

Dealing with SSI Overpayments: Avoiding, Defending, Reducing and Destroying

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I. Introduction and background.

Why this topic at this time? The Social Security Administration is re-staffing and beginning to review Special Needs Trusts, Personal Services Contracts, and other financial planning devices to acquire SSI eligibility and SSI-related Medicaid. This presentation will cover the major issues and important practice pointers in the emergency situation caused by potential termination of SSI and Medicaid benefits for various reasons.

This presentation does not cover the termination of benefits due to medical improvement and the underlying ineligibility cause by the disabled person's regaining the ability to work. Note also that the SSA rules for dealing with Title II overpayments in SSDI and Retirement benefit cases are slightly different than those dealing with the welfare component of disability and retirement, the SSI Claims.

Overpayments can occur for many reasons: increases in the wages of deemors (parents and spouses), increases in the part time work of the SSI claimant; changes in marital status; changes in living arrangement; changes in family composition; changes in the SSI recipients' children's status, income or residence; or the discovery of unreported financial transactions by too-clever attorneys and claimants.

SSA requests for repayment of "overpaid" benefits can be challenged in two ways: contesting that the alleged overpayment was not an overpayment at all; and secondly, agreeing that there was an overpayment but asking that it either be waived entirely, be reduced; or that a payment plan be devised that will not deprive the client of necessary funds to meet living expenses.

Finally, if all else fails, and if the situation otherwise permits and warrants, the client may file bankruptcy and wipe out the SSA overpayment.

Thus this topic will cover:

- Avoiding overpayments in the first place by reporting properly
- Defending the alleged overpayment – contesting the SSA position that the claimant was not entitled to the benefits received
- Reducing the overpayment – admitting the overpayment in whole or in part, and seeking to reduce the amount to be repaid, or the terms of the repayment; and
- Destroying the overpayment by filing for bankruptcy and immediately continuing eligibility as though the overpayment never occurred.

A. SSI Disability (SSI-D) vs. Social Security Disability Insurance (SSDI) benefits.

For purposes of retaining benefits during an appeal of a proposed termination, SSI and SSDI are treated differently both substantively and procedurally. Generally speaking, because SSI benefits are paid only

to persons with less than \$2,000 in reserve (the maximum cash or liquid resource limit), SSA will take steps to continue benefits if possible, and to work out more favorable repayment plans. SSDI benefits, however, do not receive such favorable treatment.

B. Treatment of Overpayments by SSA – the difference between Title II of the Social Security Act (SSDI insurance) vs. Title XVI (SSI welfare). Title II benefits are those disability, retirement or survivor's insurance benefits paid on the basis of previous contributions to the Social Security system through the collection of FICA (Social Security) taxes on wages paid or self-employment income. Title XVI, the SSI program, is the federal welfare program for elderly persons over age 65, or persons under age 65 who are disabled.

C. General important principles of Title XVI SSI benefits:

1. **Categorical eligibility.** Claimants must be either elderly (age 65 and older) or medically disabled to have a viable SSI claim.

2. **Financial eligibility is determined on two bases: low countable income of the SSI claimant, and few countable resources.**

“Income” is not the IRS definition, and includes four types – earned (e.g., wages and self-employment from work activity), unearned (e.g., gifts, trust distributions, Title II SSDI or other government benefits), in-kind support and maintenance (food and shelter paid by others), and deemed income from parents to minor child, or healthy or younger spouse to disabled or elderly spouse).

“Resources” is akin to assets – what a claimant owns or has an interest in. Many resources are not counted – a home, a car, the contents of the home and personal effects, and some special exceptions. Generally, a claimant may not have more than \$2,000 in assets on the first of the month, or \$3,000 if a member of a married couple both of whom are eligible for SSI benefits.

3. **Monthly determinations of financial eligibility.** Each month is a separate eligibility period. Claimants often go into and out of financial eligibility multiple times during a year due to fluctuations in the living situation, income, the income or resources of deems, and variations in pay periods.

4. **Initial determinations of financial eligibility is by SSA staff;** thereafter, the system relies on claimants to promptly report changes occurring this month, by the 10th day of the following month, so that benefits are adjusted in the third month.

5. **Duty to report.** The claimant, or his or her Representative Payee, is under a continuing obligation to timely report changes that would in any way affect the claimant's continuing eligibility for benefits, or the amount of those benefits. Items to be immediately reported include:

- Moving residence or changing address;
- Anyone moves into or out of the claimant's household;
- The claimants, claimant's spouse's or parent's income or earnings change;
- The claimant's, or spouse's or parent's resources change

- The claimant begins to get help with living expenses or gets income from friends or relatives
- The claimant's spouse or anyone in the household dies;
- The claimant gets married, separated, or divorced, or begins or stops holding out as "husband and wife" regardless of lawful marriage under Florida law;
- The claimant's name changes;
- The claimant becomes eligible for other benefits or payments, whether or not received;
- The claimant enters or leaves an institution, such as a hospital, nursing home, prison or jail;
- The claimant leaves the United States or returns to the United States;
- A warrant has been issued for the claimant's arrest for a crime or attempted crime that is a felony, or a crime that is punishable by death or imprisonment for one year or longer;
- There is a change in school attendance, if under age 22;
- There is a change in claimant's immigration status
- If the claimant is a sponsored immigrant and the sponsor's income
 - changes;
 - The claimant's medical (physical or psychiatric) conditions improve; or
 - The claimant cannot keep a scheduled appointment with the SSA
 - office.

6. **Failure to report – civil vs. criminal.** Obviously, for the non-reporting to become criminal, there has to be some criminal intent involved. One way to avoid allegations of a criminal nature is to report to SSA before SSA finds out on its own.

7. **The two types of SSA-initiated reviews.** "Periodic redeterminations" of financial eligibility usually occur on an annual basis when SSA is fully staffed (they still are not at this point). "Continuing Disability Reviews," also called CDRs, are usually conducted on a specific schedule depending on the severity of the medical condition and the likelihood of medical improvement to the point of regaining the ability to engage in Substantial Gainful Activity, whether or not the claimant is actually working. Work activity of significant amounts and extended duration always results in CDRs, with potential for substantial overpayments going back many years, and possible criminal involvement.

8. **Goldberg v. Kelly protections for SSI claimants.** *Goldberg v. Kelly*, 397 U.S. 254 (1970) is a 14th Amendment due process claim which sought to require a hearing before certain government benefits could be withdrawn from recipients. The holdings of the case are relevant to SSI terminations, but not SSDI terminations. The major holdings include the following:

- a. Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and procedural due process is applicable to their termination. (NOTE: SSI is a form of welfare for elderly and disabled individuals, originally provided by the states through old age and disability welfare programs, but federalized under the SSI program in 1974.)
- b. The interest of eligible recipients in the uninterrupted receipt of public assistance, which provides them with essential food, clothing, housing, and medical care, coupled with the State's interest that payments not be erroneously terminated, clearly

outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

c. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process.

i. Such hearing need not take the form of a judicial or quasi-judicial trial, but recipients must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting their own arguments and evidence orally before the decision maker.

ii. Counsel need not be furnished at the pre-termination hearing, but recipients must be allowed to retain an attorney if they so desires.

iii. The decision maker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for the determination and indicate the evidence relied on.

iv. The decision maker must be impartial, and although prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as decision maker, the decision maker should not have participated in making the determination under review.

II. Overpayments – General Procedural Principles.

A. **Parallel issues** – challenging whether there was an overpayment vs. dealing with the reduction of the amount or waiver of the overpayment, or the amount and timing of SSA recovery. Pursuant to 42 U.S.C. §404, SSA is permitted to recoup overpayments by decreasing future benefits or demanding a refund of an overpaid amount. Claimants can challenge whether SSA was correct in determining if there was an overpayment due to income or excess resources.

B. **It's an Emergency!** Fast action can preserve the right to benefits pending appeal.

1. **10 days** – continuation of benefits pending appeal. The official written notice by SSA of an overpayment triggers certain time deadlines for the claimant and the claimant's attorneys. Be careful! The notice will state on the front page, "if you disagree with this decision, you may appeal by filing a notice within 60 days receipt of this notice, plus 5 days for mailing..." However, usually on page 6 or 7, it states that if the claimant appeals within ten days, benefits will continue pending the appeal.

PRACTICE POINTER: The claimant needs to 1) run, not walk, to the local SSA office, seek continuation of the benefits pending appeal, and 2) get proof that they requested the continuation of benefits within the ten day period by a signed statement from the SSA Claims Representative. SSA will ask the claimant to sign a statement in return that the claimant acknowledges that should the claimant lose the appeal, additional amounts paid will become part of the overpayment. However, if the appeal is filed in good faith, SSA will often waive the repayment of the benefits paid during the pendency of the

appeal, unless the claimant failed to cooperate in the appeals process. 20 CFR § 404.1597a(j)(3) and 20 CFR §416,966(g)(2).

PRACTICE POINTER: Ten days is really 15 days. If the SSA notice is dated January 10th, the claimant has until January 25th to file the request for continued benefits, because SSA assumes, absent evidence to the contrary, that the notice took 5 day to get to the claimant.

2. **65 days** – challenging the SSA position that there was an overpayment at all, or that the amount of the overpayment is correct. Filing a timely Request for Reconsideration or subsequently, a Request for Hearing, permits the claimant to challenge the correctness of the decision, but does not trigger the automatic right to continuation of benefits pending the appeal. If successful on appeal, the claimant will be entitled to the underpayment (the retroactive benefits that should have been paid because the claimant was correct).

PRACTICE POINTER: Whenever filing a jurisdictional document such as a Request for Reconsideration, or a Request for Hearing, or a Request for Review of Hearing Decision with the SSA Appeals Council in Falls Church, Virginia, always send such documents by Certified Return Receipt Mail or by some other means that produces a confirmed receipt by SSA.

3. **Unlimited time** – requesting a waiver of the overpayment, or a reduction in the amount, or timing and amount of monthly or periodic recovery can be sought at any time, and multiple times based on changing circumstances, **EXCEPT that there is a 30 day time** limit for filing a request for waiver if the claimant seeks to continue payment of benefits pending appeal.

C. Medical Reviews, a/k/a Continuing Disability Reviews. Medical reviews are beyond the purpose of the CLE presentation, since few Elder Law attorneys practice Social Security disability law on the medical eligibility side. However, claimants may seek the assistance of an Elder Law attorney, who should, in turn, contact a local Social Security disability attorney immediately, and if time is running short, advise the claimant to appeal and request continuation of benefits. Generally, as noted above, there is no constitutional right of Title II Social Security Disability Insurance recipients to continuing benefits under the *Goldberg v. Kelly* standard which applies to SSI welfare recipients. For example, if there were some non-medical reason why SSA should terminate Title II benefits, there is no right to continuation of benefits. However, when dealing with SSA determinations of medical improvement, a reform measure passed to stop the Reagan administration's wholesale termination of nearly everyone on the disability roles, does provide statutory relief similar to Goldberg. The social Security Disability Benefit Reform Act of 1984, Public Law 98-460, provides recipients with three tools: the ten-day benefit continuation standard; the requirement that SSA not terminate benefits unless and until there is a face-to-face interview on the issue of medical improvement with an SSA staff person; and a standard of review that puts the burden of proof on SSA to show that the condition or conditions of the claimant are no longer disabling. The latter is called the "medical improvement standard."

PRACTICE POINTER: In medical improvement cases, if the claimant failed to request benefits continue during the Reconsideration stage, upon an adverse finding at Recon that triggers the

right to file a Request for Hearing, the claimant has a new ten-day window to request continuation of benefits pending the hearing before the federal Administrative Law Judge. Given that most Social Security Administration Offices of Disability Adjudication and Review (ODAR) are more than two years behind in their caseload, benefits can continue for a substantial time if the ten-day request was made. Failure to make the ten-day request within ten days, is also subject to a review for “good cause” and if SSA finds that the claimant had good cause in failing to request continuation within the ten days, benefits can be continued anyway. See 20 CFR §404.1597a(g)(1) and 20 CFR §416.996(d)(1).

