

- a.44. Sabia virus;
a.45. Seoul virus;
a.46. Severe acute respiratory syndrome-related coronavirus (SARS-related coronavirus);
a.47. Sheeppox virus;
a.48. Sin Nombre virus;
a.49. St. Louis encephalitis virus;
a.50. Suid herpesvirus 1 (Pseudorabies virus; Aujeszky's disease);
a.51. Swine vesicular disease virus;
a.52. Tick-borne encephalitis virus (Far Eastern subtype, formerly known as Russian Spring-Summer encephalitis virus—see 1C351.b.3 for Siberian subtype);
a.53. Variola virus;
a.54. Venezuelan equine encephalitis virus;
a.55. Vesicular stomatitis virus;
a.56. Western equine encephalitis virus; or
a.57. Yellow fever virus.
b. * * *
b.3. Tick-borne encephalitis virus (Siberian subtype, formerly West Siberian virus—see 1C351.a.52 for Far Eastern subtype).
c. * * *
c.7. Chlamydia psittaci (Chlamydophila psittaci);
* * * * *
c.18. Salmonella enterica subspecies enterica serovar Typhi (Salmonella typhi);
c.19. * * *
Note: Shiga toxin producing Escherichia coli (STEC) includes, inter alia, enterohaemorrhagic E. coli (EHEC), verotoxin producing E. coli (VTEC) or verocytotoxin producing E. coli (VTEC).
* * * * *
d. * * *
d.6. Conotoxins;
d.7. Diacetoxyscirpenol;
d.8. * * *
d.9. Microcystins (Cyanoginsins);
d.10. Modeccin;
* * * * *
d.13. Shiga toxins (shiga-like toxins, verotoxins, and verocytotoxins);
* * * * *
d.17. Viscumin (Viscum album lectin 1); or
d.18. Volkensin.
* * * * *

■ 3. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 2—Materials Processing, ECCN 2B352 is amended in the “Items” paragraph, under the List of Items Controlled section, by revising paragraph a, by revising paragraph b.1, by revising the introductory text of paragraph d.1, and by revising the nota bene to paragraph d.1, to read as follows:

2B352 Equipment capable of use in handling biological materials, as follows (see List of Items Controlled).

* * * * *

List of Items Controlled

Related Controls: * * *

Related Definition: * * *

Items:

a. Containment facilities and related equipment, as follows:

a.1. Complete containment facilities at P3 or P4 containment level.

Technical Note: P3 or P4 (BL3, BL4, L3, L4) containment levels are as specified in the WHO Laboratory Biosafety Manual (3rd edition, Geneva, 2004).

a.2. Equipment designed for fixed installation in containment facilities specified in paragraph a.1 of this ECCN, as follows:

a.2.a. Double-door pass-through decontamination autoclaves;

a.2.b. Breathing air suit decontamination showers;

a.2.c. Mechanical-seal or inflatable-seal walkthrough doors.

b. * * *

b.1. Fermenters capable of cultivation of micro-organisms or of live cells for the production of viruses or toxins, without the propagation of aerosols, having a capacity of 20 liters or greater.

* * * * *

d. * * *

d.1. Cross (tangential) flow filtration equipment capable of separation of microorganisms, viruses, toxins or cell cultures having all of the following characteristics:

* * * * *

N.B.: 2B352.d.1 does not control reverse osmosis and hemodialysis equipment, as specified by the manufacturer.

* * * * *

Dated: December 7, 2016.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2016–30099 Filed 12–15–16; 8:45 am]

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SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 405 and 416

[Docket No. SSA–2014–0052]

RIN 0960–AH71

Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are revising our rules so that more of our procedures at the hearing and Appeals Council levels of our administrative review process are consistent nationwide. We anticipate that these nationally consistent procedures will enable us to administer our disability programs more efficiently and better serve the public.

DATES: This final rule will be effective on January 17, 2017. However, compliance is not required until May 1, 2017.

FOR FURTHER INFORMATION CONTACT: Patrick McGuire, Office of Appellate

Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION

Background

We are revising and making final the rules for creating nationally uniform hearing and Appeals Council procedures, which we proposed in a notice of proposed rulemaking (NPRM) published in the **Federal Register** on July 12, 2016 (81 FR 45079). In the preamble to the NPRM, we discussed the changes we proposed from our current rules and our reasons for proposing those changes. In the NPRM, we proposed revisions to: (1) The time frame for notifying claimants of a hearing date; (2) the information in our hearing notices; (3) the period when we require claimants to inform us about or submit written evidence, written statements, objections to the issues, and subpoena requests; (4) what constitutes the official record; and (5) the manner in which the Appeals Council would consider additional evidence.

As we explained in the preamble to our NPRM, we proposed these changes to ensure national consistency in our policy and procedures and improve accuracy and efficiency in our administrative review process. We expect this final rule will positively affect our ability to manage our workloads and lead to better public service. Interested readers may refer to the preamble to the NPRM, available at <http://www.regulations.gov> under docket number SSA–2014–0052.

What changes are we making from the NPRM?

