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# Social Security Fraud

## In This Issue

November  
2004  
Volume 52  
Number 6

United States  
Department of Justice  
Executive Office for  
United States Attorneys  
Office of Legal Education  
Washington, DC  
20535

Mary Beth Buchanan  
Director

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EOUSA for any policy, program,  
or service.

The United States Attorneys'  
Bulletin is published pursuant to  
28 CFR § 0.22(b).

The United States Attorneys'  
Bulletin is published bi-monthly  
by the Executive Office for United  
States Attorneys, Office of Legal  
Education, 1620 Pendleton Street,  
Columbia, South Carolina 29201.

Periodical postage paid at  
Washington, D.C. Postmaster:  
Send address changes to Editor,  
United States Attorneys' Bulletin,  
Office of Legal Education, 1620  
Pendleton Street, Columbia, South  
Carolina 29201.

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[www.usdoj.gov/usao/  
reading\\_room/foimanuals.  
html](http://www.usdoj.gov/usao/reading_room/foimanuals.html)

Send article submissions to  
Managing Editor, United States  
Attorneys' Bulletin,  
National Advocacy Center,  
Office of Legal Education,  
1620 Pendleton Street,  
Columbia, SC 29201.

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# Introduction

The Social Security Administration (SSA) gained its independence from the Department of Health and Human Services (DHHS) in 1995 and is headed by an Inspector General (IG), who serves at the pleasure of the President. The mission of SSA, Office of the Inspector General (OIG), is to improve SSA programs and operations and protect them from fraud, waste, and abuse by conducting independent and objective audits, evaluations, and investigations. In carrying out its mandate, SSA/OIG provides timely, useful, and reliable information and advice to SSA officials, Congress, and the public.

The articles in this issue of the United States Attorneys' Bulletin were contributed by the staff of the SSA/OIG's Office of the Chief Counsel (OCCIG). OCCIG's primary duty is to provide independent legal advice and counsel to the IG on various matters, including statutes, regulations, legislation, and policy directives. OCCIG also advises the IG on investigative procedures and techniques, as well as legal implications and conclusions to be drawn from audit and investigative material. The Chief Counsel heads OCCIG. The office also includes a Deputy Chief Counsel, a supervisory attorney, several staff attorneys, law clerks/paralegals, and an administrative assistant. The majority of the staff is located at SSA headquarters in Baltimore, Maryland; however, there are several attorneys in various field offices.

In addition to its advisory duties, OCCIG also plays an advocacy role in furtherance of the OIG's mission. OCCIG administers a civil monetary penalty program, which seeks administrative remedies against individuals, as well as corporations, who violate sections 1129 and/or 1140 of the Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935). Moreover, attorneys within OCCIG serve as Special Assistant United States Attorneys in several districts. OCCIG attorneys litigate matters in administrative forums, including the Merit Systems Protection Board and the DHHS's Departmental Appeals Board.

Additionally, OCCIG operates an attorney-on-call program. Individuals from other agencies or organizations may call or e-mail the duty attorney to obtain guidance, assistance, and other information within SSA/OIG's purview. The attorney-on-call frequently assists Assistant United States Attorneys with matters involving fraud, waste, or abuse pertaining to SSA and its programs. This assistance includes, but is not limited to, the development of language necessary for the prosecution of violations of Title 42 of the United States Code, the development of cases involving identity theft or Social Security number misuse under 18 U.S.C. §§ 1028 and 1029, and research into issues particular to SSA fraud. The OCCIG attorney-on-call may be reached by calling (410) 965-6211, Monday through Friday from 8:30 a.m. to 5:00 p.m. EST.

For more information on SSA/OIG, please visit the website at <http://www.ssa.gov/oig/index.htm>.

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# Prosecuting Title II Cases: Protecting the Social Security Trust Funds from Fraud

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## I. Introduction

The Social Security Act of 1935 (the Act), enacted during the Great Depression, is generally viewed as one of the most important legislative accomplishments in United States history. (See 42 U.S.C. §§ 301-1399). The Act established a program to provide lifetime payments to retired workers beginning at age sixty-five, set up the federal system of unemployment insurance, and authorized federal grants to the states for various purposes. The initial legislation of the 1935 Act laid the foundation for the Social Security programs used today by millions of Americans. The Act has been amended many times during the intervening years, but its original purpose remains the same: "to ameliorate the rigors of life, the tragic consequences of old age, disability, loss of earnings power, and dependency on private or public charity." See *Dvorak v. Celebrezze*, 345 F.2d 894, 897 (10th Cir. 1965). Since 1935, Social Security benefits have increased, and the program has been broadened to include benefits for workers' spouses and minor children, for the survivors of deceased workers, and for disabled workers. These programs are known as Title II benefits programs and are administered by the Act.

## II. The Title II benefits programs—Old-Age, Survivors, and Disability Insurance (OASDI).

During 2003 SSA made Title II benefits payments to 32,347,974 retired workers and dependents; 6,875,054 survivors; and 7,221,268 disabled workers and dependents. See 2003 OASDI Trustees Report, *available at* <http://www.ssa.gov/OACT/TR/TR03/>. The Federal OASDI Trust Fund was established on January 1, 1940, as a separate account in the

United States Treasury, while the Federal Disability Insurance (DI) Trust Fund, another separate account in the United States Treasury, was established on August 1, 1956. All the financial operations of the OASDI and DI programs are handled through these respective funds. The primary receipts of the two funds are amounts appropriated to each of them, under permanent authority, on the basis of contributions payable by workers, their employers, and individuals with self-employment income, in work covered by the OASDI program.

All employees, and their employers, in covered employment, are required to pay contributions with respect to their wages. All self-employed persons are required to pay contributions with respect to their covered net earnings from self-employment. Generally speaking, an individual's contributions, or taxes, are computed on wages or net earnings from self-employment, or both wages and net self-employment earnings combined, up to a specified maximum annual amount. The contributions are determined first on the wages and then on any net self-employment earnings, such that the total does not exceed the annual maximum amount.

The monthly benefit amount to which an individual (or his spouse and children) may become entitled under the OASDI program is based on the individual's taxable earnings during his lifetime. According to the 2002 OASDI Trustees Report (*available at* <http://www.ssa.gov/OACT/TR/TR02/>), about 154 million persons worked in OASDI-covered employment or self-employment in 2002. Approximately ninety-six out of one hundred workers in paid employment and self-employment remain covered or eligible for coverage, and, as of December 31, 2002, about ninety-two percent of the population aged sixty-five and over were receiving benefits. In addition, about ninety-seven percent of persons aged twenty to forty-nine who worked in covered employment in 2002 acquired survivorship protection for their children under age eighteen

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(and surviving spouses caring for children under age sixteen). About ninety percent of persons aged twenty-one to sixty-four who worked in covered employment in 2002 are eligible to receive monthly cash benefits if they suffer a severe and prolonged disability.

### **A. Disability Insurance Benefits Program**

The object of the Disability Insurance Benefits Program (DIB) is to replace part of the earnings lost because of a physical or mental impairment. Monthly benefits are paid to eligible disabled persons and their eligible auxiliary beneficiaries throughout their period of disability. There are no restrictions on the use of benefits received by beneficiaries. Disability benefits cannot be paid to a person confined in a penal institution because of a felony. Monthly benefits may be paid to:

- disabled workers under age sixty-five and their families;
- unmarried persons disabled before age twenty-two who continue to be disabled; and
- disabled widows or certain surviving divorced spouses ages fifty to fifty-nine who were disabled at the time of the worker's death or became disabled within a specified period thereafter.

Generally, to have disability protection for one's self and family, it is necessary to have Social Security credits for five years out of a ten year period ending when the disability begins. Workers disabled at age forty-three or older need credit for more than five years of work. A person disabled before age thirty-one may require as few as one and a half years of credited earnings. Medical evidence of the disabling condition is required, and medical recovery and/or work activity are events that affect entitlement or continued entitlement to disability benefits.

### **B. Retirement Insurance Benefits Program**

The objective of the Retirement Insurance Benefits Program (RIB) is to replace part of the earnings lost because of retirement. Monthly benefits are paid to eligible retired workers and their eligible dependents. There are no restrictions on the use of benefits by a beneficiary. Monthly RIB (also called old-age insurance benefits) may be payable to an individual age sixty-two or over

who meets the earnings requirement of being fully insured. Monthly spouse's and child's insurance benefits are also payable on the earnings record of an individual entitled to retirement benefits, if they are eligible auxiliaries. Social Security benefits are based upon the worker's earnings as established by the Social Security Administration (SSA). For this reason, the SSA maintains a complete record of the earnings of each worker covered by Social Security. These earnings are used to determine entitlement to retirement benefits and the monthly amount of the benefits.

### **C. Survivor's Insurance Benefits Program**

The Survivor's Insurance Benefits Program (SIB) pays monthly cash benefits to eligible dependents of deceased workers. Survivors eligible for monthly cash benefits include widows and widowers, and surviving divorced wives or husbands who were married to the deceased worker for at least ten years. Age requirements are lower for disabled survivors and survivors who have dependents of the insured worker in their custody.

## **III. Impact of fraud on the SSA benefits programs**

The Title II programs have suffered significant episodes of fraud, and the costs to the Social Security trust funds can no longer be ignored. One who wrongfully applies for and/or receives benefits payments under any of the Title II programs may be subject to criminal liability under 42 U.S.C. § 408(a)(1)-(8), which sets forth penalties for felony fraud violations under Title II of the Act. The Social Security felony fraud statute can be used separately or in concert with general federal criminal statutes found in Title 18, to prosecute fraud in benefits programs. A key risk factor in Title II programs are individuals who feign or exaggerate symptoms to become eligible for disability benefits, and those who fail to report changes in resources or other circumstances that would make a recipient of Title II benefits ineligible to continue to receive payments. Eligibility for the Title II programs is often complex and difficult to verify, and SSA's ability to properly determine a recipient's initial and continued eligibility, and the correct monthly benefit due that recipient, is directly dependent upon SSA's ongoing access to accurate and current information regarding the recipient.

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As is evident, even the slightest error or fraud in the overall process can result in millions of dollars in overpayments or underpayments of Social Security benefits. It is therefore imperative that fraud in the Title II programs be identified and, wherever possible, prevented. The other alternative, after the fraud has been committed, is to prosecute and recover benefits overpayments from those who perpetrate the fraud. To that effect, the Congress and the SSA have collaborated to make fraud against the Title II programs punishable as a felony, resulting in penalties of imprisonment up to five years and a fine of as much as \$250,000.

Between October 1, 2002 and March 31, 2003, the Office of the Inspector General for the Social Security Administration (SSA/OIG) received 51,311 fraud allegations from a variety of sources, including private citizens (23,951), anonymous tips (8,782), SSA employees (7,402), law enforcement (10,120), public agencies (323), and SSA benefits recipients (726). *See* SSA/OIG 2003 Semiannual Report to Congress, *available at* <http://www.ssa.gov/oig>. At the same time, SSA/OIG opened 9,170 potential fraud cases and investigated and closed approximately 9,389 cases nationwide. During the same period, investigations by special agents of SSA/OIG culminated in 2,677 arrests and indictments involving Social Security fraud, which resulted in 1,008 criminal convictions. The SSA statistics suggest an alarming increase in fraudulent claims that threaten the integrity of the Social Security Trust Funds and block access by needy applicants with legitimate claims for benefits. In many cases, benefits paid to needy applicants serve as a lifeline that means the difference between survival and death. As disturbing as the statistics are, they represent only the identified instances of overpayments in the SSA programs. They do not represent undetected overpayments stemming from fraud, waste, and abuse. If the current trends continue, thousands more potential SSA fraud cases will focus increased attention on the felony provisions of the Act and result in scores of federal and/or state indictments and convictions.

