

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Executive Director
Barbara Silverstone

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Nancy Berryhill
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Notice and Request for Comments on “Review and Reassessment of the Social Security Administration’s (SSA) Representative Payee Selection and Replacement Policies, 83 Fed. Reg. 64422 (December 14, 2018), Docket No. SSA-2018-0048

Dear Acting Commissioner Berryhill:

These comments are submitted on behalf of the National Organization of Social Security Claimants’ Representatives (NOSSCR).

The National Organization of Social Security Claimants’ Representatives (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 more than 3,000 members from the private and public 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.

Introduction

Thank you for your attention to the selection process for representative payees. Social Security benefits are an important part of financial, medical, and other forms of stability for millions of people, including many with disabilities. Obtaining disability benefits can be difficult and time-consuming and the laws and policies beneficiaries must comply with are complex. Therefore, representative payees are very important when a person cannot manage his or her own benefits.

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Is the current order of preference list appropriate when selecting or changing a representative payee? If not appropriate, what would you change about the order of preference list?

While the current order of preference list is generally acceptable, NOSSCR agrees with the statement already in POMS GN 00502.105 that “There may be instances where the payee applicant [the SSA staff member believes] is the best choice isn’t the one highest on the above list of preferred applicants....The primary concern in selecting a payee should **always** be the well being and best interests of the beneficiary.” SSA staff should receive more training on and oversight of the payee determination process than they currently do.

Regardless of the order of preference, a beneficiary’s advance designation (such designation is part of the Strengthening Protections for Social Security Beneficiaries Act of 2018) should be considered and honored when possible. Unless someone higher on the preference list is also clearly better, the advance designation should be honored. If the designee and another applicant are approximately equal, then the advance designation should be the tiebreaker. In making this determination, it is important for SSA staff to consider the claimant/beneficiary’s capabilities at the time the designation was made, and how long ago the designation was made. Among the other criteria that should factor into determining a payee are whether the payee will charge a fee (this should be avoided when possible) and whether the payee is a creditor of the beneficiary, which can lead to conflicts of interest or incentives for misuse of benefits.

Should we change how we consider public and non-profit agencies or institutions and private, for-profit institutions in our order of preference list?

As the request for comments explained, “For disabled beneficiaries 18 years or older with a drug addiction or alcohol [DAA] condition, the regulations reflect the statutory preference for certain agencies and organizations over a family member.” SSA is limited under current law in how it selects payees for beneficiaries with DAA, but should ensure that agency staff properly administer agency policy. For example, many beneficiaries who use or have used drugs or alcohol should not have the DAA order of preference applied to them; POMS DI 90070.060 says a DAA condition only exists when there is “a medically determinable substance use disorder” that is not material. Additionally, POMS GN 00506.410 notes that at age 65 or other points at which a person with a DAA condition’s entitlement to benefits is no longer based on their disability, payees should stop collecting the higher DAA fee. SSA staff need training and oversight to ensure they apply these rules correctly.

When SSA is deciding between an agency or institutional payee versus an individual payee, an individualized determination of the beneficiary’s well being and best interests is necessary. Part of considering the beneficiary’s best interests is to consider whether any potential payees will collect a fee for their services, and what impact the loss of that money will have on the beneficiary’s well being.

Since there are statutory provisions that generally prevent a creditor from serving as a representative payee, should we consider creditor status in our order of preference list? If so, how should we consider creditor status in light of the statute?

Yes, SSA should consider creditor status when developing a payee, and should avoid allowing creditors to be payees when there is a non-creditor willing and able to serve as payee.

Are our policy and operational procedures effective in properly determining whether to change a representative payee? Do we effectively determine when to change from a payee that has a higher order of preference (such as a family member) to a payee that has a lower order of preference (such as a creditor)? When a request to change a payee arises from someone other than the beneficiary, do we effectively determine the need to change the payee? What would you change about our policies and procedures to help us determine when to change a payee?

Although SSA's policies on whether and how to change a payee are generally acceptable, they are not always followed by SSA staff. For example, we have heard anecdotal stories of beneficiaries whose nursing homes sought and were allowed to become representative payees even when a non-creditor payee higher on the order of preference was available to serve or was already providing appropriate services.

SSA should collect and publish more data on representative payees, including on situations where the payee is changed. SSA should better train and monitor its staff to avoid situations where agency policy is violated, and provide additional training and assistance to individual and organizational payees so they better understand their responsibilities and how SSA's various benefit programs work.

At any point when SSA staff considers changing an individual's representative payee, an evaluation of whether a payee is still needed, or whether the beneficiary could be paid directly, should be performed. SSA should also make sure that its workers follow the agency's existing policies in POMS GN 00504.105, which direct agency staff to make immediate direct payment to most beneficiaries found incapable until a new payee is developed.

Is there any evidence of difficulty in finding suitable payees, over time and in various circumstances? If so, how should this evidence influence our order of preference list and our policies for changing payees?

NOSSCR members are aware of anecdotal evidence that it can be difficult for SSA to locate a suitable payee. NOSSCR members learn of these situations when a claimant has been awarded benefits but has not been placed into pay status, and/or representative fees have not been paid, because SSA is attempting to locate a payee. They also learn of these situations when beneficiaries or payees approach them for advice or representation in situations where errors by payees have led to overpayments, underpayments, or suspension or termination of benefits. SSA may be able to obtain additional evidence from its own records or by surveying its staff.

While locating suitable payees can be a challenge, especially when beneficiaries do not have family or friends who are willing or able to take on the role, this should not change the order of preference list or SSA's policies for changing payees.

However, SSA should make sure that it follows its existing policies in POMS GN 00504.105, which as described above requires immediate direct payment in most circumstances. This policy allows a one-month suspension of benefits in limited circumstances and a longer suspension only

when the incapable beneficiary is legally incompetent, under age 15, or has a DAA condition where direct payment will cause substantial harm and the beneficiary will not be harmed by an extended period of nonpayment.

Conclusion

Determining whether a beneficiary requires a representative payee, and who that payee should be, is a complex task that involves delving into a beneficiary's abilities, impairments, and support networks—all of which can change over time. It is difficult to create regulations and sub-regulatory guidance that reflect the myriad of situations beneficiaries may experience. SSA should therefore ensure that its policies focus on beneficiaries' best interests and are flexible enough to accommodate unusual situations while providing guidance to agency staff. Additional training and oversight of the staff members who make these determinations, payee monitoring, and data collection and publication will all help SSA administer its programs with high levels of accuracy, efficiency, and integrity.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

Barbara Silverstone
Executive Director