We are making several changes in this final rule from the NPRM based on some of the public comments we received. We briefly outline those changes here and provide additional detail on the changes in the comment and response section that follows. We are also making minor editorial changes throughout this final rule. For the reader's ease of review, we refer to the general requirement that all evidence, objections, or written statements be submitted at least 5 business days before the date of the hearing as the “5-day requirement.” We adopted the following changes from our NPRM in this final rule:

- We lengthened the time frame for notifying claimants of a hearing date in

20 CFR 404.938 and 416.1438 from at least 60 days to at least 75 days;

- In 20 CFR 404.935(b)(3)(iv) and 416.1435(b)(3)(iv), we removed the phrase “through no fault of your own” to reduce the evidentiary burden on claimants who are unable to provide evidence;

- We clarified that the circumstances set forth in 20 CFR 404.935(b)(3)(i) to (b)(3)(iv) and 416.1435(b)(3)(i) to (b)(3)(iv) are merely examples and do not constitute an exhaustive list;

- We added the same exceptions to the 5-day requirement that we proposed for the submission of evidence in 20 CFR 404.935 and 416.1435 to the deadlines related to objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.1450(d)(2));

- We added language to 20 CFR 404.949 and 416.1449 to clarify that the 5-day requirement applies only to pre-hearing written statements, not to post-hearing written statements;

- We added an example of an exception for submitting additional evidence to the Appeals Council in 20 CFR 404.970(b)(3)(v) and 416.1470(b)(3)(v);

- We reorganized paragraphs (a)(5) and (b) of 20 CFR 404.970 and 416.1470;

- We removed proposed subsection 20 CFR 404.970(d) and 416.1470(d);

- We added clarifying cross-references to 20 CFR 404.900 and 416.1400 and 20 CFR 404.929 and 416.1429 to place the 5-day requirement in 20 CFR 404.935 and 416.1435 in context; and,

- We broadened the existing cross-reference in 20 CFR 404.968 and 416.1468 and 20 CFR 404.979 and 416.1479 to reference the entire section of 20 CFR 404.970 and 416.1470, and we removed the cross reference to 20 CFR 404.976 and 416.1476 in 20 CFR 404.979 and 416.1479.

Public Comments

We initially provided a 30-day comment period that would have ended on August 11, 2016. We subsequently extended the comment period for an additional 15 days, until August 26, 2016 (81 FR 51412). We received 154 comments on our proposed rule from the public, interested advocacy groups, and several members of Congress. We did not consider six comments because they either came from employees who commented in their official employment capacity, which is a violation of our policy, or they were outside the scope of this rulemaking. We published and carefully considered the remaining 148

comments and, where appropriate, made changes in response to these comments.

Below, we summarize and respond to the comments submitted on the proposed rule, and respond to the significant issues relevant to this rulemaking. We do not respond to comments that are outside the scope of this rulemaking proceeding.

Hearing Notice Requirement

Comment: Several commenters supported our proposal to provide more advance notice of a hearing, but asked that we adopt the 75-day advance notice requirement currently in place in the Boston region, rather than the 60-day advance notice we proposed in the NPRM. Several of the commenters stated that earlier notice would allow claimants to: (1) Obtain and submit the information and evidence, especially when a medical provider is uncooperative; (2) make arrangements for transportation to the hearing; (3) take into account time frames under the regulations implementing the Health Insurance Portability and Accountability Act (HIPAA) that provide an entity up to 60 days before it must produce records (45 CFR 164.524(b)); and (4) avoid a postponement of hearing due to non-receipt of medical records. Several other commenters said that even a 75-day notice requirement is insufficient, and that we should provide notice 90 to 120 days in advance of a hearing.

Response: We recognize that claimants and representatives may sometimes face challenges in acquiring medical records. In response to multiple advocate comments indicating a preference for 75 days’ advance notice of a hearing instead of 60 days, we are revising the final rule to provide 75 days’ advance notice. Since we already have approximately a decade of experience in using the 75-day advance notice period in the Boston Region, we believe its expansion nationwide is justified.

We proposed a 60-day period in our NPRM because we believed it would promote the efficiency of our hearing process (81 FR at 45081). However, we recognize the concerns that that commenters raised, including stated concerns about the adequacy of a 60-day advance notice requirement in light of the timeframe an entity has to provide evidence to an individual under the HIPAA regulations. In order to minimize the burden on claimants, we have decided to adopt the commenters’ suggestion that we continue to provide at least 75-day advance notice of a hearing, as we have done under the

rules we have been applying in the Boston region since 2006.

Some commenters requested that we extend the advance notice period to 90 or 120 days instead of the proposed 60-days advance notice. We have decided not to extend the advance notice period to 90 or 120 days, because providing a hearing date this far in advance would increase the likelihood that an adjudicator’s schedule will change by the scheduled hearing date. Moreover, in contrast to the 75-day period, we have no current model to support the use of a longer time period.