The opportunity for fraud is enhanced because SSA is an agency that has, historically, made extraordinary efforts to ensure accessibility to its benefits programs by qualified Americans. According to current estimates by auditors of the SSA, fraud against the various SSA benefits programs may account for as much as ten percent

of all costs to the Social Security Trust Funds. SSA/OIG 2003 Semiannual Report to Congress, *available at* <http://www.ssa.gov/oig/ADOBEPDF/sar102002032003.pdf>. Considering the volume and amount of payments SSA makes each month, even the smallest percentage of fraud, waste, and abuse can result in the loss of millions of dollars. It is not surprising, then, that fraud perpetrated on Social Security benefits programs has increasingly attracted national attention.

#### **IV. Statutory authority**

The felony fraud provisions of the Title II programs are found in 42 U.S.C. § 408(a)(1)-(8) of the Act. Most fraud involving the Title II benefits programs is the result of deliberate deception, and arises when an applicant falsifies a document or record offered as proof of disability, or misrepresents material facts, such as paternity, on an application for benefits. Fraud can also be the result of omission when a beneficiary fails to report a change in circumstance, such as marriage, a new source of income, incarceration, removal from custodial care, or failure to report the death of a parent or spouse, while continuing to spend checks or direct deposits by SSA. The following are representative of violations that could result in criminal prosecution for Social Security fraud:

- furnishing false information of identity in connection with the establishment and maintenance of Social Security records, or with the intent to gain information as to the date of birth, employment, wages, or benefits of any person;
- forging or falsifying SSA documents;
- conspiring to obtain or allow a false, fictitious, or fraudulent claim;
- using a Social Security Number (SSN) obtained on the basis of false information or falsely using the SSN of another person, for the purpose of obtaining or increasing a payment under Social Security or any other federally funded program, or for any other purpose;
- altering, buying, selling, or counterfeiting a Social Security card;
- disclosing, using, or compelling the disclosure of the SSN of any person for unauthorized purposes;

- making or causing to be made a false statement or representation of a material fact for use in determining rights to Social Security benefits, Medicare, Supplemental Security Income, or Black Lung benefits;
- making or causing to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under the Social Security Act;
- making or causing to be made any false statement or representation as to whether wages were paid or received, the amount of such wages, the period during which wages were paid or received, or the person to whom such wages were paid;
- making or causing to be made any false statement or representation as to whether net earnings from self-employment were received, the amount of such earnings, the period during which such earnings were received, or the person who received them;
- concealing or failing to report any event affecting the initial or continued right to payment received, or to be received by a person individually or on behalf of another;
- converting all or any part of a payment received on behalf of a beneficiary to a use other than for the use and benefit of that beneficiary;
- falsely representing oneself to be an employee of the U.S. Government;
- accessing SSA computer records without authorization;
- disclosing unauthorized information from the SSA's systems of records; or
- receiving or soliciting a bribe, illegal gratuity, or contribution to or supplementation of salary for U.S. Government service.

The major difference between violations of federal criminal statutes under Title 18 and those in the Social Security Act (Title 42) is the criminal intent required. *See U. S. v. Lichenstein*, 610 F.2d 1272, 1277 (5th Cir. 1980) ("The criminal intent required for a violation of the federal criminal provision is merely the intent to deceive or mislead, not an intent to defraud or deprive someone of something by means of that deceit."). In most Title 42 crimes, the relevant

intent is to defraud or deprive someone of something, while the Title 18 criminal provisions usually require only an intent to deceive. For example, simply making a mistake or giving untrue information, without any intent to deceive or mislead, does not constitute the requisite intent for a conviction under Title 18 crimes. *U. S. v. Lange*, 528 F.2d 1280 (5th Cir. 1976).

## V. The Title II criminal fraud provisions: 42 U.S.C. § 408(a)(1)-(8)

Title II of the Act, cited as 42 U.S.C. § 408(a)(1)-(8), contains the Act's primary criminal provisions and carefully spells out the Act's restraints on fraud by specifying requirements for disclosure of specific events, and identifying facts that affect the right to payment of SSA benefits. Initially enacted as a misdemeanor statute, Congress amended Title II of the Act in 1981 to increase the penalty, making Social Security fraud (including SSN misuse) a felony, punishable by five years in prison and a fine up to \$250,000. *See* Pub. L. No. 97-123, 95 Stat. 1659 (1981 amendments).

### A. 42 U.S.C. § 408(a)(1)(A)-(C)

The elements required to prove a violation of § 408(a)(1)(A)-(C) are:

- a false statement or representation;
- used to cause payment of benefits;
- where no payment is authorized; and
- whether wages were paid or received or the amount of wages or the period for which they were paid.

*See* 42 U.S.C. § 408(a)(1)(A)-(C).

Criminal liability under 42 U.S.C. § 408(a)(1) arises if: (i) an individual makes a false statement or representation about income in order to secure a higher benefit; or (ii) an employer or individual makes false statements in reporting wages or earnings to SSA or the IRS. For example, a defendant was incarcerated at the time he asked his friend to put his son on the payroll of the friend's company as a "no-show" employee so that his son would have health insurance. The friend paid defendant's son \$500 per week, issued a \$340 payroll check and withheld \$160 in federal and state taxes in the son's name. Defendant and his son repaid the friend \$500 each week in cash. The

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son never worked for the friend's company, and the friend kept the repaid cash without reporting it as income, while the friend's company claimed a deduction for the son's wages on its federal and state tax returns and made wage and earnings reports to SSA and the IRS. As a result of his job with the friend's company, and the false statements as to the son's wage and earnings made by the friend and his company, the son later applied for and qualified for \$7,700 in SSA benefits. *United States v. Mauro*, 80 F.3d 73 (2d Cir. 1996). *See also United States v. Kaczowski*, 882 F. Supp. 304 (W.D.N.Y. 1994) (defendant was placed in a "no-show" job on the payroll of a game room in order to launder gambling receipts).

### **B. 42 U.S.C. § 408(a)(2)**

The elements required to prove a violation of § 408(a)(2) are:

- defendant makes or causes to be made a false statement or representation;
- of a material fact;
- in any application for any payment or for a disability determination.

*See* 42 U.S.C. § 408(a)(2).

Criminal liability under 42 U.S.C. § 408(a)(2) arises if an individual makes or causes to be made a false statement, or misrepresents a material fact, on any application for benefits under any SSA Title II program. For example, a defendant made false statements in an application for payment of SSA Survivor's Benefits by stating that she had never before filed for benefits under any other name or SSN and had never used any SSN or name other than her own. In fact, the defendant had used numerous false SSNs on various W-4 forms from several different employers. *See United States v. Kienenberger*, 168 F.3d 496 (8th Cir. 1998).

### **C. 42 U.S.C. § 408(a)(3)**

The elements required to prove a violation of § 408(a)(3) are:

- defendant makes or causes to be made any false statement or representation;
- of a material fact;
- for use by the Social Security Administration in determining rights to payment of benefits.

*See* 42 U.S.C. § 408(a)(3).

Criminal liability under 42 U.S.C. § 408(a)(3) arises if an individual makes or causes to be made a false statement, or misrepresents a material fact, used in determining entitlement to benefits. For example, a defendant, when completing questions about his work activities, falsely stated on an SSA form that he had not worked for four years, and was disabled and unable to perform work. In truth, the defendant was working at the time he completed the SSA form and had been employed full time for several years as a computer worker by the Internal Revenue Service. *United States v. Codrington*, No. CR-03-458-GAF (C.D. Cal. Jan. 29, 2003).

### **D. 42 U.S.C. § 408(a)(4)**

The elements required to prove a violation of § 408(a)(4) are:

- defendant received Social Security benefits on behalf of another person;
- defendant had knowledge of an event affecting the other person's continued right to Social Security payments;
- defendant knowingly concealed or failed to disclose this event to the Social Security Administration; and
- defendant concealed or failed to disclose this event to the Social Security Administration with the intent to fraudulently secure payment of Social Security Income benefits in an amount greater than was due the other person or when no payment to the other person was authorized.

*See* 42 U.S.C. § 408(a)(4); *United States v. Baumgardner*, 85 F.3d 1305, 1310-11 (8th Cir. 1996).

Criminal liability under 42 U.S.C. § 408(a)(4) arises if an individual knowingly conceals a fact to secure a benefit to which he or she is not entitled. For example, a defendant, when completing questions about his work activities, falsely stated on an SSA form that he had not worked for four years, and was disabled and unable to work. In fact, defendant was working at the time he completed the SSA form and had been employed full time for several years by the Internal Revenue Service. *United States v. Codrington*, No. CR-03-458-GAF (C.D. Cal. Jan. 29, 2003).

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With respect to the first element, courts have construed the term "event" broadly, to include essentially anything that would affect the right to payment. *United States v. Baumgardner*, 85 F.3d 1305, 1310-11 (1996). *See also United States v. Huckaby*, 698 F.2d 915 (8th Cir. 1982). The second element is self-evident and straightforward, requiring that the defendant must know of the event affecting his right to payment and knowingly conceal it. The third element requires that the concealment must have been "with an intent fraudulently to secure payment...in an amount greater than was due." 42 U.S.C. § 408(a)(4).

In *United States v. Cormier*, 639 F.2d 1177 (8th Cir. 1981), the prosecution showed that the defendant concealed or failed to disclose her employment and earnings to the Social Security Administration, with the "intent to secure fraudulently unauthorized benefits." The prosecution offered evidence showing that the defendant knew she was legally obligated to disclose such information and knew she was required to file annual income reports because her original application for benefits provided notice of the reporting requirement. Further, defendant knew of the reporting requirement because her job as a Social Security service representative required her to inform other applicants and beneficiaries of their continuing obligation to do so. *Id.* at 1181.

In the case of *United States v. Phillips*, 600 F.2d 535, 536 (5th Cir. 1979), the court defined the government's burden in proving "fraudulent intent" under § 408(a)(4). The court stated that:

First, the government must show that the defendant knew that he was legally obligated to disclose certain information. Second, the government must prove that the defendant knew that by withholding the information he would receive greater payments than he was entitled to. In other words, a defendant is not guilty under § 408(d) unless he is aware both that he is deceiving the government and that the government will pay out more money because of his deception.

Theft of public funds by the fraudulent receipt of Social Security benefits on a continual basis may be considered relevant conduct under the Sentencing Guidelines when determining the base offense level in a case where the conduct is part of the same course of conduct or common scheme or

plan as the offense of conviction. *See United States v. Silkowski*, 32 F.3d 682 (2d Cir. 1994). In *Silkowski*, the court found that when a defendant engages in a clearly identifiable and repetitive "behavior pattern" of a specified criminal activity, such as continual illegal receipt and conversion of Social Security benefits, a district court may rely on such conduct as "relevant" under the federal Sentencing Guidelines, regardless of whether that conduct was charged as part of the offense of conviction. *Id.*

#### **E. 42 U.S.C. § 408(a)(5)**

The elements required to prove a violation of § 408(a)(5) are:

- the defendant knowingly and willfully converts;
- a benefit payment, or any part of a benefit payment;
- accepted on behalf of another;
- to an unauthorized use.

*See* 42 U.S.C. § 408(a)(5).

Criminal liability under 42 U.S.C. § 408(a)(5) arises if an individual knowingly and willfully converts to an unauthorized use a benefit that he or she has accepted as payee on another's behalf. For example, a criminal violation occurs if a defendant applies (a formal application to become Representative Payee is required by SSA) to become Representative Payee for the use and benefit of another (spouse, parent, grandparent, child, friend), and, having received payment(s) of a benefit from SSA on behalf of another, knowingly and willfully converts the payment(s) to his own use, rather than for the use and benefit of the intended beneficiary. A common violation occurs when a Representative Payee intentionally conceals the death of another in order to continue to receive and spend the benefits payments made by SSA to the Representative Payee.

#### **F. 42 U.S.C. § 408(a)(6)**

The elements required to prove a violation of § 408(a)(6) are:

- defendant willfully, knowingly, and with intent to deceive as to his true identity or the identity of another person;

- furnishes, or causes to be furnished, false information to SSA;
- with respect to any information used by SSA to establish or maintain records.

