December 23, 2019

Commissioner Andrew Saul  
Social Security Administration  
Attn: Office of Regulations and Reports Clearance  
3100 West High Rise  
6401 Security Boulevard  
Baltimore, Maryland 21235-6401

Submitted via: http://www.regulations.gov


Dear Commissioner Saul:

On behalf of the American Bar Association (ABA), the largest voluntary association of lawyers and legal professionals in the world, I submit the following comments on the Social Security Administration’s (SSA) proposed rule regarding Advance Designation of Representative Payees for Social Security Beneficiaries.

In 2018 the ABA adopted the attached policy resolution urging Congress and SSA to strengthen the safeguards and protections for all individuals receiving benefits via the representative payee program.

We recommend inclusion of the following provisions in the proposed regulations:

- To assess suitability, including any risk of coercion, undue influence or exploitation, SSA staff should interview proposed advance designees in person and in the company of the beneficiary. If an in-person interview is not possible, interviews could take place by video or phone.

- Prior to appointing an advance designee as a representative payee, SSA should confirm the beneficiary still prefers the advance designee to serve as representative payee.

- SSA field staff should fully document reasons for a determination to not select an advance designee.

- SSA should annually notify the beneficiary to remind them of advance designees and ask for any updates or changes to their contact information.
• When a beneficiary designates an individual, SSA should provide notice of the designation to the advance designee.

The ABA appreciates SSA’s commitment to ensuring beneficiaries direct the management of their income by providing them with the opportunity to choose who they want to serve as their representative if needed. Advance designation of representative payees could be a powerful tool in supporting the self-determination of beneficiaries.

Thank you for considering our views on this important issue. If you have any questions, please contact David Eppstein in the ABA Governmental Affairs Office at 202-662-1766 or david.eppstein@americanbar.org.

Sincerely,

Judy Perry Martinez
President, American Bar Association
RESOLUTION

RESOLVED, That the American Bar Association urges Congress and the Social Security Administration to strengthen the safeguards and protections for all individuals receiving benefits via the representative payee program, including, but not limited to, appropriate eligibility determinations, improved monitoring and training of payees, access to accounting for beneficiaries, and the appointment of an interim payee when a payee is removed.
REPORT

This proposed resolution extends the reach of the ABA’s existing policies regarding the Social Security Administration’s (SSA) representative payee program. As limited by its 2002 and 2013 policies, the ABA can only comment on organizational payees, coordination between courts and government agencies, and a few additional topics delineated in the 2002 resolution. With these current constraints, the ABA cannot address timely and important topics, including monitoring and training of individual representative payees and additional safeguards and protections for beneficiaries.

SSA has the authority to appoint a representative payee to manage the benefits of a beneficiary whom the agency deems cannot do so independently. As the custodian of what is often an individual’s sole income, a representative payee is responsible for protecting the beneficiary’s assets and preserving self-determination over finances to the greatest extent possible. The appointment of a representative payee for a beneficiary may be sufficient to address concerns regarding potential financial loss and exploitation, eliminating the need for a court-appointed guardian and maintaining some independent decision-making.

Appropriate safeguards and protections within the representative payee program are crucial to protecting the income of millions of Americans. As the number of elderly Americans and those with disabilities increases, the demand for representative payees will only grow larger. This expansive program must be properly administered and effectively monitored to prevent misuse and exploitation.

This report provides background information; explains the difference between organizational and individual payees; reviews concerns with current safeguards and protections for beneficiaries that may warrant future ABA comment (improved training

2 Other federal government agencies, such as the Veteran’s Administration and Office of Personnel Management, have fiduciary or representative payee programs that affect a smaller number of individuals, but are still significant. These programs may share some of the same issues as SSA’s, and warrant specific review.
3 See SSA Program Operations Manual System (POMS) GN 00502.001.
Background

SSA’s Representative Payee Program. Approximately six million representative payees manage benefits for eight million beneficiaries. SSA can appoint a representative payee to manage Old Age Survivor and Disability Insurance (OASDI), Social Security Disability Insurance (SSDI), or Supplemental Social Security Income (SSI) benefits upon a determination that a beneficiary cannot manage those benefits and a representative payee would best serve the recipient’s interests. The representative payee must use the SSA funds to provide for the recipient’s needs, including food, housing, and medical care, allocate spending money to the recipient, and save and/or invest remaining funds in trust for the beneficiary. Direct payment of funds to third-party payees creates potential for misuse - conversion of payment by the payee for use other than the beneficiary’s use and benefit.

Individual and Organizational Payees. SSA’s order of preference for representative payees is: court-appointed guardians, relatives, friends, or other appropriate individuals. Around 85 percent of all representative payees are family members, primarily spouses. If an individual payee is not available, SSA will appoint an organization that serves as payee in a professional capacity.