Exceptions to the 5-Day Requirement

Comment: Several commenters asked that we retain the exception in 20 CFR 404.935(b)(3)(iv) in the final rule because it recognized the difficulties of obtaining medical evidence, while another commenter suggested we eliminate this exception because it was vague and contrary to the intent and purpose of the proposed rule. Several commenters expressed concerns about our exceptions to the 5-day requirement because they were too narrowly defined, too subjective, and would increase our workloads. Other commenters suggested that we add additional exceptions, such as when the claimant is homeless or lacks representation. One commenter requested that the Appeals Council also find good cause for submitting evidence after the 5-day requirement if the claimant was unrepresented or homeless at the hearing level.

Response: We provide examples of exceptions to the 5-day requirement in final 20 CFR 404.935(b)(3) and 416.1435(b)(3) and have clarified that we did not intend for them to be all-inclusive or to exclude other extenuating circumstances that may result in a claimant being unable to meet the 5-day requirement. To clarify this point, we changed the regulatory text to state that “[e]xamples include, but are not limited to” the outlined exceptions. Because circumstances vary, we determine whether a claimant qualifies for an exception on a case-by-case basis.

We do not anticipate that evaluating requests for exceptions to the 5-day requirement will increase our workloads. We recognize that compliance with the 5-day requirement will not be possible in all situations; however, based on our experience in the Boston region, we expect that providing at least 75 days’ advance notice of a hearing will significantly increase the number of times evidence is obtained and submitted at least 5 business days before the hearing. We also note that in our experience the need to evaluate

requests to submit evidence pursuant to one of the exceptions has not caused workload spikes in our Boston region, where a 5-day requirement has been in place for more than a decade. When a claimant or appointed representative is aware that he or she will need more time to submit evidence in accordance with one of the exceptions, we expect that he or she will provide us with the necessary information in advance. To do so, the claimant or representative should notify the administrative law judge (ALJ) of what the evidence generally consists of and the expected volume of evidence (e.g., one visit to a treating physician or a one-week hospital stay). When the claimant or his or her representative timely provides this information to the ALJ, we expect that evaluating the request for an exception will likely be very simple.

The fact that a claimant is homeless or lacks representation does not automatically excuse him or her from complying with our rules. However, situations such as these may result in circumstances that warrant an exception to the 5-day requirement. We will evaluate these circumstances carefully on a case-by-case basis under the exceptions described in the final rule.

Comment: Commenters who represented advocacy groups noted that our proposed rule did not include exceptions to deadline requirements for objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.950(d)(2)). Some commenters had concerns that the 5-day requirement, as applied to objections to the issues, could force representatives to develop boilerplate notices that list all possible objections in every case.

Response: We agree with the commenters' concerns, and we have added exceptions for the deadlines related to objecting to the issues (20 CFR 404.939 and 416.1439), presenting written statements (20 CFR 404.949 and 416.1449), and submitting subpoenas (20 CFR 404.950(d)(2) and 416.1450(d)(2)). The exceptions in 20 CFR 404.939 and 416.1439 should eliminate the need for representatives to develop boilerplate notices.

Appeals Council Authority

Comment: While one commenter supported the proposal in subsections 20 CFR 404.970(d) and 416.1470(d) that the Appeals Council conduct hearings to develop evidence, other commenters expressed concern about the proposal. A few of these commenters stated it was an expansion of the Appeals Council's

authority and was inconsistent with the Administrative Procedure Act. Other commenters stated that we did not provide an adequate explanation of the authority for such hearings.

Response: Since the beginning of our hearing process in 1940, our regulations (currently found in sections 20 CFR 404.956 and 416.1456) have authorized the Appeals Council to remove a hearing request from an ALJ and conduct the hearing proceedings, using the rules that ALJs apply. We proposed to revise sections 20 CFR 404.970 and 416.1470 to clarify the Appeals Council's authority in this area. Although we disagree with some of the comments, including concerns that the proposal lacked legal support, we understand the concerns the commenters raised regarding this proposal. As a result, we have decided to remove the rule we proposed in subsections 404.970(d) and 416.1470(d). The Appeals Council will continue to exercise its authority to develop evidence in accordance with 20 CFR 404.976(b) and 416.1446(b).

"Inform" Option

Comment: Several commenters stated the proposed rule may have unintended consequences because appointed representatives may rely on the "inform" option in 20 CFR 404.935 and 416.1435 and in 20 CFR 404.1512 and 416.912 to avoid developing evidence. A few commenters stated if we retain the "inform" option, we should require the claimant to inform the hearing office earlier so there would be time to develop the evidence and avoid unnecessary supplemental hearings.

Response: On April 20, 2015, we implemented a final rule that requires a claimant to "inform us about or submit all evidence known to you that relates to whether you are blind or disabled." 81 FR 14828. As we stated in the preamble to that proposed rule, we specifically added this option because we did not intend to shift our burden to develop the record to claimants. In the proposed rule, as in this final rule, we recognize that some individuals, many of whom do not have appointed representatives, require our assistance in obtaining medical evidence needed to adjudicate their claims. Claimants who are unable to obtain evidence necessary to adjudicate their claims may inform us of this difficulty and we will continue to seek out evidence on their behalf to develop the record for their hearing. By adopting this final rule, we have not changed our longstanding policy of assisting claimants in developing the record. At the hearing level, this policy

has been explicitly set forth in our sub-regulatory instructions.