Another difference between SSDI and SSI benefits: if SSDI benefits are terminated due to the claimant’s work record at Substantial Gainful Activity levels, SSA will not continue benefits during appeal. However, that is not true for SSI and concurrent SSDI-SSI cases. See 20 CFR §404.1597a(b) and §416,996(f) and §416.1336 and POMS DI 12027.015. Benefits continue for SSI recipients even if they engage in substantial gainful activity.

D. Financial Redeterminations. As shown above, there are substantial rights for claimants who act quickly in SSI financial termination cases. However, it is also important to realize that the SSI financial case should be decided at the local level, by requesting a Formal Conference when filing the Request for Reconsideration of a financial determination (such as, the Special Needs Trust failed to meet the requirements of the POMS at SI 01120.201 et seq.). Federal ALJs and the ODAR staff, with some exceptions, are generally disinterested and inexperienced in handling SSI financial eligibility issues; ODAR staff and ALJs work daily on medical disability issues. On the other hand, local District Office SSA Claims Reps are extremely experienced in SSI and the POMS, and all the ways that financial eligibility can continue legally. Try to keep your case decided at that level, but go on to the ALJ level if necessary.

III. Dealing with Overpayments – Avoiding, Defending, Reducing and Destroying.

A. Avoiding – by following the reporting rules. As noted above, there are myriad opportunities for claimants to forget to report. However, the consequences can be significant, and over-reporting rather than under-reporting is the first defense to suffering with overpayment issues.

PRACTICE POINTER: As an attorney, you have drafted the perfect Special Needs Trust, or Personal Services Contract, or otherwise created a perfect spend-down plan of the unexpected inheritance or the personal injury settlement award. It is so perfect, that you determine that since it meets all the SSI rules, you and your client have no duty to report because it is, in your mind, a non-event. Yes, IN YOUR MIND! But not in SSA’s. Guess who gets to determine if your d4A Special Needs Trust truly meets the SSA rules? That’s right – it’s for SSA to say, not you and not your client. Therefore, REPORT all changes of circumstances, even the ones that the claimant thinks will not affect eligibility. Keep a copy, send everything certified return receipt mail. Over-reporting, and proving that an item was reported, is the safest route.

1. Work Activity. Self-employment as well as traditional wage employment must be reported by claimants within ten days of the first of the month following the month of employment. Since wages or self-employment earnings may go up and down monthly, unfortunately the reporting, and the adjustment of benefits, will also have to go up and down monthly.

2. Financial Circumstance and Living Arrangements. All of the items listed in paragraph I-C-5 above, must be reported. For example, a child of a disabled parent who takes a part time newspaper delivery job, could affect the eligibility of the disabled parent, since the healthy parent's income is not counted in full based on the number of unemployed children in the household. When one changes from unemployed to employed, if the earnings of the child are sufficient, then the child may not be counted as an SSI dependent.

B. Defending overpayments on substantive grounds.

1. Challenging Continuing Disability Reviews (CDRs). This is too specialized for non-SSA disability attorneys. Refer the client to a specialist. As noted above, however, the Elder Law attorney may be important in recognizing the importance of appealing timely and requesting continuation of benefits.

2. Challenging financial determinations. The claimant and the claimant's attorney have the right to request a reconsideration, and later a hearing. At the reconsideration stage, the right includes the opportunity to review the file prior to the Formal Conference, which the good practitioner included when filing the Request for Reconsideration. In the claimant's file, many times there will be notes of communications with the SSA Regional Office in Atlanta, detailing the reasons why the claimant is thought to be ineligible. This is invaluable in preparing for the Formal Conference. The Formal Conference is conducted at the local Social Security office, often by the same person who made the determination of ineligibility. If the SSA staff person seems closed-minded and biased, ask to speak to the supervisor, and request that another staff person be assigned to conduct the conference, and cite the claimant's rights under *Goldberg v. Kelly, supra*. SSA is aware of *Goldberg*, and the decision's import appears in the POMS. The substantive preparation for the Conference is based on finding and citing to the SSA staff, the POMS which they regard as their bible. Citing court decisions, statutes, and even federal regulations is futile. SSA staff live and die by the POMS.

PRACTICE NOTE: A significant procedural problem developed as a standard practice in local Social Security District Offices around the country. SSA staff believed that it was not possible to challenge whether there was an overpayment, by filing only a Request for Reconsideration, and instead required that the challenge be made by filing a Request for Waiver of the Overpayment. Logically, that did not make sense. It should be possible to challenge whether there is an overpayment, without having to complete a detailed financial questionnaire to allege that the overpayment should be waived. SSA agrees with us. A letter by our law firm to the Atlanta Regional Chief Counsel resulted in a national EM - "Emergency Message" - to all SSA offices around the country, stating that we can challenge the overpayment without filing the Waiver form. See a copy of the attached Emergency Message. It may be a good idea to include the EM with your Request for Reconsideration if you are challenging whether there was an overpayment in the first place.

C. Reducing the overpayment to zero or something more by requesting Waiver of the Overpayment.

In addition, or alternately to challenging whether there is an overpayment, the claimant may request that the overpayment be waived pursuant to 42 USC §404(b) which states: “In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience. In making for purposes of this subsection any determination of whether any individual is without fault, the Secretary shall specifically take into account any physical, mental, educational, or linguistic limitation such individual may have (including any lack of facility with the English language).”

Thus, a claimant must show two things: that the claimant was “without fault” in creating the overpayment, and secondly, that recovery of the overpayment would either “defeat the purposes of the Act” or “would be against equity and good conscience” for the government to recover the overpayment.

The above applies to all claimants. For SSI claimants, there is an additional “out” for the government: the recovery could be waived where failure to do so will “impede efficient or effective administration” of the SSI program due to the small amount (less than \$1,000) involved. See 20 CFR §416.550(b)(3).

Each of these terms are defined in the regulations and in the POMS.

“Without fault” as stated in 20 CFR 416.552 only considers the fault of the claimant or the Rep Payee, not the gross mismanagement of the file (i.e., fault) on the part of the Social Security Administration. Even if SSA caused the overpayment, it is like a bank ATM giving out \$1,000 instead of the \$100 requested: it still has to be repaid unless the SSA claimant was both without fault and meets the other requirements – defeats the purposes of the Act or against equity and good conscience. Fault is probably what you think it is. Suppose the claimant gave false or incomplete information to SSA, which caused SSA to pay benefits or an amount of benefits it would not have provided if the correct information was supplied. Often claimants will decide that answering whether they own other property, means only property in the United States. Failure to furnish required information, such as this, will trigger a determination that the individual was at fault in creating the overpayment.

SSA’s regulations at 20 CFR §404.510 gives fourteen examples of “fault” and “without fault,” in Title II claims (some of which apply to SSI claimants as well).

For SSI claimants, see 20 CFR §416.552 for the discussion of “without fault.”

“Defeats the purposes of the Act” means that recovering the funds from the claimant would create such a hardship that the claimant would be unable to meet ordinary and necessary living expenses. 20 CFR §404.508 and 416.553. The types of expenses include, for example, food, clothing, shelter, medical and drug expenses, court-ordered child support or court-ordered alimony. Given the meager payment of SSI benefits, SSA assumes that collection of



overpayments from SSI claimants will create a hardship so significant that it “defeats the purposes of the Act.

“Against equity and good conscience” means that the claimant changed the claimant’s position for the worse depending on the receipt of the benefits, or relinquished a valuable right depending on the continued receipt of the benefit, such as a person who moved out of Florida, giving up subsidized Section 8 housing, and depending on the SSI payment to pay for the new unsubsidized housing in North Carolina.

Making determinations of whether SSA should waive or reduce the overpayment is based on one single form, SSA-632, attached. It is long, it is detailed, but it is the basis for the opportunity to get part or all of the recovery waived, or to work out favorable repayment terms. Thus, the most important task for a claimant is to accurately complete Form SSA-632, “Request for Waiver of Overpayment Recovery or Change in Repayment Rate,” attached to this outline. At the hearing level, each of the items of expenses should be proved up by documents and testimony, as appropriate. Finally, the Federal Claims Collection Act of 1966 provides that for those persons no longer receiving SSI or SSDI benefits, SSA is entitled to “compromise” the payment and accept less than its full amount. The amount and procedure for compromising claims is found in 20 CFR §404.515.

D. Destroying the overpayment determination – bankruptcy.

It is a common misconception that all debts owed to the U.S. Government cannot be discharged in bankruptcy. Ultimately, in appropriate cases, attorneys may recommend to clients that they seek consultation with bankruptcy attorneys.

Barring claimant fraud, overpayments may be discharged in bankruptcy. See *Neavear v. Schwieker*, 674 F.2d 1201 (7th Cr. 1982). However, be aware that even bankruptcy attorneys need to be apprised of the *Neavear* case. A copy of the *Neavear* case is attached.

The position of the Social Security Administration, however, is clear. They will honor a notice of filing a bankruptcy petition and will immediately stop all collection of the overpayment, including the reduction of the monthly payment for those claimants still receiving SSI or SSDI payments. Those payments will be restored to their full amount. See the POMS at GN 002215.185 on Bankruptcy Proceedings which directs the staff to stop all collection efforts immediately and restore benefits.

The Relevant SSI portion of Social Security Administration Federal Regulations

20 CFR §416.535 Underpayments and overpayments.

(a) *General.* When an individual receives SSI benefits of less than the correct amount, adjustment is effected as described in §§416.542 and 416.543, and the additional rules in §416.545 may apply. When an individual receives more than the correct amount of SSI benefits, adjustment is effected as described in §416.570. Refund of overpayments is discussed in §416.560 and waiver of recovery of overpayments is discussed in §§416.550 through 416.555.

(b) *Additional rules for individuals whose drug addiction or alcoholism is a contributing factor material to the determination of disability.* When an individual whose drug addiction or alcoholism is a contributing factor material to the determination of

disability, as described in [§416.935](#), receives less than the correct amount of SSI benefits, adjustment is effected as described in [§§416.542](#) and [416.543](#) and the additional rule described in [§416.544](#) applies.

(c) *Additional rules for eligible individuals under age 18 who have a representative payee.* When an eligible individual under age 18 has a representative payee and receives less than the correct amount of SSI benefits, the additional rules in [§416.546](#) may apply.

(d) *Additional rules for eligible aliens and for their sponsors.* When an individual who is an alien is overpaid SSI benefits during the 3-year period in which deeming from a sponsor applies (see [§416.1160\(a\)\(3\)](#)), the sponsor and the alien may be jointly and individually liable for repayment of the overpayment. The sponsor is liable for the overpayment if he or she failed to report correct information that affected the alien's eligibility or payment amount. This means information about the income and resources of the sponsor and, if they live together, of the sponsor's spouse. However, the sponsor is not liable for repayment if the sponsor was without fault or had good cause for failing to report correctly. A special rule that applies to adjustment of other benefits due the alien and the sponsor to recover an overpayment is described in [§416.570\(b\)](#).

(e) *Sponsor without fault or good cause exists for failure to report.* Without fault or good cause will be found to exist if the failure to report was not willful. To establish willful failure, the evidence must show that the sponsor knowingly failed to supply pertinent information regarding his or her income and resources.

20 CFR §416.550 Waiver of adjustment or recovery—when applicable.

Waiver of adjustment or recovery of an overpayment of SSI benefits may be granted when (EXCEPTION: This section does not apply to a sponsor of an alien):

- (a) The overpaid individual was without fault in connection with an overpayment, and
- (b) Adjustment or recovery of such overpayment would either:
 - (1) Defeat the purpose of title XVI, or
 - (2) Be against equity and good conscience, or
 - (3) Impede efficient or effective administration of title XVI due to the small amount involved.

§416.551 Waiver of adjustment or recovery—effect of.

