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Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 439.655 Individual.

Individual means a natural person.

§ 439.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 439.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 439.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Governmentwide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PARTS 440–497 [RESERVED]

PART 498—CIVIL MONETARY PENALTIES, ASSESSMENTS AND RECOMMENDED EXCLUSIONS

Sec.

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498.222 Final decision of the Commissioner.
498.223 Stay of initial decision.
498.224 Harmless error.

AUTHORITY: Secs. 702(a)(5), 1129, and 1140 of the Social Security Act (42 U.S.C. 902(a)(5), 1320a–8, and 1320b–10).

SOURCE: 60 FR 58226, Nov. 27, 1995, unless otherwise noted.

§ 498.100 Basis and purpose.

(a) *Basis.* This part implements sections 1129 and 1140 of the Social Security Act (42 U.S.C. 1320a–8 and 1320b–10).

(b) *Purpose.* This part provides for the imposition of civil monetary penalties and assessments, as applicable, against persons who—

(1) Make or cause to be made false statements or representations or omissions or otherwise withhold disclosure of a material fact for use in determining any right to or amount of benefits under title II or benefits or payments under title VIII or title XVI of the Social Security Act;

(2) Convert any payment, or any part of a payment, received under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, while acting in the capacity of a representative payee for that individual, to a use that such person knew or should have known was other than for the use and benefit of such other individual; or

(3) Misuse certain Social Security program words, letters, symbols, and emblems; or

(4) With limited exceptions, charge a fee for a product or service that is available from SSA free of charge without including a written notice stating the product or service is available from SSA free of charge.

[60 FR 58226, Nov. 27, 1995, as amended at 61 FR 18079, Apr. 24, 1996; 71 FR 28579, May 17, 2006]

§498.101 Definitions.

As used in this part:

Agency means the Social Security Administration.

Assessment means the amount described in §498.104, and includes the plural of that term.

Commissioner means the Commissioner of Social Security or his or her designees.

Department means the U.S. Department of Health and Human Services.

General Counsel means the General Counsel of the Social Security Administration or his or her designees.

Inspector General means the Inspector General of the Social Security Administration or his or her designees.

Material fact means a fact which the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under title II or eligible for benefits or payments under title VIII or title XVI of the Social Security Act.

Otherwise withhold disclosure means the failure to come forward to notify the SSA of a material fact when such person knew or should have known that the withheld fact was material and that such withholding was misleading for purposes of determining eligibility or Social Security benefit amount for that person or another person.

Penalty means the amount described in §498.103 and includes the plural of that term.

Person means an individual, organization, agency, or other entity.

Respondent means the person upon whom the Commissioner or the Inspector General has imposed, or intends to impose, a penalty and assessment, as applicable.

Secretary means the Secretary of the U.S. Department of Health and Human Services or his or her designees.

SSA means the Social Security Administration.

SSI means Supplemental Security Income.

[60 FR 58226, Nov. 27, 1995, as amended at 61 FR 18079, Apr. 24, 1996; 71 FR 28580, May 17, 2006]

§498.102 Basis for civil monetary penalties and assessments.

(a) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any person who it determines in accordance with this part—

(1) Has made, or caused to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or amount of:

(i) Monthly insurance benefits under title II of the Social Security Act; or

(ii) Benefits or payments under title VIII or title XVI of the Social Security Act; and

(2)(i) Knew, or should have known, that the statement or representation was false or misleading, or

(ii) Made such statement with knowing disregard for the truth; or

(3) Omitted from a statement or representation, or otherwise withheld disclosure of, a material fact for use in determining any initial or continuing right to or amount of benefits or payments, which the person knew or should have known was material for such use and that such omission or withholding was false or misleading.

(b) The Office of the Inspector General may impose a penalty and assessment, as applicable, against any representative payee who receives a payment under title II, title VIII, or title XVI for the use and benefit of another individual and who converts such payment, or any part thereof, to a use that such representative payee knew or should have known was other than for the use and benefit of such other individual.

(c) The Office of the Inspector General may impose a penalty against any person who it determines in accordance with this part has made use of certain Social Security program words, letters, symbols, or emblems in such a manner that the person knew or should have known would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that a solicitation, advertisement or other communication was authorized, approved, or endorsed by the Social Security Administration, or that such person had some connection with, or authorization from, the Social Security Administration.