Because most claimants are represented at the hearing level, and because we are providing more advance notice of a hearing than we have in the past, we expect to significantly reduce the number of postponed hearings or supplemental hearings needed based on evidence that was available at least 5 business days before the hearing.

In our experience, the vast majority of representatives act ethically in regard to evidence development and make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). Therefore, we do not expect the "inform" option to significantly affect our administrative processes.

In those circumstances in which hearing offices assist unrepresented claimants in developing evidence, our sub-regulatory instructions will clarify that employees in our hearing offices should undertake development as early as possible to reduce the number of continuances or postponed hearings.

5-Day Requirement

Comment: Some commenters thought the 5-day requirement in the proposed rules was inconsistent with our duty to make eligibility decisions based on the evidence presented at the hearing.

Response: In developing these rules, we were guided by the two principles that we have always applied when we make decisions regarding our programs: As the Supreme Court has observed, the Social Security system "must be fair—and it must work."¹ These final rules appropriately balance these two guiding principles. These rules are fair because they provide the claimant with more advance notice of his or her hearing, and they provide appropriate exceptions to the 5-day requirement. At the same time, the 5-day requirement promotes the efficiency of our hearings process and allows it to work more effectively by ensuring that ALJs have a more complete evidentiary record when they hold hearings. Striking such a balance in our rules is of paramount importance to us. That balance would not be present if, as some commenters suggested, we merely gave claimants more advance notice of a hearing, without the 5-day requirement. Conversely, that balance would not be present if we simply imposed a 5-day requirement, without giving a claimant more advance notice of a hearing. Given the size of our

¹ *Richardson v. Perales*, 402 U.S. 389, 399 (1971).

hearings workloads,² where the need for efficiency is “self-evident,”³ these final rules appropriately balance the twin concerns of fairness and efficiency that always guide us.

In publishing this final rule, we do not intend to change the purpose of a hearing, where an ALJ looks fully into the issues and obtains oral testimony from the claimant and witnesses, if any. Additionally, our final rule contemplates that some circumstances may warrant the introduction of new evidence at or after the hearing, and includes appropriate exceptions to accommodate these circumstances. Thus, under our final rule, adjudicators will continue to make decisions based on the evidence of record, including the evidence adduced at the hearing. However, we expect that our final rule will help to ensure that evidentiary records are more complete at the time of the administrative hearing, which should reduce the need for post-hearing proceedings and help us provide better, more timely service to all claimants.

Comment: Some commenters stated that the philosophical underpinnings of the rule in 20 CFR 404.1512 is that ALJs must have all evidence that is available at the time of the hearing so they can reach the correct decision. The commenters thought that the proposed rule conflicted with our rule requiring claimants to submit all evidence. The commenters noted that it would not make sense to place a duty on the claimant to submit evidence when at the same time, rules are created that would allow an ALJ not to consider that evidence.

Response: Our approach with this rule is tied to the “philosophical underpinnings” of 20 CFR 404.1512 and 416.912, which describe a claimant’s ongoing duty to “inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled.” This rule will ensure claimants have the benefit of a fully developed record at the time our ALJs conduct their hearings. We recognize that there will be circumstances in which claimants cannot produce evidence at least 5 business days before the hearing. As stated above, we have included appropriate exceptions to the 5-day requirement to ensure fairness

when a claimant or his or her representative actively and diligently seeks evidence but is unable to obtain it. To bolster this point, in 20 CFR 404.935(b)(3)(iv) and 416.1435(b)(3)(iv), we removed the phrase “through no fault of your own” to ensure that our adjudicators interpret this exception consistent with our intent. We intend the words “actively” and “diligently” to be interpreted using their ordinary English usage. When a claimant or representative shows that he or she made a good faith effort to timely request, obtain, and submit evidence, but he or she did not receive the evidence in time to submit it at least 5 business days before the hearing because of circumstances outside his or her control, we expect that our adjudicators would find that this standard is met.

Some commenters perceived this rule as an exclusionary procedure designed to prevent the introduction of medical records at the expense of the claimant’s case. Our experience is more consistent with one of the commenters from the Boston region who noted that most ALJs “effectively draw the line between evidence which had been available but was not submitted, and previously unavailable evidence” and “do not use the 5-day rule as a punitive device against claimants or their representatives.” Further, in those situations in which an ALJ in the Boston region did not correctly find reason to accept evidence outside the 5-day time frame, the Appeals Council granted review in order to consider the information on appeal where the evidence raised a reasonable probability of changing the outcome of the case. This important practice will continue in our final rule.

Comment: Some commenters pointed out that the 5-day requirement would preclude a claimant from submitting evidence at the hearing or Appeals Council level of the administrative process, particularly if a claimant is illiterate or does not speak English, or is without an appointed representative or obtained a representative shortly before the hearing date, and this exclusion was an undue burden, fundamentally unfair, and disadvantaged claimants in favor of adjudicators.