See 42 U.S.C. § 408(a)(6).

Criminal liability under 42 U.S.C. § 408(a)(6) arises when a person willfully, knowingly, and with the intent to deceive the SSA as to his or her true identity, or the true identity of any other person, furnishes or causes another to furnish false information to the SSA that SSA uses to establish and maintain earnings records. A typical violation of § 408(a)(6) occurs when an individual makes false statements on an application for a new SSN (SSA Form SS-5) for the purpose of obtaining a second SSN to create a false identity.

The most common false statement occurs when a defendant, in response to the following question on the SS-5: "Has applicant or anyone acting on his/her behalf ever filed for or received a Social Security number card before?" falsely answers "no," when, in fact, the defendant knows his answer is false and it is his intent to deceive the Commissioner of Social Security as to his true identity. The defendant can be charged with a violation of § 408(a)(6) for the false statement on the SS-5 as well as any subsequent use of the second SSN.

A person may also be subject to criminal penalties under § 408(a)(6) for furnishing false information in connection with earnings records. See 20 C.F.R. § 422.108. Criminal liability can also arise under 42 U.S.C. § 408(a)(6) when an employer, knowingly, and with intent to deceive as to the identity of another person (such as an employee), furnishes, or causes another to furnish on the employer's behalf, false information to the SSA that SSA uses to establish or maintain its records. This usually occurs when an employer, who knows that an employee is working while using a false SSN and/or identity, makes false statements in wage and earnings reports to SSA and the IRS as to such wages and earnings or identity. This charge is especially applicable to companies who frequently hire individuals that the company suspects have provided false documents in order to work. Prosecution of vulnerable employees for trying to make a living in order to survive is unappealing for a number of reasons. However, prosecution of offenders whose corporate hiring policies are the source of the problem is a more cost-effective and practical

approach. Companion charges for prosecution of corporations caught violating 42 U.S.C. § 408(a)(6) usually include 18 U.S.C. §§ 1001 (false statement on I-9) and 1546 (immigration fraud).

### **G. 42 U.S.C. § 408(a)(7)(A)-(C)**

The felony provisions of 42 U.S.C. § 408(a)(7)(A)-(C), which deal with the misuse of an SSN, are particularly effective in charging cases involving identity theft or where an individual has tried to manipulate the identification systems currently in place, or where an individual has entered the country illegally. In many cases, recipients of Social Security benefits under one Title II program will be caught using a false identity and SSN to apply for, and collect, benefits under a second (or the same) Title II benefit program. This has been a common technique used by criminal travelers, who use multiple identities to apply for, and collect, benefits from SSA offices in different regions of the country.

The elements of proof for each subsection of § 408(a)(7) are more flexible than those required by 18 U.S.C. § 1028, a better known identity theft statute, that also contains subsections dealing with the misuse of an SSN. What follows is a description of each of the three subsections of § 408(a)(7), including a breakdown of the elements necessary to prove a charge under each, and a brief suggestion of when and how each subsection should be charged.

#### **42 U.S.C. § 408(a)(7)(A)**

The elements required to prove a violation of § 408(a)(7)(A) are:

- defendant, with intent to deceive;
- willfully and knowing uses a Social Security account number;
- assigned to him by the Commissioner of SSA;
- based on false information furnished by defendant or another person to the Commissioner of Social Security.

See 42 U.S.C. § 408(a)(7)(A).

Any fraudulent use of an SSN, whether made up by the offender or obtained on the basis of false information supplied to SSA, is actionable and constitutes a felony for purposes of § 408(a)(7)(A). For example, a subject in the

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United States on a tourist visa secures a nonwork SSN using his French passport. The subject then uses an alias to file a bogus application for asylum, resulting in United States Citizenship and Immigration Services (USCIS) approval and issuance of a green card and alien registration number. The subject then uses his new name and illegally procured USCIS documents to apply for a second SSN, thus completing the creation of a new identity. The subject then uses the second SSN to secure credit cards, open bank accounts, attend flight training, and make applications for employment as a pilot. The subject's use of the SSN is actionable because he used false and fraudulent documents (deceptively procured from the USCIS) to deceive SSA into issuing him a new SSN, and he may be charged with a felony under § 408(a)(7)(A). *See United States v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994) (defendant acted "willfully, knowingly, and with intent to deceive," in illegally using an SSN obtained on the basis of false information).

#### **42 U.S.C. § 408(a)(7)(B)**

The elements required to prove a violation of § 408(a)(7)(A) are:

- false representation of a Social Security account number;
- with intent to deceive;
- for any purpose.

*See United States v. Means*, 133 F.3d 444, 447 (6th Cir. 1998) (setting forth the elements for prosecution of a case under 42 U.S.C. § 408(a)(7)(B)). *See also United States v. McCormick*, 72 F.3d 1404, 1406 (9th Cir. 1995).

The majority of jurisdictions apply the *Means* standard as set forth above. However, a few jurisdictions break down the language of § 408(a)(7)(B) to include a fourth element:

- for any purpose;
- with intent to deceive;
- represented a particular Social Security account number to be his;
- which representation is false.

*See United States v. O'Brien*, 878 F.2d 1546 (1st Cir. 1989).

Subsection (B) is the most commonly charged subsection of § 408(a)(7) because of its broad application and straightforward elements of proof.

It is typically charged whenever a subject has misrepresented an SSN to open a bank account; apply for a credit card; secure credit for a cell phone; rent or lease an apartment or car; apply for employment; or enroll in flight training. The charging standard, "for any purpose," is broad and self-explanatory, and any false representation of an SSN, with an intent to deceive, is actionable conduct that may be charged as a felony under § 408(a)(7)(B). *See United States v. Silva-Chavez*, 888 F.2d 1481 (5th Cir. 1989).

The legislative history of § 408(a)(7)(B) demonstrates that Congress intended to extend criminal liability for false use of an SSN beyond the false use of a number to obtain or increase benefits under the Social Security Act, of which it is part. *See S. Rep. No. 938 at 490 (1976)*, reprinted in 1976 U.S.C.C.A.N. 2897, 4030, 4194 ("The Senate amendment...makes a misdemeanor the willful, knowing, and deceitful use of a social security number for any purpose."). In 1981 Congress amended the section, changing the offense from a misdemeanor to a felony and adding the language "or for the purpose of obtaining anything of value from any person" before "or for any other purpose." *See Pub. L. No. 97-123, 95 Stat. 1659, 1663-64 (1981)*. While the House Conference Report accompanying the amendment offers no explanation of the reasons for the change, H.R. Conf. Rep. No. 409, at 15-16 (1981), reprinted in 1981 U.S.C.C.A.N. 2681, 2687-88, the text of the amendment makes clear Congress' intent both to punish a broader range of acts and to impose a stiffer penalty. *See United States v. Darrell*, 828 F.2d 644 (10th Cir. 1987).

Direct evidence is not always necessary in order to prove that a defendant intended to use a Social Security card or number for deceptive purposes. Mere possession of a Social Security card or number that does not belong to a defendant is sometimes sufficient to support a finding that the defendant intended to deceive. *United States v. Charles*, 949 F. Supp. 365 (D.V.I. 1996). In *Charles*, the government was unable to produce direct evidence that the defendant had actually applied for a driver's license using a false SSN, but concluded that the jury could infer that the defendant received the Social Security card through false representations when the government's evidence showed that: (1) the Police Department Licensing Section had printed defendant's license; and (2) generally, in order to

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obtain such a license, an applicant must give an SSN to the licensing agent.

However, mere possession of false identity documents, including a false SSN, might not always be enough to convict. Some courts have held that the term "represent" connotes a positive action, not merely passive possession, and have thus reasoned that Congress, by using the term "represent," meant to proscribe the "use," not merely the "possession," of a false SSN.

*United States v. McKnight*, 17 F.3d 1139, 1144-45 (8th Cir. 1994). However, the concurring opinions of two *McKnight* panel members prove that this is not a hard and fast rule: "We write separately to make explicit that possession of an identification card bearing a false social security number can, in some instances, provide a sufficient predicate for a jury to properly infer that a defendant falsely represented a social security number in violation of 42 U.S.C. § 408(a)(7)(B)." *Id.* at 1146. In *United States v. Teitloff*, 55 F.3d 391, 394 (8th Cir. 1995), the court rejected the defendant's contention that he did not technically "use" the SSN because the DMV computer system automatically provided that information when he supplied the other person's identification documents.

A defendant may be found to have acted willfully, knowingly, and with intent to deceive, even if the defendant did not intend to deceive federal officials when he presented them with documents containing a false SSN. In *U.S. v. Pryor*, 32 F.3d 1192 (7th Cir. 1994), the defendant's license had been suspended, and he was found to be carrying false documents which he acknowledged that he planned to present if pulled over for a traffic violation.

The Ninth Circuit has held that an alien's use of a false SSN to further otherwise legal conduct is not a crime of "moral turpitude."

*Beltran-Tirado v. Immigration and Naturalization Serv.*, 213 F.3d 1179, 1184 (9th Cir. 2000). The significance of this decision lies in the impact such a conviction would have on the illegal alien's eligibility for inclusion on the Immigration and Nationality Act registry. See 8 U.S.C. § 1259. The registry statute was originally enacted by Congress in 1929 as a means to regularize the status of long-time illegal aliens residing in the United States, and has been updated periodically since. Under current registry provisions, conviction for a crime of moral turpitude would preclude an alien from eligibility because he

would not be considered "of good moral character." *Id.*

In *Beltran-Tirado*, defendant lived under an assumed identity, using the name and SSN of the victim to marry twice and obtain employment, a driver's license, credit cards, and a Housing and Urban Development loan. The defendant's earnings attracted the interest of the IRS, resulting in her arrest and conviction under 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 1546(b)(3). The INS moved to deport her, but the Ninth Circuit intervened to interpret the legislative history of 42 U.S.C. § 408 and carve out an exception to a conviction for a crime of moral turpitude by allowing the use of a false SSN to further "otherwise legal behavior." The *Beltran-Tirado* case appears consistent with an earlier decision by the Ninth Circuit in which the court concluded that

the crime of knowingly and willfully making any false, fictitious, or fraudulent statements or representations to an agency of the United States is not a crime of moral turpitude because a jury could convict if it found that the defendant had knowingly, but without evil intent, made a false but not fraudulent statement.

*Hirsch v. INS*, 308 F.2d 562, 567 (9th Cir. 1962).

Another California federal court, citing *Beltran-Tirado*, held that the sale of false or counterfeit SSNs is a crime that involves moral turpitude. *Souza v. Ashcroft*, No. C00-4246MMC, 2001 WL 823816 (N.D. Cal. July 16, 2001). The court distinguished between those who sell, rather than use, false or counterfeit Social Security cards ("persons convicted of the crime of selling false or counterfeit Social Security cards have, like persons convicted of the analogous crime of selling counterfeit green cards, committed a crime of moral turpitude") *Id.* at \*3, and stated that Congress, in amending 42 U.S.C. § 408, specifically excluded from the exemption those who sell, rather than use, false or counterfeit Social Security cards. The reason for this distinction is apparent. Selling false alien registry documents (green cards), as well as selling false or counterfeit Social Security cards, inherently involves a deliberate deception of the government and an impairment of its lawful functions.

When an individual makes multiple false representations by misrepresenting an SSN on multiple credit card applications, bank accounts,

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or federal documents relating to employment (I-9, W-4 forms), that person is charged with a separate offense for each use or representation. Each of the separate offenses is supportable by a different set of predicate facts and is actionable under § 408(a)(7)(B). In addition, each use or representation on a federal form is actionable as a false statement under 18 U.S.C. § 1001 and can be charged as a separate offense, also supportable by a different set of predicate facts. While charging multiple counts might not be desirable, doing so when separate predicate facts exist would not run afoul of the rule against multiplicity that prohibits the charging of a single offense in several counts. *United States v. Castaneda*, 9 F.3d 761, 765 (9th Cir. 1993) (holding that a defendant may properly be charged with committing the same offense more than once as long as each count depends on a different set of predicate facts). See also *United States v. Hurt*, 795 F.2d 765, 774-75 (9th Cir. 1986).