(1) Civil monetary penalties may be imposed for misuse, as set forth in paragraph (c) of this section, of—

(i) The words ''Social Security,'' ''Social Security Account,'' ''Social Security Administration,'' ''Social Security System,'' ''Supplemental Security Income Program,'' ''Death Benefits Update,'' ''Federal Benefit Information,'' ''Funeral Expenses,'' ''Final Supplemental Program,'' or any combination or variation of such words; or

(ii) The letters ''SSA,'' or ''SSI,'' or any other combination or variation of such letters; or

(iii) A symbol or emblem of the Social Security Administration (including the design of, or a reasonable facsimile of the design of, the Social Security card, the check used for payment of benefits under title II, or envelopes or other stationery used by the Social Security Administration) or any other combination or variation of such symbols or emblems.

(2) Civil monetary penalties will not be imposed against any agency or instrumentality of a State, or political subdivision of a State, that makes use of any words, letters, symbols or emblems of the Social Security Administration or instrumentality of the State or political subdivision.

(d) The Office of the Inspector General may impose a penalty against any person who offers, for a fee, to assist an individual in obtaining a product or service that the person knew or should have known the Social Security Administration provides free of charge, unless:

(1) The person provides sufficient notice before the product or service is provided to the individual that the product or service is available free of charge and:

(i) In a printed solicitation, advertisement or other communication, such notice is clearly and prominently placed and written in a font that is distinguishable from the rest of the text;

(ii) In a broadcast or telecast such notice is clearly communicated so as not to be construed as misleading or deceptive.

(2) Civil monetary penalties will not be imposed under paragraph (d) of this section with respect to offers—

(i) To serve as a claimant representative in connection with a claim arising under title II, title VIII, or title XVI; or

(ii) To prepare, or assist in the preparation of, an individual's plan for achieving self-support under title XVI.

(e) The use of a disclaimer of affiliation with the United States Government, the Social Security Administration or its programs, or any other agency or instrumentality of the United States Government will not be considered as a defense in determining a violation of section 1140 of the Social Security Act.

[71 FR 28580, May 17, 2006]

§ 498.103 Amount of penalty.

(a) Under § 498.102(a), the Office of the Inspector General may impose a penalty of not more than $5,000 for each false statement or representation, omission, or receipt of payment or benefit while withholding disclosure of a material fact.

(b) Under § 498.102(b), the Office of the Inspector General may impose a penalty of not more than $5,000 against a representative payee for each time the

representative payee receives a payment under title II, title VIII, or title XVI of the Social Security Act for the use and benefit of another individual, and who converts such payment, or any part thereof, to a use that such representative payee knew or should have known was other than for the use and benefit of such other individual.

(c) Under §498.102(c), the Office of the Inspector General may impose a penalty of not more than $5,000 for each violation resulting from the misuse of Social Security Administration program words, letters, symbols, or emblems relating to printed media and a penalty of not more than $25,000 for each violation in the case that such misuse related to a broadcast or telecast.

(d) Under §498.102(d), the Office of the Inspector General may impose a penalty of not more than $5,000 for each violation resulting from insufficient notice relating to printed media regarding products or services provided free of charge by the Social Security Administration and a penalty of not more than $25,000 for each violation in the case that such insufficient notice relates to a broadcast or telecast.

(e) For purposes of paragraphs (c) and (d) of this section, a violation is defined as—

(1) In the case of a mailed solicitation, advertisement, or other communication, each separate piece of mail which contains one or more program words, letters, symbols, or emblems or insufficient notice related to a determination under §498.102(c) or (d); and

(2) In the case of a broadcast or telecast, each airing of a single commercial or solicitation related to a determination under §498.102(c) or (d).

[71 FR 28580, May 17, 2006]

§498.104 Amount of assessment.

A person subject to a penalty determined under §498.102(a) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments paid under title II, title VIII or title XVI of the Social Security Act as a result of the statement, representation, omission, or withheld disclosure of a material fact which was the basis for the penalty. A representative payee subject to a penalty determined under §498.102(b) may be subject, in addition, to an assessment of not more than twice the amount of benefits or payments received by the representative payee for the use and benefit of another individual and converted to a use other than for the use and benefit of such other individual. An assessment is in lieu of damages sustained by the United States because of such statement, representation, omission, withheld disclosure of a material fact, or conversion, as referred to in §498.102(a) and (b).