Waiver of adjustment or recovery of an overpayment from the overpaid person himself (or, after his death, from his estate) frees him and his eligible spouse from the obligation to repay the amount of the overpayment covered by the waiver. Waiver of adjustment or recovery of an overpayment from anyone other than the overpaid person himself or his estate (e.g., a surviving eligible spouse) does not preclude adjustment or recovery against the overpaid person or his estate.

Example: The recipient was overpaid \$390. It was found that the overpaid recipient was eligible for waiver of adjustment or recovery of \$260 of that amount, and such action was taken. Only \$130 of the overpayment remained to be recovered by adjustment, refund, or the like.

§416.552 Waiver of adjustment or recovery—without fault.

Without fault relates only to the situation of the individual seeking relief from adjustment or recovery of an overpayment. The overpaid individual (and any other individual from whom the Social Security Administration seeks to recover the overpayment) is not relieved of liability and is not *without fault* solely because the Social Security Administration may have been at fault in making the overpayment. In determining whether an individual is without fault, the *fault* of the overpaid person and the *fault* of the individual seeking relief under the waiver provision are considered. Whether an individual is *without fault* depends on all the pertinent circumstances surrounding the overpayment in the particular case. The Social Security Administration considers the individual's understanding of the reporting requirements, the agreement to report events affecting payments, knowledge of the occurrence of events that should have been reported, efforts to comply with the reporting requirements, opportunities to comply with the reporting requirements, understanding of the obligation to return checks which were not due, and ability to comply with the reporting requirements (e.g., age, comprehension, memory, physical and mental condition). In determining whether an individual is without fault based on a consideration of these factors, the Social Security Administration will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the individual may have. Although the finding depends on all of the circumstances in the particular case, an individual will be found to have been at fault in connection with an overpayment when an incorrect payment resulted from one of the following:

- (a) Failure to furnish information which the individual knew or should have known was material;
- (b) An incorrect statement made by the individual which he knew or should have known was incorrect (this includes the individual's furnishing his opinion or conclusion when he was asked for facts), or
- (c) The individual did not return a payment which he knew or could have been expected to know was incorrect.

§416.553 Waiver of adjustment or recovery—defeat the purpose of the supplemental security income program.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in [§416.552](#)) and adjustment or recovery of the overpayment would defeat the purpose of the supplemental security income program.

(a) *General rule.* We consider adjustment or recovery of an overpayment to defeat the purpose of the supplemental security income (SSI) program if the individual's income and resources are needed for ordinary and necessary living expenses under the criteria set out in [§404.508\(a\)](#) of this chapter

(b) *Alternative criteria for individuals currently eligible for SSI benefits.* We consider an individual or couple currently eligible for SSI benefits to have met the test in paragraph (a) of this section if the individual's or couple's current monthly income (that is, the income upon which the individual's or couple's eligibility for the current month is determined) does not exceed—

- (1) The applicable Federal monthly benefit rate for the month in which the determination of waiver is made (see subpart D of this part); plus
- (2) The \$20 monthly general income exclusion described in [§§416.1112\(c\)\(3\)](#) and [416.1124\(c\)\(10\)](#); plus
- (3) The monthly earned income exclusion described in [§416.1112\(c\)\(4\)](#); plus
- (4) The applicable State supplementary payment, if any (see subpart T of this part) for the month in which determination of waiver is made.

For those SSI recipients whose income exceeds these criteria, we follow the general rule in paragraph (a) of this section.

§416.554 Waiver of adjustment or recovery—against equity and good conscience.

We will waive adjustment or recovery of an overpayment when an individual on whose behalf waiver is being considered is without fault (as defined in [§416.552](#)) and adjustment or recovery would be *against equity and good conscience*. Adjustment or recovery is considered to be *against equity and good conscience* if an individual changed his or her position for the worse or relinquished a valuable right because of reliance upon a notice that payment would be made or because of the incorrect payment itself. In addition, adjustment or recovery is considered to be *against equity and good conscience* for an individual who is a member of an eligible couple that is legally separated and/or living apart for that part of an overpayment not received, but subject to recovery under [§416.570](#).

Example 1: Upon being notified that he was eligible for supplemental security income payments, an individual signed a lease on an apartment renting for \$15 a month more than the room he had previously occupied. It was subsequently found that eligibility for the payment should not have been established. In such a case, recovery would be considered "against equity and good conscience."

Example 2: An individual fails to take advantage of a private or organization charity, relying instead on the award of supplemental security income payments to support himself. It was subsequently found that the money was improperly paid. Recovery would be considered "against equity and good conscience."

Example 3: Mr. and Mrs. Smith—members of an eligible couple—separate in July. Later in July, Mr. Smith receives earned income resulting in an overpayment to both. Mrs. Smith is found to be without fault in causing the overpayment. Recovery from Mrs. Smith of Mr. Smith's part of the couple's overpayment is waived as being *against equity and good conscience*. Whether recovery of Mr. Smith's portion of the couple's overpayment can be waived will be evaluated separately.

§416.555 Waiver of adjustment or recovery—impede administration.

Waiver of adjustment or recovery is proper when the overpaid person on whose behalf waiver is being considered is without fault, as defined in [§416.552](#), and adjustment or recovery would impede efficient or effective administration of title XVI due to the small amount involved. The amount of overpayment determined to meet such criteria is measured by the current average administrative cost of handling such overpayment case through such adjustment or recovery processes. In determining whether the criterion is met, the overpaid person's financial circumstances are not considered.

§416.556 Waiver of adjustment or recovery—countable resources in excess of the limits prescribed in [§416.1205](#) by \$50 or less.

(a) If any overpayment with respect to an individual (or an individual and his or her spouse if any) is attributable solely to the ownership or possession by the individual (and spouse if any) of countable resources having a value which exceeds the applicable dollar figure specified in [§416.1205](#) by an amount of \$50.00 or less, including those resources deemed to an individual in accordance with [§416.1202](#), such individual (and spouse if any) shall be deemed to have been without fault in connection with

the overpayment, and waiver of adjustment or recovery will be made, unless the failure to report the value of the excess resources correctly and in a timely manner was willful and knowing.

(b) Failure to report the excess resources correctly and in a timely manner will be considered to be willful and knowing and the individual will be found to be at fault when the evidence clearly shows the individual (and spouse if any) was fully aware of the requirements of the law and of the excess resources and chose to conceal these resources. When an individual incurred a similar overpayment in the past and received an explanation and instructions at the time of the previous overpayment, we will generally find the individual to be at fault. However, in determining whether the individual is at fault, we will consider all aspects of the current and prior overpayment situations, and where we determine the individual is not at fault, we will waive adjustment or recovery of the subsequent overpayment. In making any determination or decision under this section concerning whether an individual is at fault, including a determination or decision of whether the failure to report the excess resources correctly and in a timely manner was willful and knowing, we will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) of the individual (and spouse if any).

§416.557 Personal conference.

(a) If waiver cannot be approved (*i.e.*, the requirements in [§416.550](#) (a) and (b) are not met), the individual is notified in writing and given the dates, times and place of the file review and personal conference; the procedure for reviewing the claims file prior to the personal conference; the procedure for seeking a change in the scheduled date, time and/or place; and all other information necessary to fully inform the individual about the personal conference. The file review is always scheduled at least 5 days before the personal conference. We will offer to the individual the option of conducting the personal conference face-to-face at a place we designate, by telephone, or by video teleconference. The notice will advise the individual of the date and time of the personal conference.

(b) At the file review, the individual and the individual's representative have the right to review the claims file and applicable law and regulations with the decisionmaker or another of our representatives who is prepared to answer questions. We will provide copies of material related to the overpayment and/or waiver from the claims file or pertinent sections of the law or regulations that are requested by the individual or the individual's representative.

(c) At the personal conference, the individual is given the opportunity to:

- (1) Appear personally, testify, cross-examine any witnesses, and make arguments;
- (2) Be represented by an attorney or other representative (see [§416.1500](#)), although the individual must be present at the conference; and
- (3) Submit documents for consideration by the decisionmaker.

(d) At the personal conference, the decisionmaker:

- (1) Tells the individual that the decisionmaker was not previously involved in the issue under review, that the waiver decision is solely the decisionmaker's, and that the waiver decision is based only on the evidence or information presented or reviewed at the conference;
- (2) Ascertains the role and identity of everyone present;
- (3) Indicates whether or not the individual reviewed the claims file;
- (4) Explains the provisions of law and regulations applicable to the issue;
- (5) Briefly summarizes the evidence already in file which will be considered;
- (6) Ascertains from the individual whether the information presented is correct and whether he/she fully understands it;
- (7) Allows the individual and the individual's representative, if any, to present the individual's case;
- (8) Secures updated financial information and verification, if necessary;
- (9) Allows each witness to present information and allows the individual and the individual's representative to question each witness;
- (10) Ascertains whether there is any further evidence to be presented;
- (11) Reminds the individual of any evidence promised by the individual which has not been presented;
- (12) Lets the individual and the individual's representative, if any, present any proposed summary or closing statement;
- (13) Explains that a decision will be made and the individual will be notified in writing; and
- (14) Explains repayment options and further appeal rights in the event the decision is adverse to the individual.

(e) SSA issues a written decision to the individual (and his or her representative, if any) specifying the findings of fact and conclusions in support of the decision to approve or deny waiver and advising of the individual's right to appeal the decision. If waiver is denied, adjustment or recovery of the overpayment begins even if the individual appeals.

(f) If it appears that the waiver cannot be approved, and the individual declines a personal conference or fails to appear for a second scheduled personal conference, a decision regarding the waiver will be made based on the written evidence of record. Reconsideration is the next step in the appeals process.

§416.558 Notice relating to overpayments and underpayments.

(a) *Notice of overpayment and underpayment determination.* Whenever a determination concerning the amount paid and payable for any period is made and it is found that, with respect to any month in the period, more or less than the correct amount was paid, written notice of the correct and incorrect amounts for each such month in the period will be sent to the individual against whom adjustment or recovery of the overpayment as defined in [§416.537\(a\)](#) may be effected or to whom the underpayment as defined in [§416.536](#) and any amounts subject to installment payments as defined in [§416.544](#) would be payable, notwithstanding the fact that part or all of the underpayment must be withheld in accordance with [§416.543](#). When notifying an individual of a determination of overpayment, the Social Security Administration will, in the notice, also advise the individual that adjustment or recovery is required, as set forth in [§416.571](#), except under certain specified conditions, and of his or her right to request waiver of adjustment or recovery of the overpayment under the provisions of [§416.550](#).

(b) *Notice of waiver determination.* Written notice of an initial determination of waiver shall be given the individual in accordance with [§416.1404](#) unless the individual was not given notice of the overpayment in accordance with paragraph (a) of this section.

(c) *Notice relating to installment payments to individuals whose drug addiction or alcoholism is a contributing factor material to the determination of disability.* Whenever a determination is made concerning the amount of any benefits due for a period that must be paid in installments, the written notice will also explain the amount of the installment payment and when an increased initial installment payment may be made (as described in [§416.544](#)). This written notice will be sent to the individual and his or her representative payee.

§416.560 Recovery—refund.

An overpayment may be refunded by the overpaid recipient or by anyone on his or her behalf. Refund should be made in every case where the overpaid individual is not currently eligible for SSI benefits. If the individual is currently eligible for SSI benefits and has not refunded the overpayment, adjustment as set forth in [§416.570](#) will be proposed.

§416.570 Adjustment.

(a) *General.* When a recipient has been overpaid, the overpayment has not been refunded, and waiver of adjustment or recovery is not applicable, any payment due the overpaid recipient or his or her eligible spouse (or recovery from the estate of either or both when either or both die before adjustment is completed) is adjusted for recovery of the overpayment. Adjustment will generally be accomplished by withholding each month the amount set forth in [§416.571](#) from the benefit payable to the individual except that, when the overpayment results from the disposition of resources as provided by [§416.1240\(b\)](#) and [416.1244](#), the overpayment will be recovered by withholding any payments due the overpaid recipient or his or her eligible spouse before any further payment is made. Absent a specific request from the person from whom recovery is sought, no overpayment made under title XVIII of the Act will be recovered by adjusting SSI benefits. In no case shall an overpayment of SSI benefits be adjusted against title XVIII benefits. No funds properly deposited into a dedicated account (see [§416.546](#) and [416.640\(e\)](#)) can be used to repay an overpayment while the overpaid individual remains subject to the provisions of those sections.