It is not necessary that the false use or representation of an SSN have a detrimental effect in some way on the government to be actionable. See *United States v. Holland*, 880 F.2d 1091 (9th Cir. 1989). Any use of a false SSN on nonfederal documents is still actionable under § 408(a)(7)(B). For example, the subject in the case study used his falsely obtained SSN when completing multiple applications seeking employment as a pilot, and in applying for taxi permits with airport cab companies. Even though the airline and cab company employment applications are not federal documents, the subject can still be charged under § 408(a)(7)(B). Further, it is not necessary to prove that the defendant used a false SSN for payment, gain, or pecuniary value. *United States v. Silva-Chavez*, 888 F.2d 1481 (5th Cir. 1989). In addition, the Fourth Circuit has held that § 408(g)(2) applies to private, purely commercial transactions. See *United States v. Bales*, 813 F.2d 1289, 1297 (4th Cir. 1987); *United States v. Darrell*, 828 F.2d 644 (10th Cir. 1987) (affirming convictions for using a false SSN in seeking bank loans). See also *United States v. Rosenberg*, 806 F.2d 1169, 1171-72 & n. 1, 1180 (3d Cir. 1986) (using a false SSN in a commercial transaction).

The use or nonuse of a defendant's SSN on loan applications and tax returns is not protected by the First Amendment. See *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987). Similarly, a defendant's deceitful use of another person's SSN to open a bank account was within the "any other

purpose" clause of a statute prohibiting deceptive use of an SSN for any purpose. *United States v. Barel*, 939 F.2d 26, 28 (3d Cir. 1991) ("The Social Security felony fraud statute applies to the intentional use of a false Social Security number 'for any purpose' when a defendant uses a false Social Security number to open bank accounts, even absent proof of pecuniary gain to defendant."). False representation of a fake, nonexistent, SSN may constitute the offense of false pretenses. See *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987).

According to 18 U.S.C. § 1028(d)(1), an "identification document" is "a document made or issued by or under the authority of the United States Government...which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals." The House Report accompanying what became § 1028 demonstrates that the definition includes not only "identification documents, such as driver's licenses, which are widely accepted for a variety of identification purposes," but also those "commonly accepted" in certain circles for identification purposes, such as identification cards issued by state universities and federal government identification cards." H.R. Rep. No. 802, at 9 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3519, 3527. The House Report also notes that identification documents "normally will include such identifying elements as an individual's name, address, date, or place of birth, physical characteristics, photograph, fingerprints, employer, or any unique number assigned to an individual by any federal or state government entity." *Id.*

Two published circuit court decisions, both by the Fourth Circuit, have applied the definition of "identification documents" under 18 U.S.C. § 1028, and they involved Social Security cards and Form I-94 Arrival-Departure Records, which the courts concluded were "identification documents" within the meaning of the statute. See *United States v. Pahlavani*, 802 F.2d 1505 (4th Cir. 1986) (I-94 forms). In *United States v. Quinteros*, 769 F.2d 968 (4th Cir. 1985), the court relied on testimony that Social Security cards were "commonly accepted" as identification documents. An employee of the Social Security Administration testified that the Administration often issued cards for older persons to use as identification for cashing checks. She also

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testified that because the cards were so often used for identification, the government removed a notice from the back of the card that stated "Not for Identification Purposes." In all, the court concluded, there was a "common understanding that Social Security cards are identification documents." *Id.* at 970.

In *United States v. McGauley*, 279 F.3d 62 (1st Cir. 2002), the defendant was charged with making false statements to the U.S. Postal Service, in violation of 18 U.S.C. § 1001; misrepresentation of SSNs, in violation of 42 U.S.C. § 408(a)(7)(B); mail fraud, in violation of 18 U.S.C. § 1341; and money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The court held that convictions for five counts of misrepresentation of SSNs were supported by evidence that the defendant had used false numbers to open post office boxes under names other than her own, and had refund checks she fraudulently obtained from retail stores sent to those post office boxes. The court also found that the Social Security statute, which proscribes the use, with intent to deceive, of a false SSN, does not require that the SSN be used for the purpose of obtaining a payment to which the user was not entitled.

#### **42 U.S.C. § 408 (a)(7)(C)**

The elements required to prove a violation of § 408(a)(7)(C) are:

- knowingly alters a Social Security card; or
- counterfeits or possesses a Social Security card with intent to sell or alter it; or
- buys, or sells a Social Security card.

This subsection is typically charged when a subject has knowingly altered a Social Security card (usually to remove work restrictions from the face of the card), or has manufactured or counterfeited a card or cards for sale on the black market. This section can also be charged when an individual is discovered to have purchased a Social Security card for his own use or for resale. The altered and/or counterfeited cards are then used to secure false identification documents, open bank accounts, apply for credit cards, and to work, including employment in sensitive positions at airports, government facilities, and other locations requiring security clearances.

To pass as a counterfeit, an image must bear such a likeness to the original as "is calculated to

deceive an honest, sensible, and unsuspecting person of ordinary observation and care dealing with a person supposed to be upright and honest." *United States v. Gomes*, 969 F.2d 1290, 1293 (1st Cir. 1992) (stating that "the law does not criminalize only masterpieces"). *Id.* at 1294

#### **H. 42 U.S.C. § 408(a)(8)**

The elements required to prove a violation of § 408(a)(8) are:

- defendant discloses or uses, or compels the disclosure;
- of the Social Security number of any person;
- in violation of the laws of the United States.

*See* 42 U.S.C. § 408(a)(8).

Criminal liability under 42 U.S.C. § 408(a)(8) arises if a person discloses, uses, or compels the disclosure of the SSN of any person in violation of federal law. A typical violation of § 408(a)(6) occurs when an individual with access to corporate records, or other sources of information that contain lists of SSN, discloses or uses the SSNs for an illegal activity.

### **VI. Sample indictments**

The following are samples of Indictments of SSA fraud using the Title II felony fraud provisions.

#### **A. 42 U.S.C. § 408(a)(2)**

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(2)]

On or about the dates set forth below, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, aka \_\_\_\_\_, knowingly and willfully made the following false statements for use in determining defendant's rights to Title II disability benefits:

Count One	Date	Document	False Statement
	01/16/04	Statement for Determining Continuing Eligibility for Title II Disability Payments	Responded "no" to question regarding whether he had received support or money payments from any other person or organization since September 1998

Count Two	Date	Document	False Statement
	01/21/04	Statement for Determining Continuing Eligibility for Title II Disability Payments	Responded "no" to question regarding whether he had worked under any other name or SSN since September 1998

**B. 42 U.S.C. § 408(a)(3)**

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(3)]

On or about June 28, 2000, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, in a matter within the jurisdiction of SSA, knowingly and willfully made materially false statements and representations in a Representative Payee Report (SSA Form 623-OCR-SM) used by SSA to

determine continued rights to RIB payments for \_\_\_\_\_, her deceased grandmother. Specifically, when completing questions on the SSA Form 623-OCR-SM, defendant \_\_\_\_\_ concealed her grandmother's death and falsely stated that she had spent \$\_\_\_\_\_ for food, housing, clothing, and medical expenses for her grandmother.

**C. 42 U.S.C. § 408(a)(4)**

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(4)]

Beginning in or around June 1995, and continuing without interruption until in or around July 2001, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, in a matter within the jurisdiction of the Social Security Administration, having knowledge of the occurrence of an event affecting the continued right to Social Security Survivor's Insurance Benefits Payments of another individual in whose behalf defendant was receiving such payments, concealed and failed to disclose such event with the intent to fraudulently secure payment when no payment was authorized. Specifically, defendant \_\_\_\_\_ intentionally concealed and failed to disclose the death of his mother, \_\_\_\_\_, in order to continue to receive and spend Survivor's Insurance Benefits payments made to his mother. By such action, defendant \_\_\_\_\_ stole approximately \$\_\_\_\_\_ in Survivor's Insurance Benefits payments to which he knew that he was not entitled.

**D. 42 U.S.C. § 408(a)(5)**

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(5)]

Beginning in or around May 1992, and continuing without interruption until in or around January 2000, in Santa Barbara County, within the Central District of California, defendant \_\_\_\_\_, having made application to receive payment of Social Security child's insurance benefits payments for the use and benefit of another, and having received such payments, knowingly and willfully converted such payments to a use other than for the use and benefit of such other person. Specifically, while acting as Representative Payee for her step son, \_\_\_\_\_,

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defendant \_\_\_\_\_ converted to her own use Social Security child's insurance benefits payments made to her on behalf of \_\_\_\_\_, and by such action obtained approximately \$ \_\_\_\_\_ in child's insurance benefits payments to which she knew that she was not entitled.

**E. 42 U.S.C. § 408(a)(6)**

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(6)]

On or about August 4, 1999, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, aka \_\_\_\_\_, for the purpose of obtaining a second identity, did knowingly, willfully, and with the intent to deceive the Commissioner of Social Security as to his true identity, furnish and cause to be furnished false information to the Commissioner of Social Security with respect to information required to establish and maintain records under the Social Security Act. Specifically, on a Form SS-5 (Application For Original Social Security Number Card), in response to the question "Has applicant or anyone acting on his/her behalf ever filed for or received a Social Security number card before?", defendant \_\_\_\_\_, posing as \_\_\_\_\_, knowingly and with intent to deceive the Commissioner of Social Security as to defendant's true identity, falsely answered "no."

**F. 42 U.S.C. § 408(a)(7)(A)-(C)**

1. 42 U.S.C. § 408(a)(7)(A)

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(7)(A)]

On or about \_\_\_\_\_, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, aka \_\_\_\_\_, in a matter within the jurisdiction of the Social Security Administration, did willfully, knowingly, and with the intent to deceive and obtain a thing of value, use Social Security Number XXX-XX-XXXX, assigned to defendant by the Commissioner of Social Security, having obtained that Social Security Account Number on the basis of false information furnished by defendant to the Commissioner of Social Security. Specifically, defendant used Social Security Number XXX-XX-XXXX on a Statement for Determining Continuing Eligibility for SSI (SSA Form

8202-F6) to obtain Social Security benefits payments, knowing that said number had been obtained through his submission of an application to the Commissioner of Social Security for a second Social Security Number, in which he had falsely denied that he had previously applied for and been granted another Social Security Number.

2. 42 U.S.C. § 408(a)(7)(B)

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(7)(B)]

On or about March 14, 2000, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, for the purpose of obtaining something of value and for other purposes, and with the intent to deceive, falsely represented on an application for employment with \_\_\_\_\_, that XXX-XX-XXXX was the Social Security Number assigned to him by the Commissioner of Social Security, when in fact, as he well knew, such number was not the Social Security Number assigned to him by the Commissioner.

3. 42 U.S.C. § 408(a)(7)(C)

COUNT \_\_\_\_\_

[42 U.S.C. § 408(a)(7)(C)]

On or about March 13, 2001, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, knowingly possessed and intentionally used an altered, purchased, or counterfeited Social Security Number card, XXX-XX-XXXX, for the purpose of obtaining something of value and for other purposes. Specifically, defendant used a counterfeited Social Security card and Social Security Number XXX-XX-XXXX as proof of identification when completing an application and I-9 and W-4 forms to secure employment with \_\_\_\_\_.