[71 FR 28581, May 17, 2006]

§498.105 [Reserved]

§498.106 Determinations regarding the amount or scope of penalties and assessments.

(a) In determining the amount or scope of any penalty and assessment, as applicable, in accordance with §498.103(a) and (b) and 498.104, the Office of the Inspector General will take into account:

(1) The nature of the statements, representations, or actions referred to in §498.102(a) and (b) and the circumstances under which they occurred;

(2) The degree of culpability of the person committing the offense;

(3) The history of prior offenses of the person committing the offense;

(4) The financial condition of the person committing the offense; and

(5) Such other matters as justice may require.

(b) In determining the amount of any penalty in accordance with §498.103(c) and (d), the Office of the Inspector General will take into account—

(1) The nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which they were presented;

(2) The frequency and scope of the violation, and whether a specific segment of the population was targeted;

(3) The prior history of the individual, organization, or entity in their willingness or refusal to comply with informal requests to correct violations;

(4) The history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems;

(5) The financial condition of the individual or entity; and

(6) Such other matters as justice may require.

(c) In cases brought under section 1140 of the Social Security Act, the use of a disclaimer of affiliation with the United States Government, the Social Security Administration or its programs will not be considered as a mitigating factor in determining the amount of a penalty in accordance with § 498.106.

[60 FR 58226, Nov. 27, 1995, as amended at 61 FR 18080, Apr. 24, 1996; 71 FR 28581, May 17, 2006]

§ 498.107 [Reserved]

§ 498.108 Penalty and assessment not exclusive.

Penalties and assessments, as applicable, imposed under this part are in addition to any other penalties prescribed by law.

[61 FR 18080, Apr. 24, 1996]

§ 498.109 Notice of proposed determination.

(a) If the Office of the Inspector General seeks to impose a penalty and assessment, as applicable, it will serve written notice of the intent to take such action. The notice will include:

(1) Reference to the statutory basis for the proposed penalty and assessment, as applicable;

(2) A description of the false statements, representations, other actions (as described in § 498.102(a) and (b)), and incidents, as applicable, with respect to which the penalty and assessment, as applicable, are proposed;

(3) The amount of the proposed penalty and assessment, as applicable;

(4) Any circumstances described in § 498.106 that were considered when determining the amount of the proposed penalty and assessment, as applicable; and

(5) Instructions for responding to the notice, including

(i) A specific statement of respondent's right to a hearing; and

(ii) A statement that failure to request a hearing within 60 days permits the imposition of the proposed penalty and assessment, as applicable, without right of appeal.

(b) Any person upon whom the Office of the Inspector General has proposed the imposition of a penalty and assessment, as applicable, may request a hearing on such proposed penalty and assessment.

(c) If the respondent fails to exercise the respondent's right to a hearing within the time permitted under this section, and does not demonstrate good cause for such failure before an administrative law judge, any penalty and assessment, as applicable, becomes final.

[61 FR 18080, Apr. 24, 1996, as amended at 71 FR 28581, May 17, 2006]

§ 498.110 Failure to request a hearing.

If the respondent does not request a hearing within the time prescribed by § 498.109(a), the Office of the Inspector General may seek the proposed penalty and assessment, as applicable, or any less severe penalty and assessment. The Office of the Inspector General shall notify the respondent by certified mail, return receipt requested, of any penalty and assessment, as applicable, that has been imposed and of the means by which the respondent may satisfy the amount owed.

[61 FR 18080, Apr. 24, 1996]

§ 498.114 Collateral estoppel.

In a proceeding under section 1129 of the Social Security Act that—

(a) Is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*) of a Federal or State crime; and

(b) Involves the same transactions as in the criminal action, the person is estopped from denying the essential elements of the criminal offense.

[61 FR 18080, Apr. 24, 1996, as amended at 71 FR 28581, May 17, 2006]

§§ 498.115–498.125 [Reserved]

§ 498.126 Settlement.

The Inspector General has exclusive authority to settle any issues or case, without the consent of the administrative law judge or the Commissioner, at any time prior to a final determination. Thereafter, the Commissioner or his or her designee has such exclusive authority.

§498.127 Judicial review.