(b) *Overpayment made to representative payee after the recipient's death.* A representative payee or his estate is solely liable for repaying an overpayment made to the representative payee on behalf of a recipient after the recipient's death. In such case, we will recover the overpayment according to paragraph (a) of this section, except that:

- (1) We will not adjust any other payment due to the eligible spouse of the overpaid representative payee to recover the overpayment, and
- (2) If the overpaid representative payee dies before we complete adjustment, we will not seek to recover the overpayment from the eligible spouse or the estate of the eligible spouse.

§416.571 10-percent limitation of recoupment rate—overpayment.

Any adjustment or recovery of an overpayment for an individual in current payment status is limited in amount in any month to the lesser of (1) the amount of the individual's benefit payment for that month or (2) an amount equal to 10 percent of the individual's total income (countable income plus SSI and State supplementary payments) for that month. The countable income used is the countable income used in determining the SSI and State supplementary payments for that month under [§416.420](#).

When the overpaid individual is notified of the proposed SSI and/or federally administered State supplementary overpayment adjustment or recovery, the individual will be given the opportunity to request that such adjustment or recovery be made at a higher or lower rate than that proposed. If a lower rate is requested, a rate of withholding that is appropriate to the financial condition of the overpaid individual will be set after an evaluation of all the pertinent facts. An appropriate rate is one that will not deprive the individual of income required for ordinary and necessary living expenses. This will include an evaluation of the individual's income, resources, and other financial obligations. The 10-percent limitation does not apply where it is determined that the overpayment occurred because of fraud, willful misrepresentation, or concealment of material information committed by the individual or his or her spouse. Concealment of material information means an intentional, knowing, and purposeful delay in making or failure to make a report that will affect payment amount and/or eligibility. It does not include a mere omission on the part of the recipient; it is an affirmative act to conceal. The 10-percent limitation does not apply to the recovery of overpayments incurred under agreements to dispose of resources pursuant to [§416.1240](#). In addition, the 10-percent limitation does not apply to the reduction of any future SSI benefits as a consequence of the misuse of funds set aside in accordance with [§416.1231](#)(b) to meet burial expenses. Adjustment or recovery will be suspended if the recipient is subject to a reduced benefit rate under [§416.414](#) because of residing in a medical treatment facility in which Medicaid is paying a substantial portion of the recipient's cost of care.

§416.572 Are title II and title VIII benefits subject to adjustment to recover title XVI overpayments?

(a) *Definitions—*

(1) *Cross-program recovery.* Cross-program recovery is the process that we will use to collect title XVI overpayments from benefits payable to you under title II or title VIII of the Social Security Act.

(2) *Benefits payable.* For purposes of this section, benefits payable means the amount of title II or title VIII benefits you actually would receive. For title II benefits, it includes your monthly benefit and your past-due benefits after any reductions or deductions listed in [§404.401](#)(a) and (b) of this chapter. For title VIII benefits, it includes your monthly benefit and any past-due benefits after any reduction by the amount of income for the month as described in [§§408.505](#) through [408.510](#) of this chapter.

(b) *When may we collect title XVI overpayments using cross-program recovery?* We may use cross-program recovery to collect a title XVI overpayment you owe when benefits are payable to you under title II, title VIII, or both.

§416.573 How much will we withhold from your title II and title VIII benefits to recover a title XVI overpayment?

(a) If past-due benefits are payable to you, we will withhold the lesser of the entire overpayment balance or the entire amount of past-due benefits.

(b)

(1) We will collect the overpayment from current monthly benefits due in a month by withholding the lesser of the amount of the entire overpayment balance or 10 percent of the monthly title II benefits and monthly title VIII benefits payable to you in the month.

(2) If we are already recovering a title II, title VIII or title XVI overpayment from your monthly title II benefit, we will figure your monthly withholding from title XVI payments (as described in [§416.571](#)) without including your title II benefits in your total countable income.

(3) Paragraph (b)(1) of this section does not apply if:

(i) You request and we approve a different rate of withholding, or

(ii) You or your spouse willfully misrepresented or concealed material information in connection with the overpayment.

(c) In determining whether to grant your request that we withhold less than the amount described in paragraph (b)(1) of this section, we will use the criteria applied under [§416.571](#) to similar requests about withholding from title XVI benefits.

(d) If you or your spouse willfully misrepresented or concealed material information in connection with the overpayment, we will collect the overpayment by withholding the lesser of the overpayment balance or the entire amount of title II benefits and title VIII benefits payable to you. We will not collect at a lesser rate. (See [§416.571](#) for what we mean by concealment of material information.)

§416.574 Will you receive notice of our intention to apply cross-program recovery?

Before we collect an overpayment from you using cross-program recovery, we will send you a written notice that tells you the following information:

- (a) We have determined that you owe a specific overpayment balance that can be collected by cross-program recovery;
- (b) We will withhold a specific amount from the title II or title VIII benefits (see [§416.573](#));
- (c) You may ask us to review this determination that you still owe this overpayment balance;
- (d) You may request that we withhold a different amount from your current monthly benefits (the notice will not include this information if [§416.573\(d\)](#) applies); and
- (e) You may ask us to waive collection of this overpayment balance.

§416.575 When will we begin cross-program recovery from your current monthly benefits?

(a) We will begin collecting the overpayment balance by cross-program recovery from your current monthly title II and title VIII benefits no sooner than 30 calendar days after the date of the notice described in [§416.574](#). If within that 30-day period you pay us the full overpayment balance stated in the notice, we will not begin cross-program recovery.

(b) If within that 30-day period you ask us to review our determination that you still owe us this overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing.

(c) If within that 30-day period you ask us to withhold a different amount from your current monthly benefits than the amount stated in the notice, we will not begin cross-program recovery until we determine the amount we will withhold. This paragraph does not apply when [§416.573\(d\)](#) applies.

(d) If within that 30-day period you ask us to waive recovery of the overpayment balance, we will not begin cross-program recovery from your current monthly benefits before we review the matter and notify you of our decision in writing. See [§§416.550](#) through [416.556](#).

§416.580 Referral of overpayments to the Department of the Treasury for tax refund offset—General.

(a) The standards we will apply and the procedures we will follow before requesting the Department of the Treasury to offset income tax refunds due taxpayers who have an outstanding overpayment are set forth in [§§416.580](#) through [416.586](#) of this subpart. These standards and procedures are authorized by the Deficit Reduction Act of 1984 [31 U.S.C. §3720A], as implemented through Department of the Treasury regulations at 31 CFR 285.2.

(b) We will use the Department of the Treasury tax refund offset procedure to collect overpayments that are certain in amount, past due and legally enforceable, and eligible for tax refund offset under regulations issued by the Secretary of the Treasury. We will use these procedures to collect overpayments only from individuals who are not currently entitled to monthly supplemental security income benefits under title XVI of the Act. We will refer an overpayment to the Secretary of the Treasury for offset against tax refunds no later than 10 years after our right to collect the overpayment first accrued.

§416.581 Notice to overpaid individual.

A request for reduction of a Federal income tax refund will be made only after we determine that an amount is owed and past due and provide the overpaid individual with 60 calendar days written notice. Our notice of intent to collect an overpayment through Federal income tax refund offset will state:

- (a) The amount of the overpayment;
- (b) That unless, within 60 calendar days from the date of our notice, the overpaid individual repays the overpayment, sends evidence to us at the address given in our notice that the overpayment is not past due or not legally enforceable, or asks us to waive collection of the overpayment under section 1631(b)(1)(B) of the Act, we intend to seek collection of the overpayment by requesting that the Department of the Treasury reduce any amounts payable to the overpaid individual as refunds of Federal income taxes by an amount equal to the amount of the overpayment;
- (c) The conditions under which we will waive recovery of an overpayment under section 1631(b)(1)(B) of the Act;
- (d) That we will review any evidence presented that the overpayment is not past due or not legally enforceable;

(e) That the overpaid individual has the right to inspect and copy our records related to the overpayment as determined by us and will be informed as to where and when the inspection and copying can be done after we receive notice from the overpaid individual that inspection and copying are requested.

§416.582 Review within SSA that an overpayment is past due and legally enforceable.

(a) *Notification by overpaid individual.* An overpaid individual who receives a notice as described in [§416.581](#) of this subpart has the right to present evidence that all or part of the overpayment is not past due or not legally enforceable. To exercise this right, the individual must notify us and present evidence regarding the overpayment within 60 calendar days from the date of our notice.

(b) *Submission of evidence.* The overpaid individual may submit evidence showing that all or part of the debt is not past due or not legally enforceable as provided in paragraph (a) of this section. Failure to submit the notification and evidence within 60 calendar days will result in referral of the overpayment to the Department of the Treasury, unless the overpaid individual, within this 60-day time period, has asked us to waive collection of the overpayment under section 1631(b)(1)(B) of the Act and we have not yet determined whether we can grant the waiver request. If the overpaid individual asks us to waive collection of the overpayment, we may ask that evidence to support the request be submitted to us.

(c) *Review of the evidence.* After a timely submission of evidence by the overpaid individual, we will consider all available evidence related to the overpayment. We will make findings based on a review of the written record, unless we determine that the question of indebtedness cannot be resolved by a review of the documentary evidence.

§416.583 Findings by SSA.

(a) Following the review of the record, we will issue written findings which include supporting rationale for the findings. Issuance of these findings concerning whether the overpayment or part of the overpayment is past due and legally enforceable is the final Agency action with respect to the past-due status and enforceability of the overpayment. If we make a determination that a waiver request cannot be granted, we will issue a written notice of this determination in accordance with the regulations in subpart E of this part. Our referral of the overpayment to the Department of the Treasury will not be suspended under [§416.585](#) of this subpart pending any further administrative review of the waiver request that the individual may seek.

(b) Copies of the findings described in paragraph (a) of this section will be distributed to the overpaid individual and the overpaid individual's attorney or other representative, if any.

(c) If the findings referred to in paragraph (a) of this section affirm that all or part of the overpayment is past due and legally enforceable and, if waiver is requested and we determine that the request cannot be granted, we will refer the overpayment to the Department of the Treasury. However, no referral will be made if, based on our review of the overpayment, we reverse our prior finding that the overpayment is past due and legally enforceable or, upon consideration of a waiver request, we determine that waiver of our collection of the overpayment is appropriate.

§416.584 Review of our records related to the overpayment.

(a) *Notification by the overpaid individual.* An overpaid individual who intends to inspect or copy our records related to the overpayment as determined by us must notify us stating his or her intention to inspect or copy.

(b) *Our response.* In response to a notification by the overpaid individual as described in paragraph (a) of this section, we will notify the overpaid individual of the location and time when the overpaid individual may inspect or copy our records related to the overpayment. We may also, at our discretion, mail copies of the overpayment-related records to the overpaid individual.

§416.585 Suspension of offset.

If, within 60 days of the date of the notice described in [§416.581](#) of this subpart, the overpaid individual notifies us that he or she is exercising a right described in [§416.582\(a\)](#) of this subpart and submits evidence pursuant to [§416.582\(b\)](#) of this subpart or requests a waiver under [§416.550](#) of this subpart, we will suspend any notice to the Department of the Treasury until we have issued written findings that affirm that an overpayment is past due and legally enforceable and, if applicable, make a determination that a waiver request cannot be granted.

§416.586 Tax refund insufficient to cover amount of overpayment.

If a tax refund is insufficient to recover an overpayment in a given year, the case will remain with the Department of the Treasury for succeeding years, assuming that all criteria for certification are met at that time.

§416.590 Are there additional methods for recovery of title XVI benefit overpayments?

