the end of the COVID-19 public health emergency.

Furthermore, it is not feasible for SSA to process every overpayment that occurred from March to September before future months’ benefits are calculated and paid out, thereby possibly creating more overpayments. The IFR says that it will take until December 31, 2020 to *identify* all the overpayments that qualify for streamlined waiver processing (and as discussed above, that seems highly ambitious). Even if SSA can identify all eligible overpayments by the end of 2020, some overpayments that began during what the IFR calls the “pandemic period” will be identified and addressed before benefits after the pandemic period are paid, while other overpayments—no different in amount, cause, financial circumstances of the beneficiary, or other factors—will not be identified or corrected until after the “pandemic period.” People with overpayments in the former category will have their entire overpayment waived using the IFR’s streamlined procedures. In contrast, those in the latter category will have streamlined processes applied to a portion of their overpayment but will need to go through the usual procedures for the remainder of the overpayment. This arbitrary distinction will be confusing for beneficiaries and inefficient for SSA. Given that the IFR allows an expansive interpretation of “against equity and good conscience” that “is not limited to the meaning used in § 416.554 but means a broad concept of fairness that takes into account all of the facts and circumstances of the case” it would be appropriate to use the streamlined procedures for the entire overpayment if it began during the pandemic period and was a result of SSA’s limited services.

Processing the Remainder of an Overpayment After Streamlined Procedures are Used

Even with these recommended expansions in scope, there will still be situations where a portion of the overpayment remains after streamlined processing of waiver requests. It is important that SSA provide subregulatory guidance that if there is a portion of the overpayment that does not qualify for the

² SSA’s coronavirus website notes that people can make in-person appointments in certain “critical” and “dire need” situations, but NOSSCR has had repeated contact with leadership of the Operations component about people throughout the country whose appointment requests were denied.

³ https://www.hsgac.senate.gov/imo/media/doc/200916_FullReport_PetersPostalInvestigation.pdf

⁴ At the beginning of the pandemic, SSA’s coronavirus web page reported wait times of up to 90 minutes.

⁵ <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-23June2020.aspx>

streamlined provisions, requests for reconsideration or waiver of any outstanding portion of the overpayment will be processed according to SSA's usual procedures. The IFR says "Under the streamlined process, the beneficiary will not be required to complete the full form SSA-632" but the field office technician who documents the request for waiver on an electronic Report of Contact (SSA-5002) and attests to the beneficiary's signature should note whether there will be any remaining portion of the overpayment after applying the streamlined procedures. If there is, the technician should ask the beneficiary if he or she wishes to request reconsideration, and/or a waiver of the overpayment, and/or a request for change in the overpayment recovery rate. The technician should note the beneficiary's response on the SSA-5002 and complete any required portion of the SSA-632, SSA-634, and/or SSA-561 forms with attestation. The subregulatory guidance should remind agency staff that SSI beneficiaries only need to complete the SSA-632 through question 12f.

An even simpler approach if the remaining portion of the overpayment is less than \$1,000 (or any increased threshold for administrative waiver) would be to consider it a separate overpayment and use the provisions of POMS SI 02260.030.B.2 to administratively discontinue waiver development. The "anticipated administrative savings" section of the IFR estimates that the streamlined procedures will be 30 minutes faster than traditional waiver development in each case. Using the administrative waiver provisions for remaining portions of overpayments waived using the streamlined procedures would probably yield similar savings.

The Need for Notice

When SSA waives an overpayment under the streamlined procedures, the beneficiary should be mailed a notice explaining the amount of the overpayment, that the beneficiary requested a waiver, and the decision on the waiver. If the waiver request was denied in full or in part, it should provide appeal rights. The notice should also explain the remaining balance, or that there is no remaining balance. If there is a remaining balance, the beneficiary should be informed of her right to request any or all of the following: reconsideration, waiver, or a change in the rate of recovery.

In order to ensure that the notices are sent to the correct address, the field office technician who documents the request for waiver on an electronic Report of Contact (SSA-5002) and attests to the beneficiary's signature should also confirm the beneficiary's mailing address and update it as necessary in SSA's systems.

Conclusion

Thank you again for the opportunity to comment on this interim final rule. We appreciate that SSA is attempting to improve efficiency for beneficiaries and agency staff, and believe that our suggestions will help SSA achieve these goals.

Sincerely,

Barbara Silverstone
Executive Director