Sections 1129 and 1140 of the Social Security Act authorize judicial review of any penalty and assessment, as applicable, that has become final. Judicial review may be sought by a respondent only in regard to a penalty and assessment, as applicable, with respect to which the respondent requested a hearing, unless the failure or neglect to urge such objection is excused by the court because of extraordinary circumstances.

[61 FR 18080, Apr. 24, 1996]

§498.128 Collection of penalty and assessment.

(a) Once a determination has become final, collection of any penalty and assessment, as applicable, will be the responsibility of the Commissioner or his or her designee.

(b) In cases brought under section 1129 of the Social Security Act, a penalty and assessment, as applicable, imposed under this part may be compromised by the Commissioner or his or her designee and may be recovered in a civil action brought in the United States District Court for the district where the violation occurred or where the respondent resides.

(c) In cases brought under section 1140 of the Social Security Act, a penalty imposed under this part may be compromised by the Commissioner or his or her designee and may be recovered in a civil action brought in the United States district court for the district where, as determined by the Commissioner, the:

(1) Violations referred to in §498.102(c) or (d) occurred; or

(2) Respondent resides; or

(3) Respondent has its principal office; or

(4) Respondent may be found.

(d) As specifically provided under the Social Security Act, in cases brought under section 1129 of the Social Security Act, the amount of a penalty and assessment, as applicable, when finally determined, or the amount agreed upon in compromise, may also be deducted from:

(1) Monthly title II, title VIII, or title XVI payments, notwithstanding section 207 of the Social Security Act as made applicable to title XVI by section 1631(d)(1) of the Social Security Act;

(2) A tax refund to which a person is entitled to after notice to the Secretary of the Treasury under 31 U.S.C. §3720A;

(3) By authorities provided under the Debt Collection Act of 1982, as amended, 31 U.S.C. 3711, to the extent applicable to debts arising under the Social Security Act; or

(4) Any combination of the foregoing.

(e) Matters that were raised or that could have been raised in a hearing before an administrative law judge or in an appeal to the United States Court of Appeals under sections 1129 or 1140 of the Social Security Act may not be raised as a defense in a civil action by the United States to collect a penalty and assessment, as applicable, under this part.

[60 FR 58226, Nov. 27, 1995, as amended at 61 FR 18080, Apr. 24, 1996; 71 FR 28581, May 17, 2006]

§498.129 Notice to other agencies.

As provided in section 1129 of the Social Security Act, when a determination to impose a penalty and assessment, as applicable, with respect to a physician or medical provider becomes final, the Office of the Inspector General will notify the Secretary of the final determination and the reasons therefore.

[61 FR 18081, Apr. 24, 1996]

§498.132 Limitations.

The Office of the Inspector General may initiate a proceeding in accordance with §498.109(a) to determine whether to impose a penalty and assessment, as applicable—

(a) In cases brought under section 1129 of the Social Security Act, after receiving authorization from the Attorney General pursuant to procedures agreed upon by the Inspector General and the Attorney General; and

(b) Within 6 years from the date on which the violation was committed.

[61 FR 18081, Apr. 24, 1996]

§498.201 Definitions.

As used in this part—

ALJ refers to an Administrative Law Judge of the Departmental Appeals Board.

Civil monetary penalty cases refer to all proceedings arising under any of the statutory bases for which the Inspector General, Social Security Administration has been delegated authority to impose civil monetary penalties.

DAB refers to the Departmental Appeals Board of the U.S. Department of Health and Human Services.

[61 FR 65468, Dec. 13, 1996]

§ 498.202 Hearing before an administrative law judge.

(a) A party sanctioned under any criteria specified in §§ 498.100 through 498.132 may request a hearing before an ALJ.

(b) In civil monetary penalty cases, the parties to a hearing will consist of the respondent and the Inspector General.

(c) The request for a hearing must be:

(1) In writing and signed by the respondent or by the respondent's attorney; and

(2) Filed within 60 days after the notice, provided in accordance with § 498.109, is received by the respondent or upon a showing of good cause, the time permitted by an ALJ.

(d) The request for a hearing shall contain a statement as to the:

(1) Specific issues or findings of fact and conclusions of law in the notice letter with which the respondent disagrees; and

(2) Basis for the respondent's contention that the specific issues or findings and conclusions were incorrect.