(a) *General.* In addition to the methods specified in [§416.560](#), [416.570](#), [416.572](#) and [416.580](#), we may recover an overpayment under title XVI of the Act from you under the rules in subparts D and E of part 422 of this chapter. Subpart D of part 422 of this chapter applies only under the following conditions:

- (1) The overpayment occurred after you attained age 18;
- (2) You are no longer entitled to benefits under title XVI of the Act; and
- (3) Pursuant to paragraph (b) of this section, we have determined that the overpayment is otherwise unrecoverable under section 1631(b) of the Act.

(b) *When we consider an overpayment to be otherwise unrecoverable.* We consider an overpayment under title XVI of the Act to be otherwise unrecoverable under section 1631(b) of the Act if all of the following conditions are met:

- (1) We have completed our billing system sequence (*i.e.*, we have sent you an initial notice of the overpayment, a reminder notice, and a past-due notice) or we have suspended or terminated collection activity under applicable rules, such as, the Federal Claims Collection Standards in 31 CFR 903.2 or 903.3.
- (2) We have not entered into an installment payment arrangement with you or, if we have entered into such an arrangement, you have failed to make any payment for two consecutive months.
- (3) You have not requested waiver pursuant to [§416.550](#) or [§416.582](#) or, after a review conducted pursuant to those sections, we have determined that we will not waive collection of the overpayment.
- (4) You have not requested reconsideration of the initial overpayment determination pursuant to [§§416.1407](#) and [416.1409](#) or, after a review conducted pursuant to [§416.1413](#), we have affirmed all or part of the initial overpayment determination.
- (5) We cannot recover your overpayment pursuant to [§416.570](#) by adjustment of benefits payable to any individual other than you. For purposes of this paragraph, if you are a member of an eligible couple that is legally separated and/or living apart, we will deem unrecoverable from the other person that part of your overpayment which he or she did not receive.

The Relevant SSI Program Operations Manual System (POMS) Provisions

SI 02260.001 Basic Requirements Concerning Supplemental Security Income (SSI) Overpayment Waiver

A. Policy for waiving recovery of an overpayment

All overpayment waiver determination decisions **must** be made through the Modernized Supplemental Security Income Claims System (MSSICS) via Direct Supplemental Security Record (SSR) Update (MSOM BUSSR 004.001). Following are the basic waiver policies.

1. When to waive

We waive the recovery of an overpayment **only** if the liable individual is without fault in causing the overpayment, **and** recovery or adjustment would:

- **Defeat the purpose** of Title XVI of the Act; or
- **Be against equity and good conscience**; or
- **Impede effective or efficient administration** of Title XVI of the Act because of the amount involved.

2. Effect of waiver

The effect of an approved request for a waiver is to relieve the overpaid individual, his or her estate or his or her spouse (and the spouse's estate) of the obligation to repay the amount of the overpayment that is waived.

We reopen a determination to approve a request for waiver only if we later determine that the overpayment was the result of fraud.

3. When a waiver may be requested

A waiver may be requested at **any time**. A second or subsequent request may be made even if the prior waiver request was denied and the due process period has expired. Waiver may be requested after recovery has begun or even after recovery is complete.

The request must be in writing, over the individual's signature (or that of his or her representative payee, legal counsel, or other appointed representative). Even if the written request does not contain all the information required on the Form SSA-632-BK (Request for Waiver of Overpayment or Overpayment Recovery or Change in Repayment Rate) it is a request for a waiver.

The date of the waiver request is the date the written request is received in the field office (FO).

4. Effect of waiver request

A request for waiver stops recovery or adjustment effective with the month the written waiver request is received. We do not resume recovery or adjustment until we make the waiver determination and the appeal period has expired.

5. Action following waiver requests

If we cannot make the waiver determination within 10 days of the date the request was filed, we:

- **Stop** recovery or adjustment; and
- **Refund**, the amount recovered for the month the waiver was filed and any subsequent month.

6. Actions following a denial of a request for waiver

Following a denial of a request for waiver we:

- Notify the individual(s) who requested the waiver.
- Delay starting or resuming adjustment until 30 days (plus 5 days for mailing) after the date of the notice of waiver denial.

B. Waiver procedures

1. Written request for a waiver

In order to process a request for a waiver, the request must be in writing and over the individual's signature (or that of his or her representative payee, legal counsel or other appointed representative). Even if incomplete, this document is a waiver request.

A written request for waiver is not required if the total overpayment, not the outstanding balance, is less than \$1,000.01. See [SI 02260.030](#).

The date of the waiver request is the date the written request is received in the FO.

2. Actions following a request for waiver

- a. If you cannot make the waiver determination within 10 days of the waiver request date you must:
 - Stop all recovery or adjustment actions.
 - Refund the amount recovered in the month the request for waiver was filed and any subsequent months. Use the A-OTP process to refund the recovered amount(s). For instructions on the A-OTP process see SM 01902.005 and MSOM BUSSR 004.007 through MSOM BUSSR 004.009 and MSOM BUSSR 003.022.
- b. Do not refund any funds collected for months(s) before the month the request was received.
- c. Do not refund payment withheld if there is either another collect decision (i.e., different period of overpayment) or an unresolved overpayment.
- d. Develop only for the person(s) who is or are liable for making repayment.

For a discussion of liability when there is a representative payee see [SI 02201.020](#) through [SI 02201.023](#) and [SI 02201.025](#).

NOTE: Effective 12/04/2008, a representative payee (or his or her estate) is solely liable for repayment of payments he or she received on behalf of a deceased recipient for month(s) after the month of the recipient's death. See [SI 02201.005](#)

3. Actions following an approval of a request for waiver

- a. Post the approved waiver decision to the SSR using MSSICS Direct SSR Update and the UOWV screen. For instructions see MSOM BUSSR 004.009; and
- b. Refund funds recovered for the period covered by the approved request for waiver. Use the A-OTP process to refund the recovered amount. For instructions on the A-OTP process see SM 01902.005 and MSOM BUSSR 004.003 through MSOM BUSSR 004.009 and MSOM BUSSR 003.022.
- c. If the approved waiver covers months in which payments were adjusted to recover the waived overpayment, refund the amount that was withheld.
- d. Do not refund any funds if there is either another collect decision (i.e., different period of overpayment) or an unresolved overpayment.
- e. If the overpaid individual is a legal guardian or representative payee, send him or her a manual notice of an approved request for waiver. (See Notice of Waiver Decision-General, [NL 00803.200](#))

4. Action following the denial of a waiver request

For instructions on the waiver denial process see [SI 02260.006](#). If you deny a request for waiver of an overpayment you must:

- a. Post the waiver decision to the SSR using MSSICS Direct SSR Update and the UOWV screen. For instructions see MSOM BUSSR 004.009 UOWV screen. For instructions on posting a waiver denial, see MSOM BUSSR 004.009.
- b. Notify the individual(s) who requested the waiver. Use the Form SSA-8173-U3 (Notice of Waiver Denial) in current pay cases or Form SSA-8174-U4 (Notice of Waiver Denial) for non-payment cases.
- c. Never start or resume adjustment before 30 days (plus 5 days for mailing) after the date of the notice of waiver denial.

C. References

[GN 02250.325](#) - Waiver after administrative change of position

[GN 02250.330](#) - Blanket Waivers for Dollar Down Rounding Overpayments

[GN 02250.340](#) - Waiver Determinations for Automatic or Blanket Waivers

[SI 02220.017](#) - SSI Overpayment - Request for a Different Rate of Adjustment, Reconsideration or a Waiver

[SI 02220.065](#) - Recovery from Alien's Sponsor of Payments Made to the Alien

Other Attachments:

- EM-10092 – SSA Emergency Message on Processing Reconsiderations in Overpayment Cases
- Form SSA-632 to Request a Waiver of the Overpayment. **[Important Note:** When filing a Request for Waiver, 1) always attach receipts to prove the household expense items, and 2) always keep a copy and 3) send the form and attachments Certified Mail, Return Receipt, to prove SSA received the documents.]
- Bankruptcy case – *Neavear v. Schweiker*, 674 F.2d 1201 (7th Cir. 1982)

Social Security Online

Emergency Message

Identification Number EM-10092

Effective Date:
12/22/2010

Intended Audience: All
RCs/ARCs/ADs/FOs/TSCs/PSCs/OCO/ODARHQ

Originating Office: ORDP OISP

Title: Title II & Title XVI Overpayment Reconsideration Requests – One-Time-Only Instructions

Type: EM - Emergency Messages

Program: Title II (RSI); Title XVI (SSI)

Link To Reference: See References at the bottom of this EM.

Retention Date: June 22, 2011

The purpose of this message is to inform all technicians in the field office (FO) and program service center (PSC) that, without exception, we must make a determination on the reconsideration issue when we receive an SSA-561-U2 (Request for Reconsideration) for a Title II or Title XVI overpayment (OP).

A. Background

An overpaid individual or his or her representative may request a **reconsideration** when the overpaid person disputes the fact or amount of an overpayment. A **waiver** is a request for relief from making repayment.

We are revising current policy to clarify that FO and PSC technicians must always make a formal determination on a Request for Reconsideration when it involves an OP, including implied waivers and OPs of \$1,000 or less and there will be no effect on payment status or the amount of the continuing or ongoing benefit, or both.

B. FO instructions for Title II OPs

If the FO receives an SSA-561-U2 for a Title II OP, stop recovery, and forward the material to the servicing PSC.

C. FO instructions for Title XVI OPs

If the FO receives an SSA-561-U2 for a Title 16 overpayment, stop recovery, and process the request per [SI 04020.030](#).

D. FO instructions for concurrent OPs

If the FO receives an SSA-561-U2 for a concurrent overpayment, see the **NOTE:** in

[GN 03102.225B.6.](#)

E. PSC instructions for Title II OPs

1. Reconsideration request

Determine whether the fact or amount of the overpayment is correct. Document the determination using the SSA-662 (Reconsideration Determination) (or equivalent), make the appropriate input to the debt management system (DMS), and send a reconsideration notice.

NOTE: Even if the overpayment amount is \$1,000 or less, process the request as a reconsideration and not as a waiver under the \$1,000 Administrative Waiver Tolerance procedures.

2. Implied Title II OP waiver

If the overpaid person indicates on the SSA-561-U2 the inability to repay the overpayment (or similar language), the PSC takes the following actions:

- process the reconsideration as if the beneficiary or representative is requesting both a reconsideration and waiver
- forward the necessary material to the servicing FO to process the waiver request; and
- annotate on the routing sheet that the reconsideration was processed but we still need to take an action on the implied waiver request.

Please follow the above instructions even if an OP balance s no longer exists...

NOTE: If the overpaid individual or his or her representative files both an SSA-561-U2 and an SSA-632-BK (Request for Waiver), first process the Request for Reconsideration. The reconsideration determination may result in the elimination or reduction of the OP in question.

We will update the necessary POMS instructions later.

Direct all program–related and technical questions to your RO support staff or PSC OA staff. RO support staff or PSC OA staff may refer questions or problems to their Central Office contacts.

References:

- [GN 02201.025](#) – Overpayment – Reconsideration
- [GN 03102.100](#) – The Reconsideration Process
- [GN 03102.225](#) – Preparation of Form SSA-561-U2 (Request for Reconsideration)
- [GN 03102.250](#) – Form SSA-561-U2 (Request for Reconsideration)
- [GN 03102.325](#) – PC Reconsideration Processing Procedures
- [GN 03102.425](#) – Reconsideration Notices of Determination
- [GN 03102.450](#) – Form SSA-662, Reconsideration Determination
- [SI 02220.017](#) – SSI Overpayment - Request for a Different Rate of Adjustment, a Reconsideration or a Waiver
- [SI 04020.020](#) – Requests for SSI Reconsideration
- [SI 04020.030](#) – Developing and Processing SSI Reconsideration Requests
- MSOM [DMS 006.003](#) – Protest/Stop Recovery Request (PC) (DRPR)
- MSOM [DMS 006.019](#) – Protest/Stop Recovery Request (FO) (DRPF)
- MSOM [BUSSR 004.010](#) – Appeal (UOAP)

SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 0960-0037

Request For Waiver Of Overpayment Recovery Or Change In Repayment Rate

We will use your answers on this form to decide if we can waive collection of the overpayment or change the amount you must pay us back each month. If we can't waive collection, we may use this form to decide how you should repay the money.