**VI. Conclusion**

The Social Security benefits programs are essential to the economic well-being of millions of Americans, and fraud is a serious problem within the Title II benefits programs. Millions of dollars are lost each year from fraud perpetrated against SSA by unscrupulous claimants and/or their representatives, and prosecution of Social Security fraud remains one of the most important priorities of the United States Attorneys' Offices, in cooperation with the Social Security

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Administration Office of Counsel to the Inspector General. The opportunity for fraud is enhanced because SSA is an agency that has, historically, made extraordinary efforts to ensure accessibility to its benefits programs by qualified Americans. The Title II benefits programs can be properly characterized as serving as a lifeline to many needy Americans who otherwise would be unable to survive without the payments. Aggressive prosecution of Social Security fraud is essential to maintaining and preserving the integrity of the Social Security benefits programs, and to insuring that millions of Americans who rely on one or more of the SSA programs continue to have access to their lifelines. ❖

## ABOUT THE AUTHOR

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# Overview of the Felony Fraud Provisions of the Social Security Act

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## I. Introduction

Social Security fraud and identity theft involving Social Security cards and Social Security Numbers (SSNs) continue to be an increasing problem for investigators, prosecutors, and individual fraud victims. The Office of the Inspector General of the Social Security Administration (SSA/OIG) is charged with preventing fraud, waste, and abuse within the Social Security programs. Along with the United States Department of Justice (Department)

and the United States Attorneys' Offices (USAOs), the SSA/OIG utilizes the fraud provisions of the Social Security Act, Pub. L. No. 74-271 (1935), to punish and deter such crimes.

The sheer enormity of the federal entitlement process makes Social Security benefits fraud difficult to detect and manage. In 2003 the Social Security Administration (SSA) distributed an estimated \$494 billion in total benefits to recipients in the Old Age, Survivors, and Disability Insurance (OASDI) and Disability Insurance (DI) programs. SOC. SEC. ADMIN., THE FISCAL YEAR 2005 BUDGET (Feb. 2004). Each month, SSA pays benefits to more than fifty-two million people. *Id.* Thus, while actual fraud totals are not precisely quantified, even a small percentage of fraudulent payments made in any of SSA's programs can reach staggering totals.

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SSN and Social Security card misuse is a growing threat to the public, particularly as the SSN emerges as the de facto national identifier. The Social Security Administration issues approximately eighteen million new SSNs and cards each year. *Id.* SSN misuse is tied to many identity theft crimes, as criminals frequently use SSNs and Social Security cards to open credit card accounts and secure loans. In 2003 the SSA/OIG received 86,299 allegations of fraud concerning Social Security programs and SSN misuse. OFFICE OF THE INSPECTOR GEN., SEMI-ANNUAL REPORT TO CONGRESS (Nov. 2003).

Sections 208, 811, and 1632 of the Social Security Act (the Act) provide penalties for fraud in Title II, Title VIII, and Title XVI cases, respectively. Section 208 is most often utilized for criminal prosecution of benefits and SSN fraud because this statute enumerates specific fraudulent acts. Sections 811 and 1632 are less detailed, providing penalties for material false statements or representations in the application or receipt of benefits. As each of these statutes makes clear, Social Security fraud is a felony.

Over the past twenty years, §§ 208, 811, and 1632 of the Act have been amended several times, most recently in 2004, to both broaden the range of proscribed conduct and strengthen the penalty provisions. As criminals find new ways to commit benefits fraud and identity theft, Congress continues to respond to the needs of law enforcement and the public by expanding these sections, especially § 208. This article briefly describes each statute and its legislative history, explains the Social Security Protection Act of 2004, H.R. 743, 108th Cong. (2004), and provides examples of how these statutes are applied in Social Security fraud cases.

## II. The legislative history of section 208

Section 208 of the Act, 42 U.S.C. § 408, provides penalties for SSN misuse and fraudulent acts committed with the intent to receive an unauthorized payment. The original statute enacted in 1935 simply provided, "Whoever in any application for any payment under this title makes any false statement as to any material fact, knowing such statement to be false, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both." Pub. L. No. 74-271 (1935). This general prohibition against false

statements of material fact formed the foundation for present-day section 208 penalties.

While § 208 was included as part of the original Social Security Act of 1935, the first substantive amendments came in 1958 as Congress added several provisions to broaden the scope of the statute. The 1958 amendments created penalties for false statements in cases where a person intentionally conceals or fails to disclose knowledge of an event affecting his or another individual's initial or continued right to payment. Pub. L. No. 85-840, 72 Stat. 1042 (1958). In addition, the 1958 amendment introduced a provision for instances where a person converts a payment that he or she receives for the use or benefit of another. *Id.* As Congress identified new potential areas of fraud, these changes were the first to significantly expand the reach of § 208.

In 1972 Congress added misdemeanor fraud provisions to the Act in order to prevent individuals from obtaining Social Security benefits by using fraudulent SSNs. Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1363, 1364. This amendment prohibited the fraudulent use of an SSN to increase any benefit payment or to obtain any improper benefit under any federal benefits program. *Id.* However, this amendment proved insufficient to combat other forms of SSN misuse.

In 1976 Congress again expanded § 208 to include a provision for those who misused SSNs "for any other purpose," no longer limiting the provision to receipt of unauthorized benefits. The 1976 report of the Senate Finance Committee justified the "for any other purpose" language, stating:

While the Social Security Act currently provides criminal penalties for the wrongful use of a social security number for the purpose of obtaining or increasing certain benefit payments, including social security benefits, there is no provision in the Code or in the Social Security Act relating to the use of a social security number for purposes unrelated to benefit payments. The committee believes that social security numbers should not be wrongfully used for any purpose.

S. Rep. No. 94-938(I) (1976), *reprinted in* 1976 U.S.C.C.A.N. 3438, 3819. Thus, Congress clearly intended to broaden the scope of the Act to encompass a wider range of fraudulent acts.

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Five years later, in 1981, Congress again amended § 208. This amendment reclassified the offenses from misdemeanors to felonies and added the italicized language: "or for the purpose of obtaining anything of value from any person, or for any other purpose" to paragraph (7), discussing misuse of SSNs. The additional text broadens the range of acts covered under the statute and imposes stiffer penalties for violations. In 1984 Congress again stiffened § 208 by adding penalties of up to \$25,000 and imprisonment for up to five years for violations by representative payees or representative payee applicants. This amendment also granted courts discretion to order partial or full restitution for representative payees convicted of willful misuse of funds. Pub. L. No. 98-460 (1984), *available at* <http://policy.ssa.gov/poms.nsf/lnx/0428080100>.

### III. Section 208 today

In 2003 SSA made benefit payments to more than thirty-two million individuals under Title II of the Social Security Act. SOC. SEC. ADMIN., THE FISCAL YEAR 2005 BUDGET (Feb. 2004). Title II OASDI benefit programs distribute benefits to retired workers and their dependents. The Disability Insurance Benefits Program (DIB), Retirement Insurance Benefits Program (RIB), Survivor's Insurance Benefits Program (SIB), and Representative Payee Program (Rep Payee) are the most common programs under this title.

Section 208 sets out the felony fraud provisions for the OASDI program. Many instances of fraud involving Title II programs are the result of intentional false statements or representations of material facts to SSA on documents related to the application for, or periodic review of, benefit payments. Omissions may also constitute fraud under § 208, such as when a beneficiary fails to report a new source of income, incarceration, or a new marriage. The enumerated acts constituting fraud under this section include:

- misrepresentations as to earnings and wages received and/or credited and the time period in which such earnings were paid;
- false statements or misrepresentations as to material facts in applications for benefits;
- false statements or misrepresentations of material facts used to determine rights to payment;

- concealment or failure to disclose events affecting initial or continuing rights to payment;
- converting the benefits of one upon whose behalf an individual is receiving benefits;
- furnishing false information with the intent to deceive the Commissioner as to one's true identity;
- using an SSN obtained through false information to wrongfully obtain benefits;
- falsely representing an SSN as belonging to a person to whom it does not belong to obtain benefits wrongfully;
- altering or counterfeiting a Social Security card, or buying or selling a card so altered or counterfeited, or possessing a Social Security card or counterfeit card with intent to sell or alter it; and
- disclosing, using, or compelling the disclosure of the SSN of any person in violation of federal law.

A violation of § 208 can result in a fine of up to \$250,000 and up to five years in prison.

### IV. Sections 811 and 1632

Sections 811 and 1632 of the Act (42 U.S.C. § 1011 and 42 U.S.C. § 1383a, respectively) each contain the same provision for fraudulent acts pertaining to Social Security benefits. Both statutes provide that:

- (a) Whoever—(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit under this subchapter; (2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit; (3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit, or (B) the initial or continued right to any such benefit of any other individual in whose behalf he has applied for or is receiving such benefit, conceals or fails to disclose such event with an intent fraudulently to secure such benefit either in a greater amount or quantity than is due or when no such benefit is authorized; or (4) having made application to

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receive any such benefit for the use and benefit of another and having received it, knowingly and willfully converts the benefit or any part thereof to a use other than for the use and benefit of the other individual,

shall be fined under Title 18, imprisoned not more than five years, or both.

Criminal liability attaches under this provision when material facts are withheld from the agency or where there is fraudulent intent to conceal events that would effect a benefit determination. A material fact has been interpreted as a fact that has the "propensity to influence agency action." *United States v. Vaughn*, 797 F.2d 1485, 1490 (9th Cir. 1986). In other words, a material fact is usually a fact that the Commissioner of Social Security may consider in determining entitlement to benefits.

### **A. Section 811**

Title VIII established a benefits program for those World War II veterans who reside outside of the United States, and it pays retirement benefits to individuals who meet certain qualifications. Specifically, Title VIII applies to Filipino veterans who served under the Armed Forces of the United States between 1941 and 1946. 42 U.S.C. § 1012. Because this statute specifies a target population, it will continue to have limited application as the number of veterans and their beneficiaries decreases. Section 811 provides penalties for those who commit fraud in order to receive Title VIII benefits to which they are not entitled.

Section 811's fraud provisions are similar to those in §§ 208 and 1632, proscribing one from knowingly and willfully making a false statement or misrepresentation of a material fact in any application for benefits or in information used to determine any right to benefits, or concerning events which affect the initial or continuing right to benefits. In the past two years, the SSA/OIG has received only one allegation of fraud under § 811 of the Act.

### **B. Section 1632**

This statute pertains to applications for, and entitlement to, Supplemental Security Income (SSI) under Title XVI of the Social Security Act (42 U.S.C. § 1383a). Section 1632 provides criminal penalties for false statements of material

fact that are made in connection with such applications or entitlement determinations. It also provides penalties for failure to disclose an event which affects entitlement or (in the case of representative payees) conversion of another's benefits to one's own use. In 1994 Congress amended § 1632 to reclassify violations of the statute as felonies and to include fines and terms of imprisonment of up to five years pursuant to Title 18. Until this year, the 1994 amendment was the only significant change in § 1632 since 1972.

### **V. The 2004 amendments to sections 208, 811, and 1632**

The Social Security Protection Act of 2004, H.R. 743, 108th Cong. (2004), amended all three statutes to create felony fraud provisions in the Act. The fraud statutes, § 208 of Title II (42 U.S.C. § 408 (a)), § 811 of Title VIII (42 U.S.C. § 1011(a)), and § 1632 of Title XVI (42 U.S.C. § 1383a), were amended to provide for mandatory restitution payments to the victims of fraud, defined as either an individual or the SSA. Previously, restitution was not specifically required for a violation of the Act. The new provision enhances a judge's ability to compensate the Social Security programs or individuals and to punish persons for violations including, but not limited to, improper receipt of Social Security payments and misuse of SSNs.

In February 2004 Congress passed the Social Security Protection Act, a far-reaching amendment to the Social Security Act that enhances protections for beneficiaries whose representative payees commit fraud, expands the civil monetary penalty program to encompass the withholding of material facts from SSA, strengthens penalties for the misleading use of Agency symbols or names, and authorizes judicial orders of restitution in cases of fraud. The fraud portion of the amendment, which modifies §§ 208, 811, and 1632 of the Act, states that when a federal court sentences a defendant convicted under the Act, the court may order the defendant to make restitution to the victim of the fraud. Such restitution may be ordered in addition to, or in lieu of, any other penalty authorized by law. Moreover, if the court does not order restitution, the amendment requires the court to state why no restitution was ordered.