(e) For purposes of this section, the date of receipt of the notice letter will be presumed to be five days after the date of such notice, unless there is a reasonable showing to the contrary.

(f) The ALJ shall dismiss a hearing request where:

(1) The respondent's hearing request is not filed in a timely manner and the respondent fails to demonstrate good cause for such failure;

(2) The respondent withdraws or abandons respondent's request for a hearing; or

(3) The respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under this part.

[61 FR 65468, Dec. 13, 1996]

§ 498.203 Rights of parties.

(a) Except as otherwise limited by this part, all parties may:

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this part;

(4) Agree to stipulations of fact or law which will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of section 206 of title II of the Social Security Act, which authorizes the Commissioner to specify or limit these fees.

[61 FR 65469, Dec. 13, 1996]

§ 498.204 Authority of the administrative law judge.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this part;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, exclude, or limit evidence;

(11) Take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact; and

(13) Conduct any conference or argument in person, or by telephone upon agreement of the parties.

(c) The ALJ does not have the authority to:

(1) Find invalid or refuse to follow Federal statutes or regulations, or delegations of authority from the Commissioner;

(2) Enter an order in the nature of a directed verdict;

(3) Compel settlement negotiations;

(4) Enjoin any act of the Commissioner or the Inspector General; or

(5) Review the exercise of discretion by the Office of the Inspector General to seek to impose a civil monetary penalty or assessment under §§ 498.100 through 498.132.

[61 FR 65469, Dec. 13, 1996]

§ 498.205 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

[61 FR 65469, Dec. 13, 1996]

§ 498.206 Prehearing conferences.

(a) The ALJ will schedule at least one prehearing conference, and may schedule additional prehearing conferences as appropriate, upon reasonable notice to the parties.

(b) The ALJ may use prehearing conferences to address the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents and deadlines for challenges, if any, to the authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at a hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) The time and place for the hearing and dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this part;

(9) Such other matters as may tend to encourage the fair, just, and expeditious disposition of the proceedings; and

(10) Potential settlement of the case.

(c) The ALJ shall issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

[61 FR 65469, Dec. 13, 1996]

§ 498.207 Discovery.

(a) For the purpose of inspection and copying, a party may make a request to another party for production of documents which are relevant and material to the issues before the ALJ.

(b) Any form of discovery other than that permitted under paragraph (a) of this section, such as requests for admissions, written interrogatories and depositions, is not authorized.

(c) For the purpose of this section, the term documents includes information, reports, answers, records, accounts, papers, memos, notes and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system will be produced in a form accessible to the requesting party.

(d)(1) A party who has been served with a request for production of documents may file a motion for a protective order. The motion for protective order shall describe the document or class of documents to be protected, specify which of the grounds in § 498.207(d)(2) are being asserted, and explain how those grounds apply.

(2) The ALJ may grant a motion for a protective order if he or she finds that the discovery sought:

(i) Is unduly costly or burdensome;

(ii) Will unduly delay the proceeding; or

(iii) Seeks privileged information.

(3) The burden of showing that discovery should be allowed is on the party seeking discovery.

[61 FR 65469, Dec. 13, 1996]

§ 498.208 Exchange of witness lists, witness statements and exhibits.

(a) At least 15 days before the hearing, the parties shall exchange:

(1) Witness lists;

(2) Copies of prior written statements of proposed witnesses; and

(3) Copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 498.216.

(b)(1) Failure to comply with the requirements of paragraph (a) of this section may result in the exclusion of evidence or testimony upon the objection of the opposing party.

(2) When an objection is entered, the ALJ shall determine whether good cause justified the failure to timely exchange the information listed under paragraph (a) of this section. If good cause is not found, the ALJ shall exclude from the party's case-in-chief:

(i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that good cause exists, the ALJ shall determine whether the admission of such evidence would cause substantial prejudice to the objecting party due to the failure to comply with paragraph (a) of this section. If the ALJ finds no substantial prejudice, the evidence may be admitted. If the ALJ finds substantial prejudice, the ALJ may exclude the evidence, or at his or her discretion, may postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence.

(c) Unless a party objects by the deadline set by the ALJ's prehearing order pursuant to § 498.206 (b)(3) and (c), documents exchanged in accordance with paragraph (a) of this section will be deemed authentic for the purpose of admissibility at the hearing.