Response: We expect that this final rule will enhance our decision-making process and allow us to provide more timely decisions to claimants. We do not intend to unduly burden claimants with this rule. By asking claimants to inform us about or submit evidence at least 5 business days before the hearing date, we expect that evidentiary records

will be more complete and comprehensive at the time of the scheduled hearing. In turn, this should facilitate the ALJ’s ability to look fully into the issues at the hearing and produce a timely, accurate decision. As stated above, we will continue our longstanding practice of assisting those individuals who, for various reasons, are unable to develop the record themselves. This rule also incorporates appropriate exceptions to take into account for the needs of individuals who, due to unique circumstances, do not fully understand or are not capable of adhering to our requirements or requests.

Comment: Some commenters said that the proposed rule makes the administrative review process more formal and adversarial. Commenters also asked the agency to clarify that if a claimant informs an ALJ about evidence at least 5 business days before the hearing, the ALJ must consider the evidence regardless of whether an exception exists. Commenters said that the proposed rule overlooked that an ALJ adjudicates a case through the date of his or her decision, and that he or she needs evidence of ongoing treatment to adjudicate the case. Commenters also said the proposed rule did not provide the claimant with an opportunity to submit evidence to rebut other evidence produced at or after the hearing or permit an ALJ to hold the record open when a new issue arises during the hearing.

Response: From our experience, similar rules that applied in the Boston region for approximately a decade have not resulted in a more adversarial process or misunderstandings from the public. Moreover, many of our other rules that apply nationwide impose deadlines or other requirements on the public, such as the deadline to appeal a determination or decision. While processing a case, we frequently request that individuals submit a response or provide us with information within certain timeframes. We have not found that these provisions make our process more adversarial. Rather, like this final rule, they are necessary for efficient administration of our programs.

If a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline.

While it is true that, in many cases, an ALJ adjudicates the case through the date of the hearing decision, our rule is not intended to prevent a claimant from submitting evidence related to ongoing treatment. Rather, we expect that

² See *Annual Statistical Supplement to the Social Security Bulletin*, 2015, Table 2.F9, at page 2.81 (April 2016) (setting out the number of hearing level receipts, dispositions, and end-of-year pending cases for fiscal years 012–2014).

³ See *Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003) (“As we have observed, ‘[t]he Social Security hearing system is ‘probably the largest adjudicative agency in the western world.’ . . . The need for efficiency is self-evident.”) (quoting *Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983)).

evidence of ongoing treatment, which was unavailable at least 5 business days before the hearing, would qualify under the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3).

Similarly, if an ALJ introduces new evidence at or after a hearing, the claimant could use the exception in 20 CFR 404.935(b)(3) and 416.1435(b)(3) to submit rebuttal evidence. The claimant could also rebut evidence introduced at or after the hearing by submitting a written statement to the ALJ. As previously mentioned, we added language to 20 CFR 404.949 and 416.1449 to clarify that the 5-day requirement applies only to pre-hearing written statements, not to post-hearing written statements.

Comment: Some commenters stated that the 5-day requirement could affect a representative's ability to prepare useful and persuasive pre-hearing statements, given that the Office of Disability Adjudication and Review (ODAR) frequently exhibits files very close to the hearing date.

Response: For the same reasons we are adopting a 5-day requirement for available evidence, we are adopting this requirement for pre-hearing written statements to ensure that an ALJ has the benefit of reviewing arguments before the hearing. This will allow the ALJ to be fully aware of any unresolved issue(s) that a claimant is raising and which the ALJ may need to address at the hearing. While we are sympathetic to the commenters who noted exhibit numbers were unlikely to be available at least 5 business days before the hearing, we note that this issue existed under our prior rules as well and therefore, this convenience does not outweigh our need for a complete case file before the hearing.

Comment: Some commenters stated that the 5-day requirement could disadvantage claimants who hire representatives shortly before the hearing date.

Response: We reiterate that we expect all appointed representatives to make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). However, we have included appropriate exceptions to the 5-day requirement to ensure fairness when a claimant or his or her representative actively and diligently seeks evidence but is unable to obtain it. The appointment of a representative shortly before a hearing may be such an exception, depending on the circumstances surrounding the late appointment. In addition, we note that if a claimant informs an ALJ about

evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline.

Representation

Comment: A few commenters argued that when taking a new case, representatives often find that prior counsel was incompetent in obtaining evidence, and this rule, as applied at both the hearing and Appeals Council levels, unjustly harms claimants represented by such individuals.

Response: We reiterate that we expect all appointed representatives to make good faith efforts to assist claimants in obtaining and submitting the required evidence before a hearing, as required under 20 CFR 404.1740(b)(2) and 416.1540(b)(2). Additionally, if a new representative can show that a prior representative did not adequately uphold his or her duty to the claimant, we expect that our adjudicators would find that this would warrant an exception to the 5-day requirement.

Other

Comment: Several commenters stated the new standard at the Appeals Council level would force claimants to choose between filing a new claim and appealing an ALJ's decision to the Appeals Council, which could result in the loss of significant benefits. Another commenter stated it would result in filing more new applications overall or the reopening of prior applications so that a claimant could submit previously excluded evidence.