Under this provision, a victim is defined as either an individual who suffers financial loss or

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the SSA. Specifically, the Commissioner of Social Security is the victim of the fraud where the defendant causes SSA to make a benefit payment that should not have been made, or where the defendant is serving as a representative payee for the person suffering the financial loss. In cases where restitution is ordered, funds paid to the SSA will be deposited in either the Federal Old-Age and Survivors Insurance Trust Fund (for Title II cases) or the Federal Disability Insurance Trust Fund (for Title XVI cases). This restitution provision brings the penalty statutes of the Act in line with other fraud statutes and grants SSA more authority to recover lost funds in such cases.

## **VI. Examples of cases prosecuted under sections 208, 811, and 1632**

OIG Special Agents and United States Attorneys work together to prosecute many individuals each year for §§ 208 and 1632 violations. In many cases, individuals are charged with multiple counts of fraud under multiple provisions of the Act. For example, in May 2003, the USAO in Philadelphia (E.D. PA.) prosecuted an individual who was receiving Title XVI Supplemental Security Income (SSI) benefits under her actual SSN, while working as a seasonal temporary worker for the Internal Revenue Service using a SSN that was issued to another individual born in 1987. The individual plead guilty to a three count criminal Information charging her with: Use of a False Social Security Number in violation of 42 U.S.C. § 408(a)(7)(B); Fraud related to the Supplemental Security program in violation of 42 U.S.C. § 1383a(a)(3)(A); and Possession and Use of a False Identification Document in violation of 18 U.S.C. § 1028(a)(4). The individual was ordered to serve five years' probation and pay restitution to SSA in excess of \$10,000. *See United States v. Arnetta Green-Jones*, No. CR-02-447 (E.D. Pa. 2003).

In February 2004 an individual plead guilty to Count Four of a four-count Indictment, which charged her with a violation of § 1632 (42 U.S.C. § 1383a(a)(2)) - providing a false statement to continue Supplemental Security Income (SSI) disability benefits. The individual was sentenced in the Southern District of West Virginia to five years probation and ordered to pay \$26,925 in restitution to SSA for providing a false statement on a form that determines a continuing right to benefits. The OIG received an allegation from a private citizen that the individual worked for

multiple employers using a different name and SSN while receiving SSI benefits. An investigation by OIG Special Agents revealed that the individual was working under an alias and fictitious SSN from 1998 to 2003 in order to conceal income from SSA. *See United States v. Donna Chapman (Shull)*, No. 3:03-00233 (S.D. W. Va. 2004).

As identity theft becomes more widespread, SSN misuse cases are also proliferating. In October 2002 an individual in Los Angeles was convicted under § 1632 (42 U.S.C. § 1383a(a)(3)) for failing to report employment and a second SSN to SSA. The individual misused the SSN of a private citizen to establish numerous credit and charge cards. During the execution of a search warrant, OIG Special Agents seized evidence of SSN misuse relating to other victims. The individual was sentenced to four months in prison and three years' probation, and was ordered to pay full restitution to SSA. *See United States v. Margaret Jones*, No. CR-02-0631-ER (C.D. Cal. 2002).

Cases such as these highlight the way in which OIG Special Agents interact with USAOs to prosecute benefits fraud and identity theft cases. The OIG hopes to continue to foster relationships and information sharing with USAOs in order to aggressively pursue Social Security fraud and identity theft cases.

## **VII. Further strengthening the penalties for fraud**

Sections 208, 811, and 1632 cover a wide range of fraudulent acts relating to Social Security programs. However, as identity theft and benefits fraud increase, the statutes prohibiting such crimes also need to keep pace. As the SSN increasingly provides a gateway for criminals to fraudulently obtain other documents such as drivers' licenses, credit cards, or loans, the pressure on Congress grows to find statutory solutions to deter and punish such crimes. In 2003 the SSA/OIG began working with the Department to introduce H.R. 2971, 108th Cong. (2004) to further amend § 208 of the Social Security Act to enhance penalties when a fraudulent SSN is used to facilitate an act of terrorism, to facilitate drug trafficking, or in connection with a crime of violence. The legislative proposal is modeled after 18 U.S.C. § 1028, which prohibits fraud and

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related activity with identification documents and information.

Currently, 42 U.S.C. § 1383a imposes a sentence of up to five years for a conviction under the title. H.R. 2971 proposes a graduated penalty in which a second conviction under the statute would carry a sentence of up to ten years. The bill adds provisions for misuse of an SSN related to domestic or international terrorism which would carry sentence of up to twenty-five years in prison, and proposes a penalty for fraudulent use of an SSN related to drug trafficking, which would carry a sentence of up to twenty years. Legislation such as H.R. 2971 is an example of how the OIG, Department, and other law enforcement agencies continue to work together to close loopholes and strengthen existing fraud laws.❖

#### ABOUT THE AUTHOR

**Jonathan Morse** joined the Office of Chief Counsel to the Inspector General in the Fall of 2002. Since joining the OCCIG, he has worked on civil monetary penalty issues and legislative matters.✉

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# Prosecuting Supplemental Security Income (SSI) Fraud: Punishing Abusers of the Nation's Federal Welfare Program

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## I. Introduction

In 2003 the Social Security Administration (SSA) made more than \$31.6 billion in benefits payments to more than 2.3 million beneficiaries of the Title XVI Supplemental Security Income (SSI) program. *See* SOC. SEC. ADMIN 2003 ANNUAL REPORT OF THE SSI PROGRAM, available at <http://www.ssa.gov/OACT/SSIR/SSI03/ssiTOC.html>. SSI benefits payments are not the same as those paid from the Social Security Title II programs, even though the SSI Program and the various Title II programs are administered collectively by SSA. The money for SSI benefits comes from general funds of the United States Treasury (Treasury), while Social Security Title II

benefits are paid from the contributions of workers, employers, and self-employed people and are referred to as entitlement programs. However, a beneficiary under a Title II Social Security program may also be eligible to receive SSI under Title XVI as long as he meets the eligibility standards for disability, income, and resources.

The SSI program is sometimes defined as a nationwide federal welfare program, administered by SSA and designed as a lifeline of last resort for the aged, blind, or disabled, whose income and resources are below specified levels. The program establishes that payment may be received as a right by those U.S. citizens or legally admitted aliens residing in this country, who qualify by meeting income and resource criteria. No work credits are necessary to qualify for SSI, and every SSI case is subject to review once a year to ensure that the recipients receiving checks are still

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eligible and are being paid the correct monthly amount.

## II. Impact of fraud on the SSI program

Fraud is an inherent risk in SSA's disability programs, and abuse in the SSI program is particularly prevalent. Some unscrupulous people view SSI's disability benefits as money waiting to be taken. A key risk factor in the SSI program is individuals who feign or exaggerate symptoms to become eligible for disability benefits and those who fail to report changes in resources or other circumstances that would make an SSI recipient ineligible to continue to receive SSI benefits payments. Eligibility for the SSI program is often complex and difficult to verify. SSI is awarded on the basis of financial need, as determined in relation to both income and resources (as those terms are defined for purposes of the Social Security Act (the Act)). Eligibility for SSI monthly cash benefits depends upon the severity of the applicant's condition, and the amount paid to each SSI recipient depends upon: (1) how much other income an individual receives; (2) the living arrangements of the individual; and (3) other circumstances that affect an individual's financial needs. SSA's ability to properly determine a recipient's continuing eligibility, and the correct monthly benefit due that recipient, is directly dependent upon SSA's ongoing access to accurate and current information regarding the recipient.

To facilitate collection of information, SSA relies in large part on the honesty and good faith of the SSI recipient to provide accurate and timely information. Further, because an individual's financial circumstances are prone to sudden change, SSA must frequently reassess a recipient's continuing eligibility for benefits. As a result, the SSI program tends to be difficult and labor intensive to administer and is often vulnerable to fraud and overpayments.

Congress and SSA have collaborated to make fraud against the SSI program punishable as a felony, resulting in penalties of imprisonment up to five years and a fine of as much as \$250,000. Most fraud involving the SSI program is the result of deliberate deception and arises when an applicant falsifies a document or record offered as proof of disability or continuing disability, or misrepresents material facts as to income or severity of disability on an initial application or report of continuing disability. SSI fraud can also

be the result of omission when a beneficiary fails to report a change in circumstance, such as marriage, a new source of income, incarceration, removal from custodial care, or failure to report the death of a parent or spouse, while continuing to spend checks or direct deposits paid by SSA. The following violations are representative of violations that could result in criminal prosecution for SSI fraud:

- forging or falsifying SSI documents;
- conspiring to obtain or allow a false, fictitious, or fraudulent claim;
- making or causing to be made a false statement or representation of a material fact for use in determining rights to SSI benefits;
- making or causing to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under the Social Security Act;
- concealing or failing to report any event affecting the initial or continued right to payment received or to be received by a person, individually or on behalf of another;
- converting all or any part of a payment received on behalf of a beneficiary to a use other than for the use and benefit of that beneficiary.

*See* 42 U.S.C. §§ 1383a(a)(1-4).

## III. Legislative history and statutory authority

On October 30, 1972, Congress enacted legislation under the Act authorizing creation of Title XVI (Supplemental Security Income for the Aged, Blind, and Disabled). *See* Pub. L. No. 92-603, sec. 301. Title XVI sets forth the Act's primary criminal provisions for prosecuting SSI fraud. *See* 42 U.S.C. § 1383a(a)(1)-(4). The criminal penalties of Title XVI carefully spell out the Act's restraints on SSI fraud by specifying requirements for disclosure of specific events in the initial application process that identify facts that affect the applicant's right to payment of SSI benefits. Initially enacted as a misdemeanor statute (*See* Pub. L. No. 92-603, sec. 301), Congress amended Title XVI of the Act in 1994 to increase the penalty, making SSI fraud a felony. *See* Independence and Program Improvements Act

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of 1994, Pub. L. No. 103-296, § 206(c)(1), 108 Stat. 1464 (1994). The 1994 amendments served to conform the specific crime of SSI fraud to the criminal sanctions already found in Title II (42 U.S.C. § 408(a)(1)-(8)). The statute is broadly written, and is paraphrased below:

**A. Statutory authority: 42 U.S.C. §§ 1383a(a)(1)-(4)**

Section 1383a. Fraudulent acts; penalties; restitution

(a) Whoever—

(1) knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit...

(2) at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to any such benefit,

(3) having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit, or (B) the initial or continued right to any such benefit of any other individual in whose behalf he has applied for or is receiving such benefit, conceals or fails to disclose such event with an intent fraudulently to secure such benefit either in a greater amount or quantity than is due or when no such benefit is authorized, or

(4) having made application to receive any such benefit for the use and benefit of another and having received it, knowingly and willfully converts such benefit or any part thereof to a use other than for the use and benefit of such other person, shall be fined under Title 18, imprisoned not more than 5 years, or both.

See 42 U.S.C. § 1383a(a)(1)-(4).