[61 FR 65470, Dec. 13, 1996]

§ 498.209 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual, whose appearance and testimony are relevant and material to the presentation of a party's case at a hearing, may make a motion requesting the ALJ to issue a subpoena.

(b) A subpoena requiring the attendance of an individual may also require the individual (whether or not the individual is a party) to produce evidence at the hearing in accordance with § 498.207.

(c) A party seeking a subpoena will file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. Such request will:

(1) Specify any evidence to be produced;

(2) Designate the witness(es); and

(3) Describe the address and location with sufficient particularity to permit such witness(es) to be found.

(d) Within 20 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(e) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena will serve the subpoena by delivery to the individual named, or by certified mail addressed to such individual at his or her last dwelling place or principal place of business.

(f) The subpoena will specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(g) The individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(h) When a subpoena is served by a respondent on a particular individual or particular office of the Office of the Inspector General, the OIG may comply by designating any of its representatives to appear and testify.

(i) In the case of contumacy by, or refusal to obey a subpoena duly served upon any person, the exclusive remedy is specified in section 205(e) of the Social Security Act (42 U.S.C. 405(e)).

[61 FR 65470, Dec. 13, 1996]

§498.210 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the Inspector General, a check for witness fees and mileage need not accompany the subpoena.

[61 FR 65470, Dec. 13, 1996]

§498.211 Form, filing and service of papers.

(a) *Form.* (1) Unless the ALJ directs the parties to do otherwise, documents filed with the ALJ will include an original and two copies.

(2) Every document filed in the proceeding will contain a caption setting forth the title of the action, the case number, and a designation of the pleading or paper.

(3) Every document will be signed by, and will contain the address and telephone number of the party or the person on whose behalf the document was filed, or his or her representative.

(4) Documents are considered filed when they are mailed.

(b) *Service.* A party filing a document with the ALJ will, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document will be made by delivering a copy, or placing a copy of the document in the United States mail, postage prepaid and addressed, or with a private delivery service, to the party's last known address. When a party is represented by an attorney, service will be made upon such attorney. Proof of service should accompany any document filed with the ALJ.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, will be proof of service.

[61 FR 65470, Dec. 13, 1996]

§498.212 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response. This paragraph does not apply to requests for hearing under §498.202.

[61 FR 65470, Dec. 13, 1996]

§498.213 Motions.

(a) An application to the ALJ for an order or ruling will be by motion. Motions will:

(1) State the relief sought, the authority relied upon and the facts alleged; and

(2) Be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at a hearing, all motions will be in writing.

(c) Within 10 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant or deny a written motion before the time for filing responses has expired, except upon consent of the parties or following a hearing on the motion.

(e) The ALJ will make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

(f) There is no right to appeal to the DAB any interlocutory ruling by the ALJ.

[61 FR 65470, Dec. 13, 1996]

§ 498.214 Sanctions.

(a) The ALJ may sanction a person, including any party or attorney, for:

(1) Failing to comply with an order or procedure;

(2) Failing to defend an action; or

(3) Misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

(b) Such sanctions will reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—

(1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;

(2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(3) Striking pleadings, in whole or in part;

(4) Staying the proceedings;

(5) Dismissal of the action; or

(6) Entering a decision by default.

(c) In addition to the sanctions listed in paragraph (b) of this section, the ALJ may:

(1) Order the party or attorney to pay attorney's fees and other costs caused by the failure or misconduct; or

(2) Refuse to consider any motion or other action that is not filed in a timely manner.

[61 FR 65471, Dec. 13, 1996]

§ 498.215 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the respondent should be found liable under this part.

(b) In civil monetary penalty cases under §§ 498.100 through 498.132:

(1) The respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The Inspector General has the burden of going forward and the burden of persuasion with respect to all other issues.

(c) The burden of persuasion will be judged by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause.

(e)(1) A hearing under this part is not limited to specific items and information set forth in the notice letter to the respondent. Subject to the 15-day requirement under § 498.208, additional items or information may be introduced by either party during its case-in-chief, unless such information or items are inadmissible under § 498.217.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal as to those issues presented in the case-in-chief, even if not previously exchanged in accordance with § 498.208.

[61 FR 65471, Dec. 13, 1996]

§ 498.216 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in § 498.208.