An individual payee does not directly collect a fee for serving in that capacity. However, those serving in a professional capacity, such as court-appointed guardians and certified fiduciaries, may charge their professional fee for the time served as a representative payee. If the professional is an attorney, it is not appropriate to charge an attorney’s rate for representative payee services.

An organizational payee must be a state or local government agency, or a non-profit entity or financial institution that is bonded and licensed in its home state, regularly serves at least five beneficiaries, and is not a creditor of the beneficiary. Examples

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7 20 C.F.R §§ 416.640(a), 416.645.
8 42 U.S.C. §1383a(a)(4)
9 Supra note 6 § 416.621.
10 SSA OIG, supra note 4.
11 20 C.F.R. § 416.621.
13 20 C.F.R. § 416.640(a).
include state Veterans’ Administration hospitals, state psychiatric institutions, social services agencies, and state agencies serving people with developmental disabilities. An organizational payee may collect a “fee for service” from the beneficiary’s monthly SSA benefits. SSA regulations limit this fee to a certain percentage of the beneficiary’s payment.14

While SSA prefers to appoint individual over organizational payees, properly trained organizational payees may be more appropriate for certain high-risk populations and less likely than individual payees to commit abuse and neglect. In 2007, the National Research Council of the National Academies released a comprehensive report on SSA’s representative payee program, recommending that fee-for-service payees, as licensed professionals, may be a better match for at-risk beneficiaries - people with mental illness, alcohol or substance abuse problems, severe disabilities, and those who are homeless.15

However, organizational payees, with multiple clients, have the potential to commit widespread fraud and abuse. A recent report from SSA’s Office of Inspector General (OIG) showed SSA has failed to adequately address the misuse of funds by organizational and high volume individual representative payees. Even when SSA discovers misuse, the agency seldom recovers lost benefits from the payee or restores the benefits to the recipient. In some circumstances, SSA has allowed the representative payee to continue to serve even after discovering fraudulent activity.16

The potential for organizational payees to commit horrific abuse and neglect gained national attention after the discovery in 2009 that Henry’s Turkey Service, an organizational representative payee that employed adult men with disabilities, had been exploiting its beneficiaries and forcing them to live in inhumane conditions for decades.17 In response, SSA contracted the National Disability Rights Network (NDRN), the national membership and technical assistance/training provider for the federally funded and mandated Protection & Advocacy System (P&A), to work with P&As to monitor selected organizational representative payees.18 Recently, SSA declined to renew NDRN’s contract and instead hired a for-profit company to conduct reviews.

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14 Id. § 416.640(a).
15 See National Research Council of the National Academies, Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse at 89-91 (National Academies Press 2007).
16 SSA OIG, supra note 4.
Safeguards and Protections

It is critical that SSA’s Representative Payee program has effective practices for ensuring that (1) payees are appointed for individuals who truly need assistance, and (2) payees manage beneficiaries’ benefits with the dual goals of protecting funds and supporting self-determination. These practices include:

Appropriate Eligibility Determination. SSA should transfer an individual’s control over public benefits only when it is truly necessary. In 2016, the Social Security Advisory Board concluded that SSA’s determination process is insufficient for a decision that curtails a beneficiary’s right to exercise self-determination with regards to benefits: “Despite hundreds of pages of policy and regulations, the way SSA determines whether a representative payee is needed is arbitrary.”¹⁹

Failings of the current determination process include: lack of input from the beneficiary or a representative; SSA field offices, already overworked, bear the burden of reviewing applications and determining whether to appoint a payee; and there is no mandatory competency or due process hearing prior to assigning a payee. Furthermore, once a payee is appointed, SSA is only then required by regulation to notify the beneficiary with the name of the appointed representative payee and information about the beneficiary’s right to appeal the appointment. The Social Security Advisory Board recommended requiring, prior to appointment, a competency hearing, or at a minimum, a review of medical certification that addresses the specific issue of capability to manage benefits.²⁰

Monitoring. Monitoring of representative payees is quite limited from the initial selection process to regular evaluation of payee actions. SSA field office staff are required to interview all payee applicants in person. These face-to-face interviews do not always occur, and some organizations are exempt from the requirement.²¹ The only vetting of prospective payees occurs when individuals apply through SSA’s Electronic Representative Payee System (eRPS), and SSA employees ask questions to assess the applicant’s suitability.²²