**B. Eligibility and continuing reporting requirements for SSI**

Eligibility for Social Security benefits and the amount paid to eligible recipients can change with circumstances. Consequently, SSA has established specific criteria requiring SSI recipients to report changes in their circumstances. By doing so, SSA is able to increase its ability to monitor eligibility of SSI recipients, which enables SSA to maintain

a semblance of system integrity. Specifically, an SSI recipient must report: improvements in his medical condition; increase in work activity, including any increase in the amount of work; and amount of earnings. See 20 C.F.R. §§ 404.1588; 416.988; 416.708(h). In addition, SSA maintains specific reporting requirements for SSI recipients that are related to the nondisability standards of SSI. These special reporting requirements relate to a recipient's financial circumstances and family composition, both of which can change significantly at a moment's notice, and will, upon change, affect the amount of SSI benefits paid to a recipient. While SSA does not require a recipient of SSI to report benefit cost-of-living adjustments, other important events must be revealed to SSA when they occur. These include any:

- change in the make-up of household;
- increase or decrease in income;
- increase or decrease in the income of an ineligible spouse living at home, a parent living at home if the recipient is a child, or an ineligible child living at home. See 20 C.F.R. § 416.708(a)-(c);
- receipt or disposition of resources by a recipient, his or her ineligible spouse, or the recipient's parent if the recipient is a child and the parent is living at home;
- eligibility of a recipient for benefits other than SSI;
- death of a recipient's eligible spouse, ineligible spouse living at home, or any other person living at home. See 20 C.F.R. § 416.708(d), (e), (f)(1). In addition, an eligible spouse must report the death of anyone living in the household; an eligible child must report the death of a parent who was living at home; and, if a recipient has a representative payee, he or she must report the death of the payee. See 20 C.F.R. § 416.708(f)(2)-(5);
- changes in marital status, including the marriage, divorce, or annulment of marriage of a parent, if the recipient is a child. See 20 C.F.R. § 416.708(g);
- admission to or discharge from a hospital, skilled nursing facility, intermediate care facility, or private institution. See 20 C.F.R. § 416.708(k); and

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- termination of residency in the United States, whether voluntary or by deportation, and any other departure from the United States for thirty or more consecutive days or for a full calendar month. *See* 20 C.F.R. § 416.708(m)(n).

All SSI recipients, their eligible spouses and children, applicants awaiting a final determination of their claim, and representative payees, must make regular reports known as Continuing Disability Reviews. *See* 20 C.F.R. § 416.704(a). SSA requires that an SSI recipient complete and submit a Continuing Disability Review within ten days after the end of the month in which an event affecting the eligibility of the recipient occurs. The Continuing Disability Review may be written, mailed, or delivered; or communicated by telephone or in person. *See* 20 C.F.R. §§ 416.712; 416.714(a).

#### **IV. Charging decisions and elements of the crime (42 U.S.C. § 1383a(a)(1)-(4))**

The purpose of the SSI criminal provisions (42 U.S.C. § 1383a(a)(1-4)) is to maintain the integrity of the claims process and the SSI Program, as well as protecting SSI beneficiaries and the general public. In addition, among other things, the Federal Criminal Code generally prescribes fraud penalties as to acts involving false claims against the government and/or false or fraudulent statements made in matters before an agency. These false and/or fraudulent statements or actions can also be the result of omission, such as when a beneficiary or his representative payee fails to report a change in living conditions or circumstances. Because SSI is awarded solely on the basis of need and level of income, any adjustment in status of an SSI beneficiary as to marriage, a new source of income, incarceration, removal from custodial care, or the death of a parent or spouse, directly affects an individual's eligibility to receive SSI. An individual receiving SSI, or any person receiving SSI payments on behalf of any SSI recipient (such as a representative payee) is required by SSA, as a condition of receiving SSI payments, to report any change in circumstances that would affect the recipient's eligibility to receive SSI. To combat fraud that is inherent in the SSI system, Congress increased the penalties for such fraud from misdemeanor to felony status in 1994. *See* Pub. L. 103-296, § 206(c)(1), 108 Stat. 1464 (1994). The

penalty upon conviction for violation of the criminal provisions of the Title XVI of the Act may be a fine (\$250,000), imprisonment (five years), or both. The following is an analysis of each section of the Title XVI felony fraud provisions, including elements and a short case study:

#### **A. 42 U.S.C. § 1383a(a)(1)**

The elements required to prove a violation of § 1383a(a)(1) are:

- defendant knowingly and willfully makes or causes to be made;
- any false statement or representation of a material fact;
- in any application for any benefit.

*See* 42 U.S.C. § 1383a(a)(1).

Criminal liability under 42 U.S.C. § 1383a(a)(1) arises if an individual makes or causes to be made a false statement, or misrepresents a material fact, on any application for benefits.

Example 1. A defendant made false statements to the SSA in an application for payment of SSI benefits by stating that she had never before filed for benefits under any other name or Social Security Number (SSN) and had never used any SSN or name other than her own. In fact, the individual had created a false identity and used it to secure a second SSN, which she used to apply for SSI benefits.

Example 2. An individual applied for SSI and stated on the initial application and subsequent Reports of Continuing Disability Review that he had no resources or assets that total more than \$700, when in fact, the individual received a settlement on a personal injury suit that totaled \$75,000 prior to filing his initial application for SSI. This constitutes fraud.

In each example noted above, the individual can be charged with Social Security fraud under 42 U.S.C. § 1383a(a)(1), as well as making false statements to a government agency under 18 U.S.C. § 1001.

Example 3. On his initial application for SSI benefits, the applicant falsely stated that he was disabled due to a broken back, a bleeding ulcer, and hearing trouble, and that he had no income or resources. Based on his false application, SSA

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determined that applicant was disabled and began making SSI payments. The applicant later filed a second application for SSI benefits in which he also made several false statements and omissions, including:

- He did not disclose that he had two other SSNs.
- He did not disclose that he was receiving unemployment compensation.
- He did not disclose that his wife was receiving unemployment compensation.
- He falsely stated that he had not received any income for a period of time prior to the application.
- He did not disclose material personal resources, including a savings account.
- He did not disclose that he had received worker's compensation payments.
- He failed to reveal that he had purchased a grocery store, opened two bank accounts, and purchased five new automobiles.

Shortly thereafter, the applicant completed a Statement for Determining Continuing Eligibility for Supplemental Security Income Payments, in which he once again failed to reveal his use of other names and SSNs. He also did not disclose that he and his wife owned and operated a grocery store and that they were employed by, and earned money from, that grocery store. He also failed to disclose various assets, including bank accounts, life insurance policies, and automobiles. Based on the defendant's applications and his Statement for Determining Continuing Eligibility for Supplemental Security Income Payments, the applicant received SSI payments in the amount of \$38,919, along with state benefits in the amount of \$8,086. Additionally, because the applicant received federal SSI benefits, he was able to obtain Medicaid benefits in the amount of \$23,235. As a result of this scheme, a federal grand jury returned a seven-count indictment against the applicant, alleging mail fraud (the defendant had received the SSI and Medicaid payments through the United States mail), in violation of 18 U.S.C. § 1342; making false statements in an initial application for SSI benefits, in violation of 42 U.S.C. § 1383a(a)(1); and making false statements for use in determining the continuing right to SSI benefits, in violation of 42 U.S.C. § 1383a(a)(2). *See*

*United States v. Rahim*, No. 02-1405, 2002 WL 31898228 (7th Cir. Dec. 27, 2002). Rahim pled guilty to one count of mail fraud, was sentenced to twenty-four months imprisonment, and ordered to pay \$70,241.80 in restitution.

### **B. 42 U.S.C. § 1383a(a)(2)**

The elements required to prove a violation of § 1383a(a)(2) are:

- defendant knowing and willfully makes or causes to be made;
- any false statement or representation of a material fact;
- for use in determining rights to any benefit.

*See* 42 U.S.C. § 1383a(a)(2).

Criminal liability under 42 U.S.C. § 1383a(a)(2) arises if an individual makes or causes to be made a false statement, or misrepresents a material fact, used in determining entitlement to benefits. This usually occurs when an individual, while completing a Report of Continuing Disability Review or other SSA reporting document, makes any false statement that is material to a decision by SSA to continue to pay, or terminate, a claim for SSI benefits. For example, a false statement to SSA regarding marriage status, income, or cohabitation would be considered material to the decision-making process of SSA as to whether to continue to pay SSI benefits.

The applicant unsuccessfully applied for SSI benefits in 1991, leaving blank the sections in the application asking for information about a spouse. In April 1993 the applicant successfully reapplied, this time noting that she was married to, but had for years been estranged from, her husband. The 1993 application informed applicant that she "must tell Social Security every time there is a change in her circumstances." The application listed the types of changes that must be reported by defendant, including changes in marital status (described as marriage, divorce, separation, or the resumption of cohabitation after a separation) and changes in "things of value that you own"—for example, when "[y]ou buy or are given anything of value."

In May 1993 the defendant and her husband bought a house, the defendant did not inform the SSA of either the marriage or the purchase of the house, and she continued to receive SSI payments.

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In the fall of 1996 SSA was notified of the defendant's marriage and home ownership. In January 1997 the defendant went to an SSA office where she completed a Statement for Determining Continuing Eligibility for Supplemental Security Income Payments, in which she denied that there had been any change in her marital status and denied owning a home. Instead, she stated that she rented a home for \$300 per month, and told SSA that she was still married to, but separated from, her husband. As a result of the scheme, a grand jury returned a five-count indictment against the defendant, including one count of making false statements for use in determining the continuing right to SSI benefits, in violation of 42 U.S.C. § 1383a(a)(2), with all charges stemming from her repeated failures to inform the SSA of the fact that she had bought a house and was married to and living with her husband. *See United States v. Gardner*, No. 03-4018, 2003 WL 21940628 (4th Cir. Aug. 14, 2003). She was convicted on all counts.

A claimant for, or recipient of, SSI benefits may be held criminally liable for knowingly and willfully taking material actions intended to fraudulently secure benefits to which he is not entitled. *See POMS § SI 04070.020; available at* <http://policy.ssa.gov/poms.nsf/lnx/0504070020!opendocument>.

### **C. 42 U.S.C. § 1383a(a)(3)**

The elements required to prove a violation of § 1383a(a)(3) are:

- the defendant received Social Security benefits on his own or on behalf of another person;
- the defendant had knowledge of an event affecting his or the other person's initial or continued right to Social Security benefits payments;
- the defendant knowingly concealed or failed to disclose this event to the Social Security Administration; and
- the defendant concealed or failed to disclose this event to the Social Security Administration with the intent to fraudulently secure payment of Social Security Income benefits in an amount greater than was due the other person or when no payment to the other person was authorized.

*See* 42 U.S.C. § 1383a(a)(3).

Criminal liability under 42 U.S.C. § 1383a(a)(3) arises if an individual knowingly conceals a fact to secure a benefit to which he is not entitled. For example, a defendant, when completing questions about his work activities, falsely stated on an SSA form that he had not worked for four years and was disabled and unable to perform work. In truth, defendant was working at the time he completed the SSA form and had been employed full time for several years as a computer worker by the Internal Revenue Service. *See United States v. Allen*, No. CR 03-190-ABC (C.D. Cal. Jan. 21, 2003).

An "intent to defraud" is an intentional deception or misrepresentation which the individual knows to be false or which he does not believe to be true, but makes knowing that the deception could result in some unauthorized benefit to himself or some other person. *See POMS, supra*, at § GN 04105.005(B)(4). A person has "fraudulent intent" if he knows that he is legally obligated to disclose certain information and that, by withholding that information, he will receive greater payments than he is entitled to receive. The SSA may establish fraudulent intent if the claimant's behavior is so devious and uncharacteristic of an innocent person that a jury could infer that he must have known he was doing wrong. *See United States v. Phillips*, 600 F.2d 535 (5th Cir. 1979).

A defendant filed for and received Social Security disability benefits over a seven-year period. Unbeknownst to the government, the defendant obtained the benefits through false statements on her applications that she did not have any independent sources of income. To the contrary, she earned a living during the period in question by babysitting children who lived in her neighborhood. She also worked as a substitute teacher and, along with her husband, received proceeds from rental property. The defendant also failed to disclose that she co-owned several bank accounts. After a brief investigation, SSA discovered that the defendant had made numerous misrepresentations in her applications and terminated her disability benefits in July 1997. The defendant was convicted on five counts of theft of government property (Social Security disability benefits), in violation of 18 U.S.C. § 641; five counts of concealing and failing to disclose information, in violation of 42 U.S.C. § 1383a(a)(3); and two counts of making a false statement to obtain Social Security disability

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benefits, in violation of 42 U.S.C. § 1383a(a)(2). She was sentenced to a twenty-one month term of imprisonment and ordered to make restitution. *See United States v. Khatami*, 280 F.3d 907 (9th Cir. 2001); *see also United States v. Jackman*, No. 96-40069-01, 1996 WL 772607 (D. Kan. Dec. 30, 1996).