Please answer the questions on this form as completely as you can. We will help you fill out the form if you want. If you are filling out this form for someone else, answer the questions as they apply to that person.

FOR SSA USE ONLY	
ROAR Input	<input type="checkbox"/> Yes <input type="checkbox"/> No
Input Date	
Waiver	<input type="checkbox"/> Approval <input type="checkbox"/> Denial
SSI	<input type="checkbox"/> Yes <input type="checkbox"/> No
AMT OF OP \$	
PERIOD (DATES) OF OP	

1. A. Name of person on whose record the overpayment occurred: _____

B. Social Security Number _____

C. Name of overpaid person(s) making this request and his or her Social Security Number(s):

_____	_____
_____	_____
_____	_____
_____	_____

2. Check any of the following that apply. (Also, fill in the dollar amount in B, C, or D.)
- A. The overpayment was not my fault and I cannot afford to pay the money back and/or it is unfair for some other reasons.
- B. I cannot afford to use all of my monthly benefit to pay back the overpayment. However I can afford to have \$ _____ withheld each month.
- C. I am no longer receiving Supplement Security Income (SSI) payments. I want to pay back \$ _____ each month instead of paying all of the money at once.
- D. I am receiving SSI payments. I want to pay back \$ _____ each month instead of paying 10% of my total income.

SECTION I- INFORMATION ABOUT RECEIVING THE OVERPAYMENT

3. A. Did you, as representative payee, receive the overpaid benefits to use for the beneficiary? Yes No (Skip to Question 4)

B. Name and address of the beneficiary

C. How were the overpaid benefits used?

4. If we are asking you to repay someone else's overpayment:

A. Was the overpaid person living with you when he/she was overpaid? Yes No

B. Did you receive any of the overpaid money? Yes No

C. Explain what you know about the overpayment AND why it was not your fault.

5. Why did you think you were due the overpaid money and why do you think you were not at fault in causing the overpayment or accepting the money?

6. A. Did you tell us about the change or event that made you overpaid? Yes No
If no, why didn't you tell us?

B. If yes, how, when and where did you tell us? If you told us by phone or in person, who did you talk with and what was said?

C. If you did not hear from us after your report, and/or your benefits did not change, did you contact us again? Yes No

7. A. Have we ever overpaid you before? Yes No

If yes, on what Social Security number?

B. Why were you overpaid before? If the reason is similar to why you are overpaid now, explain what you did to try to prevent the present overpayment.

SECTION II-YOUR FINANCIAL STATEMENT

NAME: _____
 SSN: _____

You need to complete this section if you are asking us either to waive the collection of the overpayment or to change the rate at which we asked you to repay it. Please answer all questions as fully and as carefully as possible. We may ask to see some documents to support your statements, so you should have them with you when you visit our office.

EXAMPLES ARE:

- Current Rent or Mortgage Books
- Savings Passbooks
- Pay Stubs
- Your most recent Tax Return
- 2 or 3 recent utility, medical, charge card, and insurance bills
- Cancelled checks
- Similar documents for your spouse or dependent family members

Please write only whole dollar amounts-round any cents to the nearest dollar. If you need more space for answers, use the "Remarks" section at the bottom of page 7.

- 8.** A. Do you now have any of the overpaid checks or money in your possession (or in a savings or other type of account)? Yes Amount: \$ _____
 Return this amount to SSA
 No
- B. Did you have any of the overpaid checks or money in your possession (or in a savings or other type of account) at the time you received the overpayment notice? Yes Amount: \$ _____
 Answer Question 9.
 No

- 9.** Explain why you believe you should not have to return this amount.

ANSWER 10 AND 11 ONLY IF THE OVERPAYMENT IS SUPPLEMENTAL SECURITY INCOME (SSI) PAYMENTS. IF NOT, SKIP TO 12.

- 10.** A. Did you lend or give away any property or cash after notification of the overpayment? Yes (Answer Part B)
 No (Go to question 11.)
- B. Who received it, relationship (if any), description and value:

- 11.** A. Did you receive or sell any property or receive any cash (other than earnings) after notification of this overpayment? Yes (Answer Part B)
 No (Go to question 12.)
- B. Describe property and sale price or amount of cash received:

- 12.** A. Are you now receiving cash public assistance such as Supplemental Security Income (SSI) payments? Yes (Answer B and C and See note below)
 No
- B. Name or kind of public assistance

- C. Claim Number

IMPORTANT: If you answered "YES" to question 12, DO NOT answer any more questions on this form. Go to page 8, sign and date the form, and give your address and phone number(s). Bring or mail any papers that show you receive public assistance to your local Social Security office as soon as possible.

Members Of Household

13. List any person (child, parent, friend, etc.) who depends on you for support AND who lives with you.

NAME	AGE	RELATIONSHIP (If none, explain why the person is dependent on you)

Assets-Things You Have And Own

14. A. How much money do you and any person(s) listed in question 13 above have as cash on hand, in a checking account, or otherwise readily available?

\$

B. Does your name, or that of any other member of your household appear, either alone or with any other person, on any of the following?

TYPE OF ASSET	OWNER	BALANCE OR VALUE	SHOW THE INCOME (interest, dividends) EARNED EACH MONTH. (If none, explain in spaces below. If paid quarterly, divide by 3).	
			PER MONTH	
SAVINGS (Bank, Savings and Loan, Credit Union)		\$	\$	
CERTIFICATES OF DEPOSIT (CD)		\$	\$	
INDIVIDUAL RETIREMENT ACCOUNT (IRA)		\$	\$	
MONEY OR MUTUAL FUNDS		\$	\$	
BONDS, STOCKS		\$	\$	
TRUST FUND		\$	\$	
CHECKING ACCOUNT		\$	\$	
OTHER (EXPLAIN)		\$	\$	
TOTALS —		\$	\$	Enter the "Per Month" total on line (k) of question 18.

15. A. If you or a member of your household own a car, (other than the family vehicle), van, truck, camper, motorcycle, or any other vehicle or a boat, list below.

OWNER	YEAR/MAKE/MODEL	PRESENT VALUE	LOAN BALANCE (if any)	MAIN PURPOSE FOR USE
		\$	\$	
		\$	\$	
		\$	\$	

B. If you or a member of your household own any real estate (buildings or land), OTHER than where you live, or own or have an interest in, any business, property, or valuables, describe below.

OWNER	DESCRIPTION	MARKET VALUE	LOAN BALANCE (if any)	USAGE-INCOME (rent etc.)
		\$	\$	
		\$	\$	
		\$	\$	
		\$	\$	

Monthly Household Income

If paid weekly, multiply by 4.33 (4 1/3) to figure monthly pay. If paid every 2 weeks, multiply by 2.166 (2 1/6). If self-employed, enter 1/12 of net earnings. Enter monthly TAKE HOME amounts on line A of question 18 also.

16. A. Are you employed? YES (Provide information below) NO (Skip to B)

Employer name, address, and phone: (Write "self" if self-employed)	Monthly pay before deduction (Gross)	\$
	Monthly TAKE-HOME pay (NET)	\$

B. Is your spouse employed? YES (Provide information below) NO (Skip to C)

Employer(s) name, address, and phone: (Write "self" if self-employed)	Monthly pay before deduction (Gross)	\$
	Monthly TAKE-HOME pay (NET)	\$

C. Is any other person listed in Question 13 employed? YES NO (Go to Question 17) Name(s)

Employer(s) name, address, and phone: (Write "self" if self-employed)	Monthly pay before deduction (Gross)	\$
	Monthly TAKE-HOME pay (NET)	\$

17. A. Do you, your spouse or any dependent member of your household receive support or contributions from any person or organization? YES (Answer B) NO (Go to question 18)

B. How much money is received each month? (Show this amount on line (J) of question 18)	\$	SOURCE
---	----	--------

BE SURE TO SHOW MONTHLY AMOUNTS BELOW - If received weekly or every 2 weeks, read the instruction at the top of this page.

18. INCOME FROM #16 AND #17 ABOVE AND OTHER INCOME TO YOUR HOUSEHOLD	YOURS	<input checked="" type="checkbox"/>	SPOUSE'S	<input checked="" type="checkbox"/>	OTHER HOUSEHOLD MEMBERS	<input checked="" type="checkbox"/>	
A. TAKE HOME Pay (Net) (From #16 A, B, C, above)	\$	<input type="checkbox"/>	\$	<input type="checkbox"/>	\$	<input type="checkbox"/>	
B. Social Security Benefits		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
C. Supplemental Security Income (SSI)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
D. Pension(s) (VA, Military, Civil Service, Railroad, etc.)	TYPE	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
	TYPE	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
E. Public Assistance (Other than SSI)	TYPE	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
F. Food Stamps (Show full face value of stamps received)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
G. Income from real estate (rent, etc.) (From question 15B)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
H. Room and/or Board Payments (Explain in remarks below)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
I. Child Support/Alimony		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
J. Other Support (From #17 (B) above)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
K. Income From Assets (From question 14)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
L. Other (From any source, explain below)		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	
REMARKS	TOTALS	\$	\$	\$			
GRAND TOTAL						\$	
(Add 3 total blocks above)							

Monthly Household Expenses

If the expense is paid weekly or every 2 weeks, read the instruction at the top of Page 5. Do NOT list an expense that is withheld from income (Such as Medical Insurance). Only take home pay is used to figure income.

Show "CC" as the expense amount if the expense (such as clothing) is part of CREDIT CARD EXPENSE SHOWN ON LINE (F).

		\$ PER MONTH	SSA USE ONLY
19.	A. Rent or Mortgage (If mortgage payment includes property or other local taxes, insurance, etc. DO NOT list again below.)		
	B. Food (Groceries (include the value of food stamps) and food at restaurants, work, etc.)		
	C. Utilities (Gas, electric, telephone)		
	D. Other Heating/Cooking Fuel (Oil, propane, coal, wood, etc.)		
	E. Clothing		
	F. Credit Card Payments (show minimum monthly payment allowed)		
	G. Property Tax (State and local)		
	H. Other taxes or fees related to your home (trash collection, water-sewer fees)		
	I. Insurance (Life, health, fire, homeowner, renter, car, and any other casualty or liability policies)		
	J. Medical-Dental (After amount, if any, paid by insurance)		
	K. Car operation and maintenance (Show any car loan payment in (N) below)		
	L. Other transportation		
	M. Church-charity cash donations		
	N. Loan, credit, lay-away payments (If payment amount is optional, show minimum)		
O. Support to someone NOT in household (Show name, age, relationship (if any) and address)			
P. Any expense not shown above (Specify)			
EXPENSE REMARKS (Also explain any unusual or very large expenses, such as medical, college, etc.)	TOTAL	\$	

Income And Expenses Comparison

20. A. Monthly income (Write the amount here from the "Grand Total" of #18.)	_____	\$
B. Monthly Expenses (Write the amount here from the "Total" of #19.)	_____	\$
C. Adjusted Household Expenses	_____	+\$25
D. Adjusted Monthly Expenses (Add (B) and (C))	_____	\$ 25

21. If your expenses (D) are more than your income (A), explain how you are paying your bills.	FOR SSA USE ONLY	
	<input type="checkbox"/> INC. EXCEEDS ADJ EXPENSE	\$ _____ +
	<input type="checkbox"/> INC LESS THAN ADJ EXPENSE	\$ _____ -

Financial Expectation And Funds Availability

22. A. Do you, your spouse or any dependent member of your household expect your or their financial situation to change (for the better or worse) in the next 6 months? (For example: a tax refund, pay raise or full repayment of a current bill for the better-major house repairs for the worse).

YES (Explain on line below)
 NO

B. If there is an amount of cash on hand or in checking accounts shown in item 14A, is it being held for a special purpose?