Response: It bears reiterating that we expect the final rule will help to ensure that evidentiary records are more complete at the time of the scheduled hearing. However, our final rule contemplates that some circumstances may warrant the introduction of new evidence at or after the hearing, and includes an "inform" option and broad exceptions to accommodate these circumstances. With the "inform" option and the broad exceptions to the 5-day requirement, we do not expect to see a spike in new applications or reopenings.

Moreover, it is already our policy that if a claimant wants to file a new disability application under the same title and for the same benefit type as a disability claim pending at the Appeals Council level, and the claimant does not have evidence of a new critical or disabling condition, the claimant must choose to continue the appeal of the prior claim or file a new application. Nothing in the proposed or final rule substantively changes this policy.

Under our current rules in 20 CFR 404.970 and 416.1470, the Appeals Council considers additional evidence only if it is new, material, and related to the period on or before the date of the ALJ's decision. This does not mean, however, that the Appeals Council grants a claimant's request for review of an ALJ's decision whenever additional evidence meets this criteria. In many cases, the Appeals Council adds evidence that meets the criteria to the record, but denies the request for review of the case. Under our current rules, the Appeals Council will review a case in this situation only if it finds that the ALJ's action, findings, or conclusion is contrary to the weight of the evidence currently of record. This final rule provides more clarity to this procedure. Under this final rule, the Appeals Council will grant review of a case based on the receipt of additional evidence if the evidence is new, material, and related to the period on or before the date of the hearing decision and if there is a reasonable probability that the additional evidence would change the outcome of the decision.

If a claimant submits evidence that the Appeals Council does not consider, the Appeals Council will notify the claimant that if he or she files a new application for disability insurance benefits within 6 months or a new application for Supplemental Security Income within 60 days of the Appeals Council notice, the date of the request for review will constitute a protective filing for a new application.

Comment: One commenter expressed concerns about the proposed language in 20 CFR 404.951(b) and 416.1451(b) because adding the phrase "appropriate reference" was insufficient to describe what evidence an ALJ must include in the record.

Response: During the time that substantially the same rule was in place in the Boston region, we did not experience any confusion as to the meaning of the phrase "appropriate reference." Further, this language is consistent with our longstanding sub-regulatory policies and practices nationwide, and adoption of this language does not change our policies regarding what constitutes the official record.

Comment: Many commenters submitted a broad statement that there have been "serious problems" and inconsistencies with implementation of the 5-day requirement in the Boston region. The commenters generally presented two main points: (1) There was variance in applying the 5-day requirement between ALJs; and (2) ALJs who did apply the rule varied in when

the 5-day requirement ended and in evaluating whether an exception to the 5-day requirement applied.

Response: We acknowledge that in a report issued by the Administrative Conference of the United States (ACUS)⁴ on December 13, 2013, ACUS noted several variances in applying similar rules in the Boston region. However, in response to the ACUS report, we provided additional training to adjudicators and staff regarding application of our Part 405 rules. We also incorporated instructions for processing cases originating in the Boston region into our training materials for all staff, including addressing Part 405 issues in several of our quarterly Videos-On-Demand series that focus on new or problematic areas of adjudication. We updated our sub-regulatory guidance to include references and instructions on how to process cases under Part 405. We will provide the training and instruction necessary to ensure consistent application of our rules nationwide.

Comment: One commenter asked that if we retain the 5-day requirement, we amend the language to require that each party make every reasonable effort to ensure the ALJ receives all the evidence. The commenter noted that proposed 20 CFR 404.935(a) and 416.1435(a) require “every effort,” which the commenter believed is an impossible standard to meet.

Response: While our final rule requires a claimant to “make every effort to ensure that the administrative law judge receives all of the evidence,” we do not believe the rule creates an “impossible standard” because it also includes appropriate exceptions to accommodate circumstances when, despite good faith efforts, the claimant cannot satisfy the 5-day requirement.

Comment: Some commenters stated that 20 CFR 404.944(a)(1) and 416.1444(a)(1) conflict with 20 CFR 404.1512 and 416.912 because one regulation requires an ALJ to “accept[] as evidence any documents that are material to the issues” while the other regulation requires a claimant to submit evidence that “relates to whether or not you are blind or disabled.”

Response: A claimant continues to have a duty to submit all evidence that relates to whether or not he or she is blind or disabled, subject to our other

requirements, at the hearing and Appeals Council levels of the administrative process. Whereas 20 CFR 404.1512 and 416.912 explain a claimant’s responsibility, 20 CFR 404.944(a)(1) and 416.1444(a)(1) address actions an administrative law judge will take. We expect claimants to submit evidence that relates to whether they are blind or disabled, but our administrative law judges are responsible for making the legal judgment determination whether evidence is “material to the issues.”

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

Regulatory Flexibility Act

We certify that this final rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These final rules contain reporting requirements in regulation sections §§ 404.968, 404.976, 416.1468, and 416.1476 that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). SSA will submit separate information collection requests to OMB in the future for these regulations sections. We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 405

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Public assistance programs;

Reporting and recordkeeping requirements; Social Security; Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits, Public assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we amend 20 CFR chapter III, parts 404, 405, and 416 as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950—)

Subpart J—[Amended]

■ 1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 2. In § 404.900, revise the second sentence of paragraph (b) to read as follows:

§ 404.900 Introduction.