(c) The ALJ will exercise reasonable control over the mode and order of witness direct and cross examination and evidence presentation so as to:

(1) Make the examination and presentation effective for the ascertainment of the truth;

(2) Avoid repetition or needless waste of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses. This does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual engaged in assisting the attorney for the Inspector General.

[61 FR 65471, Dec. 13, 1996]

§498.217 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence, but may be guided by them in ruling on the admissibility of evidence.

(c) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(d) Although relevant, evidence must be excluded if it is privileged under Federal law, unless the privilege is waived by a party.

(e) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(f)(1) Evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.

(2) Such evidence is admissible regardless of whether the crimes, wrongs or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and regardless of whether they were referenced in the IG's notice sent in accordance with §498.109.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence as to those issues raised in the parties' case-in-chief.

(h) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause.

[61 FR 65471, Dec. 13, 1996]

§498.218 The record.

(a) The hearing shall be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause.

[61 FR 65471, Dec. 13, 1996]

§498.219 Post-hearing briefs.

(a) Any party may file a post-hearing brief.

(b) The ALJ may require the parties to file post-hearing briefs and may permit the parties to file reply briefs.

(c) The ALJ will fix the time for filing briefs, which is not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record.

(d) The parties' briefs may be accompanied by proposed findings of fact and conclusions of law.

[61 FR 65471, Dec. 13, 1996]

§498.220 Initial decision.

(a) The ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law.

(b) The ALJ may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General.

(c) The ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs or reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a

notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ cannot issue an initial decision within the 60 days, the ALJ will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless an appeal or request for extension pursuant to § 498.221(a) is filed with the DAB, the initial decision of the ALJ becomes final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

[61 FR 65472, Dec. 13, 1996]

§ 498.221 Appeal to DAB.

(a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.

(b) If a party files a timely notice of appeal with the DAB, the ALJ will forward the record of the proceeding to the DAB.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(f) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.

(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

(h) The DAB may remand a case to an ALJ for further proceedings, or may issue a recommended decision to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ.

(i) When the DAB reviews a case, it will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.

(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

[61 FR 65472, Dec. 13, 1996]

§ 498.222 Final decision of the Commissioner.

(a) Except with respect to any penalty or assessment remanded to the ALJ, the DAB's recommended decision, including a recommended decision to decline review of the initial decision, shall become the final decision of the Commissioner 60 days after the date on which the DAB serves the parties to the appeal and the Commissioner with a copy of the recommended decision, unless the Commissioner reverses or modifies the DAB's recommended decision within that 60-day period. If the Commissioner reverses or modifies the DAB's recommended decision, the Commissioner's decision is final and binding on the parties. In either event, a copy of the final decision will be served on the parties. If service is by mail, the date of service will be deemed

to be five days from the date of mailing.

(b) There shall be no right to personally appear before or submit additional evidence, pleadings or briefs to the Commissioner.

(c)(1) Any petition for judicial review must be filed within 60 days after the parties are served with a copy of the final decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging a final action of the Commissioner will be sent by certified mail, return receipt requested, to the SSA General Counsel. The petition copy will be time-stamped by the clerk of the court when the original is filed with the court.

(3) If the SSA General Counsel receives two or more petitions within 10 days after the final decision is issued, the General Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period.

[61 FR 65472, Dec. 13, 1996]

§498.223 Stay of initial decision.

(a) The filing of a respondent's request for review by the DAB will automatically stay the effective date of the ALJ's decision.

(b)(1) After issuance of the final decision, pending judicial review, the respondent may file a request for stay of the effective date of any penalty or assessment with the ALJ. The request must be accompanied by a copy of the notice of appeal filed with the Federal court. The filing of such a request will automatically act to stay the effective date of the penalty or assessment until such time as the ALJ rules upon the request.

(2) The ALJ may not grant a respondent's request for stay of any penalty or assessment unless the respondent posts a bond or provides other adequate security.

(3) The ALJ will rule upon a respondent's request for stay within 10 days of receipt.

[61 FR 65472, Dec. 13, 1996]

§498.224 Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the ALJ or the DAB to be inconsistent with substantial justice. The ALJ and the DAB at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

[61 FR 65472, Dec. 13, 1996]

PART 499 [RESERVED]