NO (Amount on hand)
 NO (Money available for any use)
 YES (Explain on line below)

C. Is there any reason you CANNOT convert to cash the "Balance or Value" of any financial asset shown in item 14B.

YES (Explain on line below)
 NO

D. Is there any reason you CANNOT SELL or otherwise convert to cash any of the assets shown in items 15A and B?

YES (Explain on line below)
 NO

Remarks Space –

If you are continuing an answer to a question, please write the number (and letter, if any) of the question first.

(MORE SPACE ON NEXT PAGE)

REMARKS SPACE (Continued)

PENALTY CLAUSE, CERTIFICATION AND PRIVACY ACT STATEMENT

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge. I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison, or may face other penalties, or both.

SIGNATURE OF OVERPAID PERSON OR REPRESENTATIVE PAYEE

SIGNATURE (First name, middle initial, last name) (Write in ink)

DATE (Month, Day, Year)

HOME TELEPHONE NUMBER (Include area code)

WORK TELEPHONE NUMBER IF WE MAY CALL YOU AT WORK (Include area code)

**SIGN
HERE**

MAILING ADDRESS (Number and street, Apt. No., P.O. Box, or Rural Route)

CITY AND STATE

ZIP CODE

ENTER NAME OF COUNTY (IF ANY) IN WHICH YOU NOW LIVE

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the individual must sign below, giving their full addresses.

SIGNATURE OF WITNESS

SIGNATURE OF WITNESS

ADDRESS (Number and street, City, State, and ZIP Code)

ADDRESS (Number and street, City, State, and ZIP Code)

Privacy Act Statement

Collection and Use of Personal Information

Sections 204, 1631(b), and 1870 of the Social Security Act, as amended, and the Federal Coal Mine Health and Safety Act of 1969 authorize us to collect this information. The information you provide will be used to make a determination on waiving overpayment recovery or changing your repayment rate.

The information you furnish on this form is voluntary. However, failure to provide the requested information may prevent us from approving your request.

We rarely use the information you supply for any purpose other than for determining waiver or a change in the repayment rate of an overpayment recovery. However, we may use it for the administration and integrity of Social Security programs. We may also disclose information to another person or to another agency in accordance with approved routine uses, which include but are not limited to the following:

To enable a third party or an agency to assist Social Security in establishing rights to Social Security benefits and/or coverage; To comply with Federal laws requiring the release of information from Social Security records (e.g., to the Government Accountability Office and Department of Veterans' Affairs);

To facilitate statistical research, audit or investigative activities necessary to assure the integrity of Social Security programs; and To the Department of Justice when representing the Social Security Administration in litigation.

We may also use the information you provide in computer matching programs. Matching programs compare our records with records kept by other Federal, state or local government agencies. Information from these matching programs can be used to establish or verify a person's eligibility for Federally funded or administered benefit programs and for repayment of payments or delinquent debts under these programs.

Additional information regarding this form, routine uses of information, and our programs and systems, is available on-line at www.socialsecurity.gov or at your local Social Security office.

Paperwork Reduction Act Statement - This information collection meets the requirements of 44 U.S.C. § 3507, as amended by section 2 of the Paperwork Reduction Act of 1995. You do not need to answer these questions unless we display a valid Office of Management and Budget control number. We estimate that it will take about 2 hours to read the instructions, gather the facts, and answer the questions. **SEND OR BRING THE COMPLETED FORM TO YOUR LOCAL SOCIAL SECURITY OFFICE. To find the nearest office, call 1-800-772-1213 (TTY 1-800-325-0778). Send only comments on our time estimate above to: SSA, 6401 Security Blvd., Baltimore, MD 21235-6401.**

« up

674 F.2d 1201

6 Collier Bankr.Cas.2d 367, 9 Bankr.Ct.Dec. 132,
Bankr. L. Rep. P 68,656

In the Matter of Randall B. NEAVEAR, Debtor.
Randall B. NEAVEAR, Plaintiff-Appellant,

v.

Richard S. SCHWEIKER, Secretary of Health and Human
Services, Defendant-Appellee.

No. 81-1860.

**United States Court of Appeals,
Seventh Circuit.**

*Argued Feb. 11, 1982.
Decided April 5, 1982.*

James S. Brannon, Peoria, Ill., for plaintiff-appellant.

Frank A. Rosenfeld, Appellate Staff, Civil Division, Dept. of Justice, Washington, D. C.,
for defendant-appellee.

Before CUDAHY, Circuit Judge, FAIRCHILD, Senior Circuit Judge, and POSNER, Circuit
Judge.

CUDAHY, Circuit Judge.

1 In this appeal we are presented with a question of first impression at the federal
appellate level: whether section 207 of the Social Security Act, 42 U.S.C. § 407
(1976), confers on the Social Security Administration ("SSA") a blanket exemption
from the operation of the bankruptcy laws, so that a debt owing to the SSA because
of an overpayment of benefits cannot be discharged in bankruptcy. We hold that the
SSA enjoys no such immunity from the bankruptcy laws and that the overpayment
debt is dischargeable under the provisions of the Bankruptcy Reform Act of 1978, 11
U.S.C. § 1 et seq. (Supp. III 1979) (the "Code" or "Bankruptcy Code").

I.

2 The debtor and plaintiff in this action, Randall B. Neavear, began receiving social
security disability benefits in 1968. Beginning in January, 1976, and continuing
until August, 1979, Neavear was not disabled, having engaged in substantial gainful
activity as a part-time, self-employed real estate broker. Neavear failed to report
this activity to the SSA as required by 20 C.F.R. § 404.1588 (1981), and he and his
family continued to receive disability benefits until they were terminated by the SSA
in August of 1978.

In August, 1979, Neavear again became disabled and was thus entitled to receive
benefits under the statute. The SSA, however, commenced a proceeding to offset the
earlier payments improperly received by Neavear against the future benefits to
which he was now entitled. Section 204(a) of the Social Security Act, 42 U.S.C. §

3 404(a) (1976), authorizes such a recovery or recoupment of overpayments by
decreasing future benefits. In a decision issued on February 26, 1980, the
« up Administrative Law Judge ("ALJ") found that Neavear had been overpaid
\$19,818.10 in disability benefits. The ALJ further ruled that a waiver of the
recoupment was not warranted because, under section 204(b), 42 U.S.C. § 404(b)
(1976), Neavear was not "without fault" in receiving the overpayments and because
recoupment would not "defeat the purpose" of the statute. The ALJ accordingly
ordered that future benefits payable to Neavear be reduced in satisfaction of the
overpayment debt.¹ Neavear did not seek administrative or judicial review of this
decision.²

4 On April 8, 1980, Neavear filed his Chapter 7 bankruptcy petition, listing on his
schedule of debts the \$19,818.10 overpayment debt to the SSA. Neavear was
subsequently granted a discharge by the bankruptcy court but the SSA continued to
reduce his disability benefits pursuant to the ALJ's recoupment order. On July 14,
1980, Neavear filed a complaint in the bankruptcy court seeking a declaration that
the overpayment debt had been discharged. The Secretary answered the complaint
and interposed four affirmative defenses: (1) that Neavear's action was barred
because of his failure to exhaust administrative remedies; (2) that the court lacked
jurisdiction because the government had not waived its defense of sovereign
immunity; (3) that section 207 of the Social Security Act, 42 U.S.C. § 407 (1976),
rendered the debt nondischargeable in bankruptcy; and (4) that the SSA's right of
recoupment created a statutory lien precluding discharge of the overpayment
debt.³ The bankruptcy court found in favor of the SSA on the first three affirmative
defenses, but did not address the question of a statutory lien. *Neavear v. Schweiker*,
16 B.R. 528 (Bkrcty, C.D.Ill.1981). The district court affirmed without opinion.

II.

5 At the outset we are faced with two issues in the nature of jurisdictional obstacles
to Neavear's action against the Secretary: the applicability of the doctrines of
administrative exhaustion and sovereign immunity.

6 The bankruptcy court held that Neavear's complaint was barred because of his
failure to seek administrative review of the Secretary's determination that he was at
fault in receiving the overpayments of benefits. This ruling was erroneous. "The
basic purpose of the exhaustion doctrine is to allow the administrative agency to
perform functions within its special competence-to make a factual record, to apply
its expertise, and to correct its own errors so as to moot judicial controversies."
Continental Can Co. v. Marshall, 603 F.2d 590, 597 (7th Cir. 1979); see *Parisi v.*
Davidson, 405 U.S. 34, 37, 92 S.Ct. 815, 817, 31 L.Ed.2d 17 (1972); *McKart v. United*
States, 395 U.S. 185, 193-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969). None of
these purposes would be even remotely served by applying the exhaustion doctrine
in the instant case.

7 The bankruptcy court apparently believed that Neavear's complaint in effect
sought review of the ALJ's recoupment order. To the contrary, Neavear does not
contest the validity of that administrative determination but instead seeks from the
bankruptcy court an order declaring that the overpayment debt has been
discharged. Neavear thus requests relief that could not have been granted in the
administrative proceeding, and the issue of dischargeability presented to the
bankruptcy court does not invoke the "special competence" of the SSA. *Rowan v.*
Morgan, 15 B.R. 834, 837-38 (Bkrcty, N.D.Ohio 1981).⁴ We thus conclude that
Neavear was not required, as a condition of obtaining relief in the bankruptcy court,
to pursue lengthy and quite possibly groundless administrative appeals of the ALJ's
recoupment decision.

8 There is a somewhat more challenging question whether the Secretary's
« up invocation of the defense of sovereign immunity precludes Neavear's action. The
bankruptcy court held that it did, reasoning that sovereign immunity may be
waived only where the government files a proof of claim. Because the Secretary did
not file a claim in the instant case, the court concluded, he was not amenable to suit
at the instance of a Chapter 7 debtor.

9 The bankruptcy court's decision appears to have ignored section 106(c) of the
Code, 11 U.S.C. § 106(c) (Supp. III 1979).⁵ That section, unlike sections 106(a) and
(b), does not condition the waiver of sovereign immunity upon the filing of a proof
of claim.⁶ The legislative history of section 106(c) indicates that it was enacted in
order to codify the Ninth Circuit's decision in *Gwilliam v. United States*, 519 F.2d
407 (9th Cir. 1975). 124 Cong.Rec. H11,091 (daily ed. Sept. 28, 1978); 124 Cong.Rec.
S17,407 (daily ed. Oct. 6, 1978). *Gwilliam* held that, notwithstanding the failure by
the government to file a proof of claim, the bankruptcy court possessed jurisdiction
under section 17(c) of the former Bankruptcy Act, 11 U.S.C. § 35(c) (1976), to
determine the dischargeability of tax debts upon application of the debtor.⁷ See
also *McGugin v. District Director of IRS (In re Dolard)*, 519 F.2d 282 (9th Cir.
1975). This court followed *Gwilliam* in *McKenzie v. United States*, 536 F.2d 726 (7th
Cir. 1976), where we upheld the jurisdiction of the bankruptcy court to determine
the dischargeability of a tax debt despite the government's failure to file a proof of
claim:

10 We hold that Section 17(c), in explicitly allowing the bankrupt to file an
application for the determination of the dischargeability of "any debt" waives the
sovereign immunity of the United States in any bankruptcy action in which the
United States is alleged to be a creditor of the bankrupt, including instances in
which federal taxes have become due and owing.

11 536 F.2d at 729 (emphasis supplied).

12 Section 106(c) thus preserves the rule, established in *Gwilliam* and approved by
this court in *McKenzie*, that a debtor may seek a declaration from the bankruptcy
court that a debt owed to an agency of the United States is dischargeable. Just as in
McKenzie, we perceive no basis for distinguishing between a debt owed to the SSA
and those debts owed to the Internal Revenue Service at issue in *Gwilliam* and
McKenzie. Accordingly, we hold that section 106(c) of the Bankruptcy Code waives
the sovereign immunity of the United States with respect to questions relating to
the dischargeability of debts owed to the government. The bankruptcy court thus
committed error when it refused, on grounds of sovereign immunity, to adjudicate
the dischargeability of Neavear's overpayment debt.