* * * * *

(b) * * * Subject to certain timeframes at the hearing level (see § 404.935) and the limitations on Appeals Council consideration of additional evidence (see § 404.970), we will consider at each step of the review process any information you present as well as all the information in our records. * * *

■ 3. Revise the fifth and eighth sentences in § 404.929 to read as follows:

§ 404.929 Hearing before an administrative law judge-general.

* * * You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. * * * If you waive your right to appear at the hearing, in person, by video teleconferencing, or by telephone, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935,

⁴ Administrative Conference of the United States, “SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Program,” Final Report: December 23, 2013. https://www.acus.gov/sites/default/files/documents/Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf.

any new evidence that may have been submitted for consideration.* * *

■ 4. Revise § 404.935 to read as follows:

§ 404.935 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 404.1512 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 404.1512, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence, unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 404.1512 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;
(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;
(ii) There was a death or serious illness in your immediate family;
(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing.

■ 5. In § 404.938, revise paragraphs (a) and (b) to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

(a) *Issuing the notice.* After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you

have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 75 days before the date of the hearing.

(b) *Notice information.* The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representative appears at your scheduled hearing without good reason under § 404.957;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video conferencing, or by telephone. If we have scheduled you to appear at the hearing by video conferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video conferencing site and explain what it means to appear at your hearing by video conferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 404.935(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

■ 6. Revise § 404.939 to read as follows:

§ 404.939 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 404.935(b). You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

■ 7. Revise § 404.944 to read as follows:

§ 404.944 Administrative law judge hearing procedures—general.

A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 404.935: Accepts as evidence any documents that are material to the

issues; may stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and may reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

■ 8. Revise § 404.949 to read as follows:

§ 404.949 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. If presenting written statements prior to hearing, you must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 404.935(b).

■ 9. In § 404.950, revise paragraphs (c) and (d) to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) *Admissible evidence.* Subject to the provisions of § 404.935, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) *Subpoenas.* (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date, unless you show that your circumstances meet the conditions described in § 404.935(b). The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important

facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

■ 10. Revise § 404.951 to read as follows:

§ 404.951 Official record.

(a) *Hearing recording.* All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) *Contents of the official record.* All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 404.929 and 404.935. All exhibits introduced as evidence must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing. It also will include any prior initial determinations or decisions on your claim.

■ 11. In § 404.968, revise the second sentence of paragraph (a) introductory text to read as follows:

§ 404.968 How to request Appeals Council review.

(a) * * * You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 404.970. * * *

* * * * *

■ 12. Revise § 404.970 to read as follows:

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

(b) The Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence as described in § 404.935 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause;

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing; or

(v) You received a hearing level decision on the record and the Appeals Council reviewed your decision.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (a)(5) of this section, or the Appeals Council does not find you had good cause for missing the deadline to submit the evidence in § 404.935, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of

your right to file a new application. The notice will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 404.630. If you file a new application within 6 months of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

■ 13. Revise § 404.976 to read as follows:

§ 404.976 Procedures before the Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

§ 404.979 [Amended]

■ 14. Revise the first sentence of § 404.979 to read as follows:

After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, subject to the limitations on Appeals Council consideration of additional evidence in § 404.970, the Appeals Council will make a decision or remand the case to an administrative law judge. * * *

PART 405—[REMOVED AND RESERVED]

■ 15. Under the authority of sections 205(a), 702(a)(5), and 1631(d)(1) of the Social Security Act, part 405 is removed and reserved.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 16. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 17. In § 416.1400, revise the second sentence of paragraph (b) to read as follows:

§ 416.1400 Introduction.

* * * * *

(b) * * * Subject to certain timeframes at the hearing level (see § 416.1435) and the limitations on Appeals Council consideration of additional evidence (see § 416.1470), we will consider at each step of the review process any information you present as well as all the information in our records. * * *

■ 18. Revise the fifth and eighth sentences of § 416.1429 to read as follows:

§ 416.1429 Hearing before an administrative law judge—general.

* * * You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. * * * If you waive your right to appear at the hearing, in person, by video teleconferencing, or by telephone, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration. * * *

■ 19. Revise § 416.1435 to read as follows:

§ 416.1435 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 416.912 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 416.912, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law

judge may decline to consider or obtain the evidence unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 416.912 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing.

(c) *Claims Not Based on an Application For Benefits.*

Notwithstanding the requirements in paragraphs (a)–(b) of this section, for claims that are not based on an application for benefits, the evidentiary requirement to inform us about or submit evidence no later than 5 business days before the date of the scheduled hearing will not apply if our other regulations allow you to submit evidence after the date of an administrative law judge decision.

■ 20. In § 416.1438, revise paragraphs (a) and (b) to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

(a) *Issuing the notice.* After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 75 days before the date of the hearing.

(b) *Notice information.* The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representative appears at your scheduled hearing without good reason under § 416.1457;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video teleconferencing, or by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

■ 21. Revise § 416.1439 to read as follows:

§ 416.1439 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b). You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

■ 22. Revise § 416.1444 to read as follows:

§ 416.1444 Administrative law judge hearing procedures—general.