¹⁹ Social Security Advisory Board (SSAB), The Social Security Representative Payee Program and Adult SSI Recipients at 1 (2016), http://www.ssab.gov/Portals/0/OUR_WORK/SSI%20STATEMENTS--BRIEFS/2016_SSI_Statement.pdf. See also Wynn, supra note 17, at 4-5 for recommendations on reforming the capability determination process.
²⁰ SSAB, supra note 18 at 5.
²¹ National Research Council, supra note 14 at 25.
²² See National Research Council, supra note 14, at Chapters 4 and 5, for an in-depth discussion of “Defining and Discovering Misuse” and “New Approaches to Detect Misuse.”
Once appointed, payees must file an annual accounting report with SSA. This form is SSA’s primary tool for discovering misuse. Yet SSA does not have a method for systematically evaluating the form, and payees can easily provide inaccurate information without fear of recrimination.

SSA’s failure to appropriately monitor “organized care providers” allows for conflicts of interest. An “individual” payee who serves up to fourteen beneficiaries and is affiliated with an organization that serves the beneficiary in a fee-for-service capacity is not only the disburser of SSA benefits, but also the provider of services. For example, a group home operator may serve as a payee for ten residents. The operator collects a fee for each resident, which comes out of each resident’s Social Security benefits – a clear conflict of interest for the representative payee.

The 2007 National Research Council study recommended that SSA define and treat individual payees who serve multiple, unrelated beneficiaries and are also the owner, administrator, or provider of a room-and-board facility as organizational payees.

Training. The 2007 National Research Council study concluded that SSA “does little to help payees perform the required functions and best serve their beneficiaries and the program,” and recommended SSA provide comprehensive and formal training for payees. It is essential that payees understand their duties and responsibilities, including how to keep records, deposit benefits into separate accounts, and save money. The study’s concerns and recommendations remain current. Representative payees, particularly non-professional individual payees, are often not fully aware of their responsibilities as a payee.

SSA has taken some steps to provide guidance, including a guide for individual payees and a webinar. SSA has also published a judicial training guide. Recognizing the need for education of the growing population of “financial caregivers,” the Consumer

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25 *Id.* at 95.
26 *Id.* at 96.
27 *Id.* at 9.
Financial Protection Bureau published a guide exclusively for family and friends serving as representative payees.\textsuperscript{32}

Possible additional guidance strategies and materials could include: staff or volunteers charged with educating federal fiduciaries, toll-free telephone numbers for payees seeking assistance from SSA, broadly distributed plain language brochures containing examples and explanations, online guidance to complete the annual accounting forms, samples of completed forms, improved and additional fact sheets, videos and web applications. All materials should be available in multiple languages other than English.\textsuperscript{33}

Failure to Provide an Accounting to Beneficiaries. While payees must submit an accounting to SSA, beneficiaries are not entitled to receive an accounting from their payees or SSA. Beneficiaries should have access to an accounting online or at a minimum on a regular basis in writing.

Interim Payee. Currently, if a payee is removed from service, there is no institutional mechanism for ensuring SSA benefits will continue until a new payee is appointed. In fact, a recipient may not receive benefits for months while waiting for approval of a new payee. SSA could provide an interim payee to avoid a freeze in benefits.

ABA Policy

Current ABA policy does not address the need for safeguards and protections of beneficiaries of individual payees. The 2002 Policy urges SSA to support and enact legislation to strengthen safeguards and protections of beneficiaries receiving funds from organizational payees, including the following safeguards and protections that would also apply to individual payees: “Replacement by SSA of any benefits misappropriated or misused by an organizational representative payee if not otherwise reimbursed…and authority for SSA to impose a civil monetary penalty against organizational representative payees which misuse, convert, or misappropriate payments for Beneficiaries received while acting in a representative payee capacity.”\textsuperscript{34} The policy makes additional important recommendations for improved organizational

\textsuperscript{32} Consumer Financial Protection Bureau, \textit{Managing Someone Else’s Money: Help for Representative Payees and VA Fiduciaries},
\textsuperscript{34} See \textit{infra} note 1, ABA 2002 Policy at paragraph (a).
payee practices, but it is over ten years old and does not address training or monitoring for payees.

The ABA’s 2013 policy addresses only one practice meant to safeguard and protect beneficiaries’ funds; the need for coordination between SSA’s representative payee program and state/territorial courts to share information about payee fraud and abuse.\textsuperscript{35}

Conclusion

The proposed resolution will expand the scope of the potential for ABA to comment on SSA’s representative payee program, which affects the financial well-being of millions of Americans.

Respectfully submitted,

Hon. Patricia Banks
Chair, Commission on Law & Aging

Robert T. Gonzales
Chair, Commission on Disability Rights
February 2018

\textsuperscript{35} See \textit{infra} note 1, 2013 ABA Policy.