13 Having concluded that the bankruptcy court had jurisdiction to adjudicate the
dischargeability of the overpayment debt, we turn now to the question whether that
debt was dischargeable in bankruptcy.

III.

14 Section 727(b) of the Bankruptcy Code, 11 U.S.C. § 727(b) (Supp. III 1979),
provides that a discharge in bankruptcy "discharges the debtor from all debts that
arose before the date of the order for relief," (emphasis supplied), except as
provided in section 523.⁸ The issue presented in the instant case is whether section
207 of the Social Security Act, 42 U.S.C. § 407 (1976), confers on the SSA a blanket
exemption from the operation of the Bankruptcy Code, so that an overpayment debt
is nondischargeable regardless whether the debt falls within one of the exceptions
to discharge listed in section 523.

Section 207 provides:

15 « up The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

16 42 U.S.C. § 407 (1976). By its terms, section 207 is concerned with the protection of social security benefits from the reach of creditors. Since 1963, however, the SSA has interpreted this provision more expansively. Social Security Ruling SSR 63-7 (1963). The SSA believes that the reference in section 207 to "rights existing under this subchapter" embraces not only the rights of social security recipients but also the rights of the agency itself-including the SSA's right to recoup overpayments under section 204, 42 U.S.C. § 404 (1976). The SSA asserts, therefore, that Congress in section 207 conferred upon it a total exemption from the operation of all bankruptcy laws.

17 In support of the SSA's interpretation of section 207, the Secretary relies solely on the language of the statute.⁹ He offers no reasons of policy to explain why Congress supposedly gave the SSA rights enjoyed by no other creditor,¹⁰ and he does not point to any legislative history supporting his sweeping interpretation. Above all, however, the Secretary's argument must fail because it asks us, in construing the reference to "rights" in section 207, to disregard the surrounding text. Section 207 speaks throughout in terms of the rights of social security recipients (the rights to "future payment," and to "moneys paid or payable") and the protection of their benefits from the reach of creditors (through "execution, levy, attachment, garnishment, or other legal process"). The exemption from "the operation of any bankruptcy or insolvency law" (which should be construed as parallel to the preceding forms of legal process) simply closes off what would otherwise be an additional avenue for creditors to satisfy their claims from the social security benefits of the debtor.¹¹ Thus, section 207 deals only with the protection of social security benefits from creditor action. The Secretary's interpretation of the section turns the statute on its head, since this interpretation would transform a provision designed to protect social security recipients from creditors into a provision conferring super-creditor status on the SSA. We thus conclude that section 207 provides an exemption from the bankruptcy laws only for the benefits of social security recipients, and does not operate to prevent a debtor from obtaining a discharge of a debt owed to the SSA because of an overpayment.¹²

18 Our conclusion that section 207 poses no obstacle to a debtor seeking a discharge of an overpayment debt does not, of course, mean that every social security recipient who receives, not without fault, an overpayment of benefits may escape his duty to repay those benefits by means of a quick discharge in bankruptcy. To the contrary, section 523 of the Code provides that debts arising from transactions involving "false pretenses, a false representation, or actual fraud," are not dischargeable. 11 U.S.C. § 523(a)(2)(A) (Supp. III 1979). While we do not necessarily accept what appears to have been the Secretary's argument in the bankruptcy court-that the ALJ's determination that Neavear was at fault in obtaining the overpayments constitutes a finding of a "false representation" precluding discharge-we do agree that at least in some cases an overpayment debt may fall within this category of exceptions to discharge. Whether Neavear's debt to the SSA is such a nondischargeable debt under section 523 is a question we leave for the bankruptcy court to decide on remand of this case.¹³

19 Finally, we pause to note that two recent cases, one now awaiting review in this
 court, have concluded as we do today that overpayment debts owing to the SSA are
 « up dischargeable in bankruptcy. *Rowan v. Morgan*, 15 B.R. 834 (Bkrcty, N.D.Ohio
 1981); *Gutierrez v. Schweiker*, 15 B.R. 268 (N.D.Ill.1981), appeal docketed, No. 81-
 2243 (7th Cir. 1981). The reasoning employed in these cases, however, is different
 from ours. Both cases held that the SSA had failed to make timely objections under
 section 523(c) to the discharge of the overpayment debts. Both courts either
 accepted or ignored the argument that section 207 of the Social Security Act itself
 exempts overpayment debts from discharge under the Bankruptcy Code, and found
 instead that the Code repealed section 207 by implication.¹⁴ We take a more direct
 path, however, and hold that section 207 does not by itself render overpayment
 debts nondischargeable. We thus have no occasion to reach the question of an
 implied repeal.

IV.

20 For the reasons stated herein, we hold that the bankruptcy court had jurisdiction
 to adjudicate the dischargeability of an overpayment debt owed to the SSA and that
 section 207 of the Social Security Act does not prevent the discharge of such a debt.
 We therefore reverse the judgments of the courts below and remand the case for a
 consideration of the two issues not yet addressed by the bankruptcy court: whether
 Neavear's overpayment debt is nondischargeable under section 523 of the Code and
 whether the overpayment debt creates a statutory lien precluding discharge.

21 Reversed and remanded.

¹ By June 30, 1980, the overpayment debt had been reduced to \$11,407.20 as a result of
 the recoupment order

² Neavear could have appealed the ALJ's decision, first to an ALJ appointed by the
 Associate Commissioner for Hearings and Appeals, 20 C.F.R. § 404.929 (1981), then to
 the Appeals Council within the SSA, 20 C.F.R. § 404.967 (1981), and finally to the
 district court, 42 U.S.C. § 405(g) (1976)

³ The SSA also asserted a defense based on an alleged absence of a justiciable case or
 controversy. That argument appears to have been abandoned

⁴ Cf. *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974) (plaintiff not required to exhaust
 administrative remedies where he sought judicial resolution of a constitutional question
 that could not be adjudicated by the federal agency)

⁵ Section 106(c), 11 U.S.C. § 106(c) (Supp. III 1979), provides:

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any
 assertion of sovereign immunity-

(1) a provision of this title that contains "creditor", "entity", or "governmental unit"
 applied to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds
 governmental units.

⁶ That a waiver of sovereign immunity may be found even though the government has not
 filed a proof of claim is illustrated by *Remke, Inc. v. United States*, 5 B.R. 299 (Bkrcty,
 E.D.Mich.1980), in which a bankruptcy court held that a Chapter 11 debtor could recover
 a preferential transfer from the Internal Revenue Service pursuant to section 547 of the
 Code. 11 U.S.C. § 547 (Supp. III 1979). In reaching this conclusion, the court stated, "the
 government's contention that a governmental unit's defense of sovereign immunity is

waived only in cases in which the government has filed a proof of claim, is without merit." 5 B.R. at 302 (footnote omitted)

« up

⁷ Section 17(c), 11 U.S.C. § 35(c) (1976), authorized the bankrupt to file an application with the bankruptcy court for "the determination of the dischargeability of any debt." (Emphasis supplied). This provision was not carried forward into the new Bankruptcy Code, but this fact does not detract from the continued applicability of Gwilliam and related cases. The legislative history of the Code indicates that section 17(c) was "deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1471(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act § 17c." H.Rep.No.95-595, 95th Cong., 1st Sess. 363 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6319

⁸ Section 523, 11 U.S.C. § 523 (Supp. III 1979), provides in pertinent part:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt-

(2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by-

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition

⁹ In its interpretive ruling, the SSA relied on the Supreme Court's decision in *United States v. Munsey Trust Co.*, 332 U.S. 234, 239, 67 S.Ct. 1599, 1601, 91 L.Ed. 2022 (1947), as authority for the conclusion that the agency's right to recoup overpayments is one of the "rights" protected by section 207. *Munsey Trust* was a government contract case, however, and not a case arising under the Social Security Act. The decision thus sheds no light on the question whether Congress intended section 207 to exempt the SSA in its role as a creditor from the operation of the Bankruptcy Code

¹⁰ Not even the Internal Revenue Service has been accorded the favorable treatment in bankruptcy that the SSA now contends it was granted. Under the Bankruptcy Code, tax claims generally receive a sixth priority, 11 U.S.C. § 507(a)(6) (Supp. III 1979), and are nondischargeable only if they fall within the limited exceptions of section 523, 11 U.S.C. § 523 (Supp. III 1979)

¹¹ Under the Bankruptcy Code, social security benefits are included in the property of the estate. 11 U.S.C. § 541(c) (Supp. III 1979). Such benefits can be exempted, however, either under section 522(d)(10)(A), or, if the debtor so elects, under section 522(b)(2)(A), which grants an exemption for "any property that is exempt under Federal law, other than" section 522(d). Section 207 is one of the "Federal law" exemptions. See *In re Smith*, 640 F.2d 888, 890 (7th Cir. 1981); *Cheeseman v. Nachman*, 656 F.2d 60, 62 n.5 (4th Cir. 1981). Thus, section 207 operates to exempt social security benefits from the property of the estate

¹² Section 207 is similar to other statutes that remove government benefits from the reach of creditors. See, e.g., 5 U.S.C. § 8130 (1976); 33 U.S.C. § 775 (1976); 38 U.S.C. § 770(g) (1976); 38 U.S.C. § 3101 (1976); 42 U.S.C. § 1717 (1976). Other statutes that expressly conferred on government agencies in their role as creditors an exemption from discharges in bankruptcy, however, were repealed when the Bankruptcy Code was enacted. See 20 U.S.C. § 1087-3 (1976), repealed by Pub.L.No. 95-598, Title III, § 317, 92 Stat. 2678 (1978); 42 U.S.C. § 294f(g) (1976), repealed by Pub.L.No. 95-598, Title III, § 327, 92 Stat. 2679 (1978); 42 U.S.C. § 656(b) (1976), repealed by Pub.L.No. 95-598, Title III, § 328, 92 Stat. 2679 (1978). Although not conclusive, the fact that Congress did not repeal section 207 when these other statutes granting exceptions to discharge were repealed is some evidence that Congress never regarded section 207 as rendering social security overpayment debts nondischargeable

13 « up The Secretary apparently raised the argument that the overpayment debt was nondischargeable under section 523(a)(2) for the first time in his memorandum in opposition to Neavear's motion to strike the affirmative defenses. In light of this fact, we suggest that the bankruptcy court on remand consider the timeliness of the Secretary's objection to discharge. 11 U.S.C. § 523(c) (Supp. III 1979). See *Rowan v. Morgan*, 15 B.R. 834, 839 (Bkrcty, N.D. Ohio 1981); *Gutierrez v. Schweiker*, 15 B.R. 268 (D.C.N.D. Ill. 1981), appeal docketed, No. 81-2243 (7th Cir. 1981)

14 *Rowan* and *Gutierrez* relied on *In re Buren*, 6 B.R. 744 (D.C.M.D. Tenn. 1980), appeal docketed, No. 80-5427 (6th Cir. 1981), for their conclusion that the Bankruptcy Code impliedly repealed section 207. *Buren* does hold that the Code effected an implied repeal of section 207, but in circumstances quite different than those in the instant case. At issue in *Buren* was the power of the bankruptcy court under 11 U.S.C. § 1325(b) (Supp. III 1979) to order the SSA to deduct benefits owing to the debtor and to pay these benefits directly to the Chapter 13 trustee. Thus, the challenged income deduction order implicated the central purpose of section 207: the protection of debtors from the transfer or assignment of social security benefits to creditors. The *Buren* court held that, given Congress' expressed desire to broaden the availability of Chapter 13 relief to include individuals whose only regular income consisted of social security benefits, Congress could not have intended section 207 to prevent Chapter 13 debtors from voluntarily subjecting their benefits to income deduction orders. The court held that section 207 was accordingly repealed by implication, but only insofar as it involved income deduction orders under section 1325(b). The *Buren* case thus has little relevance to the question whether the discharge provisions of the Code also work an implied repeal of section 207