A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 416.1435: Accepts as evidence any documents that are material to the issues; may stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and may reopen the hearing at any time before he or she mails a notice of the decision in order

to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

■ 23. Revise § 416.1449 to read as follows:

§ 416.1449 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. If presenting written statements prior to hearing, you must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b).

■ 24. In § 416.1450, revise paragraphs (c) and (d) to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) *Admissible evidence.* Subject to the provisions of § 416.1435, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) *Subpoenas.* (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date, unless you show that your circumstances meet the conditions described in § 416.1435(b). The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

■ 25. Revise § 416.1451 to read as follows:

§ 416.1451 Official record.

(a) *Hearing recording.* All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) *Contents of the official record.* All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 416.1429 and 416.1435. All exhibits introduced as evidence must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing. It also will include any prior initial determinations or decisions on your claim.

■ 26. In § 416.1468, revise the second sentence of paragraph (a) introductory text to read as follows:

§ 416.1468 How to request Appeals Council review.

(a) * * * You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470. * * *

■ 27. Revise § 416.1470 to read as follows:

§ 416.1470 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

(b) In reviewing decisions other than those based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any additional evidence it believes is material to an issue being considered. However, in reviewing decisions based on an application for benefits, the Appeals Council will only consider additional evidence under paragraph (a)(5) of this section if you show good cause for not informing us about or submitting the evidence as described in § 416.1435 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause;

(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than 5 business days prior to the hearing; or

(v) You received a hearing level decision on the record and the Appeals Council reviewed your decision.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (a)(5) of this section, or the Appeals Council does not find you had

good cause for missing the deadline to submit the evidence in § 416.1435, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 60 days after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 416.340. If you file a new application within 60 days of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

■ 28. Revise § 416.1476 to read as follows:

§ 416.1476 Procedures before the Appeals Council on review.

(a) *Limitation of issues.* The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) *Oral argument.* You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

§ 416.1479 [Amended]

■ 29. Revise the first sentence of § 416.1479 to read as follows:

After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, subject to the limitations on Appeals Council consideration of additional evidence in § 416.1470, the Appeals Council will make a decision or remand the case to an administrative law judge. * * *

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 91

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RIN 2506-AC41

Modernizing HUD's Consolidated Planning Process To Narrow the Digital Divide and Increase Resilience to Natural Hazards

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Final rule.

SUMMARY: HUD's Consolidated Plan is a planning mechanism designed to help States and local governments to assess their affordable housing and community development needs and to make data-driven, place-based investment decisions. The Consolidated Planning process serves as the framework for a community-wide dialogue to identify housing and community development priorities that align and focus funding from HUD's formula block grant programs. This rule amends HUD's Consolidated Plan regulations to require that jurisdictions consider two additional concepts in their planning efforts.

The first concept is how to address the need for broadband access for low- and moderate-income residents in the communities they serve. Broadband is the common term used to refer to a high-speed, always-on connection to the Internet. Such connection is also referred to as high-speed broadband or high-speed Internet. Specifically, the rule requires that States and localities that submit a Consolidated Plan describe the broadband access in housing occupied by low- and moderate-income households. If low-income residents in the communities do not have such access, States and jurisdictions must consider providing broadband access to these residents in their decisions on how to invest HUD funds. The second concept added to the Consolidated Plan process requires jurisdictions to consider incorporating resilience to natural hazard risks, taking care to anticipate how risks will increase due to climate change, into development of the plan in order to begin addressing impacts of climate change on low- and moderate-income residents.

DATES: *Effective Date:* January 17, 2017.

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Development, Office of Community Planning and Development, 451 7th Street SW., Suite 7204, Washington, DC 20410 at 202-402-4492 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of This Rule

The purpose of this rule is to require States and local governments to evaluate the availability of broadband access and the vulnerability of housing occupied by low- and moderate income households to natural hazard risks, many of which may be increasing due to climate change, in their Consolidated Planning efforts. These evaluations are to be conducted using readily available data sources developed by Federal government agencies, other available data and analyses (including State, Tribal, and local hazard mitigation plans that have been approved by the Federal Emergency Management Agency (FEMA)), and data that State and local government grantees may have available to them. Where access to broadband Internet service is not currently available or is minimally available (such as in certain rural areas), States and local governments must consider ways to bring broadband Internet access to low- and moderate-income residents, including how HUD funds could be used to narrow the digital divide for these residents. Further, where low- and moderate-income communities are at risk of natural hazards, including those that are expected to increase due to climate change, States and local governments must consider ways to incorporate appropriate hazard mitigation and resilience into their community planning and development goals, codes, and standards, including the use of HUD funds to accomplish these objectives. These two planning considerations reflect emerging needs of communities in this changing world. Broadband provides access to a wide range of resources, services, and products, which assist not only individuals and, but also communities, in their efforts to improve their economic outlooks. Analysis of natural hazards, including the anticipated effects of climate change on those hazards, is important to help ensure that jurisdictions are aware of existing and developing vulnerabilities in the geographic areas that they serve that can threaten the health and safety of the populations they serve.