#### **D. 42 U.S.C. § 1383a(a)(4)**

The elements required to prove a violation of § 1383a(a)(4) are:

- defendant knowingly and willfully converts;
- a benefit, or any part of a benefit;
- received on for the use and benefit of another;
- to a use other than for the benefit of the other person.

*See* 42 U.S.C. § 1383a(a)(4).

Criminal liability under 42 U.S.C. § 1383a(a)(4) arises if an individual knowingly and willfully converts to an unauthorized use a benefit that he has accepted as payee on another's behalf. For example, a criminal violation occurs if a defendant applies (a formal application to become Representative Payee is required by SSA) to become the Representative Payee for the use and benefit of another (spouse, parent, grandparent, child, friend), and, having received payment(s) of a benefit from SSA on behalf of another, knowingly and willfully converts the payment(s) to his own use, rather than for the use and benefit of the intended beneficiary. A common violation occurs when a Representative Payee intentionally conceals the death of another in order to continue to receive and spend the benefits payments made by SSA to the Representative Payee.

In 1989, 1990, and April 1992 the defendant applied to SSA for SSI benefits. On each occasion, her application was rejected because her husband's income was too high. The defendant again applied in July 1992 (prior to that application, an Administrative Law Judge had determined she was disabled). That application was again denied due to the defendant's husband's income. On or about April 1995, when defendant filed a fifth SSI application, she stated to the SSA that her husband had moved out of their house on April 1, 1995. She stated that her husband would continue to pay bills, but the resulting loss of income qualified her for SSI. She began to receive

it on May 1, 1995. Defendant was indicted for failing to disclose an event affecting her right to SSI (42 U.S.C. § 1383a(a)(4)) and embezzlement. *See United States v. Martinez*, No. 02-41461, 2003 WL 22002566 (5th Cir. Aug. 21, 2003).

#### **V. Sample indictments**

The following are samples of indictments of SSI fraud using the Title XVI felony fraud provisions.

##### **A. 42 U.S.C. § 1383a(a)(1)**

COUNT \_\_\_\_\_

[42 U.S.C. § 1383a(a)(1)]

On or about September 4, 1999, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_ knowingly and willfully made a false statement and representation of material fact for use by the Social Security Administration in determining rights to Social Security Supplemental Security Income Benefits payments. Specifically, when completing an initial Application For Supplemental Security Income, defendant \_\_\_\_\_ falsely stated that he was not working and had not worked since January 1990. In truth and in fact, as defendant well knew, he was working as a \_\_\_\_\_, where he had been employed since 1988.

##### **B. 42 U.S.C. § 1383a(a)(2)**

COUNT \_\_\_\_\_

[42 U.S.C. § 1383a(a)(2)]

On or about January 16, 2004, in Los Angeles County, within the Central District of California, defendant, \_\_\_\_\_, knowingly and willfully made a false statement and representation of material fact for use by the Social Security Administration in determining rights to Supplemental Security Income payments. Specifically, on a Report of Continuing Eligibility Interview (SSA Form 454-BK) dated January 16, 2004, defendant \_\_\_\_\_ answered "no" to question #11, which asked: "since you became disabled, have you done work?" In truth and in fact, as defendant \_\_\_\_\_ well knew, at the time he completed the SSA Form he was working

full-time as a repair technician while using his son's social security number (XXX-XX-XXXX).

**C. 42 U.S.C. § 1383a(a)(3)**

COUNT \_\_\_\_\_

[42 U.S.C. § 1383a(a)(3)]

On or about January 6, 1999, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, aka \_\_\_\_\_, in a matter within the jurisdiction of the Social Security Administration, having knowledge of the occurrence of an event affecting his initial or continued right to payment of Title XVI Supplemental Security Income benefits, concealed and failed to disclose such event with the intent fraudulently to secure payment in an amount greater than was due him, or when no payment was authorized. Specifically, on a Statement for Determining Continuing Eligibility for Supplemental Security Income (SSA Form 8202-F6) defendant \_\_\_\_\_ concealed from the Social Security Administration that he was employed and receiving Title II Social Security Disability Income Benefits payments under a second identity and Social Security Number in order to deceive the Social Security Administration into making benefit payments when he was otherwise ineligible to receive such payments.

**D. 42 U.S.C. § 1383a(a)(4)**

COUNT \_\_\_\_\_

[42 U.S.C. § 1383a(a)(4)]

Beginning in or around April 1999, and continuing without interruption until in or around September 1999, in Los Angeles County, within the Central District of California, defendant, \_\_\_\_\_, in a matter within the jurisdiction of the Social Security Administration, having made application to receive Supplemental Security Income Benefits payments as Representative Payee for the use and benefit of her son, \_\_\_\_\_, and having received such benefits payments, knowingly and willfully converted the benefits payments for her own use rather than for the use and benefit of her son. Specifically, defendant \_\_\_\_\_, while acting as Representative Payee for her son, \_\_\_\_\_, failed to disclose \_\_\_\_\_'s death in order to

continue to receive and spend Supplemental Security Income Benefits payments paid to \_\_\_\_\_ by the Social Security Administration. By such action, defendant \_\_\_\_\_ stole approximately \$ \_\_\_\_\_ in Supplemental Security Income Benefits payments to which she knew that she was not entitled.

**VI. Conclusion**

The Supplemental Security Income program can be properly characterized as a lifeline to many needy Americans, who would otherwise be unable to survive without the payments. Access to SSI must be protected. Millions of dollars are lost each year from fraud perpetrated against SSI by unscrupulous claimants and/or their representatives, and prosecution of SSI fraud remains one of the most important priorities of the United States Attorneys' offices in cooperation with the Social Security Administration Office of Counsel to the Inspector General. The opportunity for fraud is enhanced because SSA is an agency that has, historically, made extraordinary efforts to ensure accessibility to its benefits programs by qualified Americans. Aggressive prosecution of Social Security fraud is essential to maintaining and preserving the integrity of the Social Security benefits programs, and to insure that millions of Americans who rely on one or more of the SSA programs continue to receive their lifeline. ❖

**ABOUT THE AUTHOR**

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# Prosecuting Social Security Recipients for False Endorsement of Treasury Checks

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## I. Introduction

A rarely used theory of liability may enhance prosecutions under certain statutes criminalizing false statements made to the federal government. The theory is simple—the endorsement of a United States Department of Treasury (Treasury) check, when the signer knows he or she is not eligible or entitled to receive the funds, constitutes an actionable false statement that the individual is entitled or eligible to receive the funds. This theory has been endorsed in reported opinions under 18 U.S.C. § 1001, and under 42 U.S.C. § 408(a)(3), an antifraud provision of the Social Security Act (the Act).

## II. Background: Social Security Programs and the false statement provisions—42 U.S.C. § 408 and 18 U.S.C. § 1001

Title II of the Act sets out the Old Age Disability and Security Income program. It provides for old-age, survivor, and disability benefits for insured individuals irrespective of financial need. *See* 42 U.S.C. §§ 402, 423. Insured status is acquired by earning "quarters of coverage" through covered employment. *Id.* at §§ 413, 414. Old-age benefits are the well-known Social Security retirement benefits. *Id.* at § 402. Survivor's benefits are paid to certain family

members of a deceased worker who paid Social Security taxes. *Id.* Disability benefits are paid to insured individuals who meet the statutory definition of disability, i.e., an inability to engage in any substantial gainful activity. *Id.* at §§ 402, 423.

42 U.S.C. § 408(a)(3) makes it a felony to "at any time make[] or cause[] to be made any false statement or representation of a material fact for use in determining rights to payment under" Title II of the Social Security Act. In contrast to the antifraud provision of § 408(a)(3), 18 U.S.C. § 1001 makes it a felony to:

- (1) falsif[y], conceal[ ], or cover[ ] up by any trick, scheme, or device a material fact;
- (2) make[ ] any materially false, fictitious, or fraudulent statement or representation; or
- (3) make[ ] or use[ ] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States. Violations of 42 U.S.C. § 408(a)(3) and 18 U.S.C. § 1001 are punishable by a fine under Title 18 or imprisonment for not more than five years, or both.

Materiality is an essential element of each offense and, under both statutes, courts generally apply identical standards for determining materiality. A material fact is one that has a natural tendency to influence, or is capable of influencing, the Social Security Administration

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(SSA) or the government agency or department in question. *United States v. Price*, No. 00-10151, 2001 WL 488896 (9th Cir. May 8, 2001) (materiality under 42 U.S.C. § 408(a)(3)); *United States v. Valdez*, 594 F.2d 725, 728 (9th Cir. 1979) (materiality under 18 U.S.C. § 1001).

Reported opinions interpreting the essential elements of an offense under 18 U.S.C. § 1001 and 42 U.S.C. § 408(a)(3) reveal the extent to which the two provisions contrast. Proof of five elements is essential to sustain a conviction under 18 U.S.C. § 1001: "a statement, falsity, materiality, specific intent, and agency jurisdiction." *United States v. Boone*, 951 F.2d 1526, 1544 (9th Cir. 1991) (citing *United States v. Lange*, 528 F.2d 1280, 1287 (5th Cir. 1976)). In contrast, by its terms, 42 U.S.C. § 408(a)(3) requires only proof that the defendant made a false statement or representation of a material fact for use in determining rights to payment under Title II of the Act.

While specific intent is a crucial element of an offense under 18 U.S.C. § 1001, *Boone*, 951 F.2d at 1545, courts appear to have split on whether 42 U.S.C. § 408(a)(3) is a specific intent crime. Citing the omission of any statutory language regarding intent, as compared to other subsections under 42 U.S.C. § 408, the Sixth Circuit held that § 408(a)(3) does not include the element of specific intent to make a false representation. *United States v. Adair*, No. 88-1264, 1988 WL 114791 (6th Cir. Oct. 31, 1988) (citing *United States v. Morrison*, 43 F.R.D. 516, 518 (N.D. Ill. 1967)). Indeed, in contrast to 42 U.S.C. § 408(a)(3), § 408(a)(4) makes it a felony to:

hav[e] knowledge of the occurrence of any event affecting (1) his initial or continued right to any payment under this title [42 U.S.C. § 408], or (2) the initial or continued right to any payment of any other individual in whose behalf he has applied for or is receiving such payment, conceal[], or fail[] to disclose such event with an intent fraudulently to secure payment either in a greater amount than is due or when no payment is authorized....

However, in contrast to the Sixth Circuit in *Adair*, the Eighth Circuit has stated (without significant discussion) that specific intent is an essential element of a violation under 42 U.S.C. § 408(a)(3). *United States v. Cacioppo*, 517 F.2d 22, 23 (8th Cir. 1975). Given the text of 42 U.S.C. § 408(a)(3), especially as it compares to other subsections under § 408, it would appear that the

Sixth Circuit approach is better supported by the wording of the statute.

Consequently, the immediate advantage to charging a 42 U.S.C. § 408(a)(3) violation is that proof of knowledge that the false statement will effect initial or continued rights to payment under Title II may not be required.

### **III. Treasury check endorsements, made with knowledge that the endorser is not entitled to or eligible for the funds, constitute false statements**

#### **A. Check endorsements as false statements in criminal prosecutions**

In *Morrison*, 43 F.R.D. at 517, one count of a ten count information charged the defendant with willfully and knowingly concealing and failing to disclose the death of her mother to the SSA, with intent to fraudulently secure payment of widow's benefits when no such payments were authorized, in violation of 42 U.S.C. § 408(a)(4). The remaining nine counts charged the defendant with making and causing to be made false statements and representations of a material fact by endorsing Title II benefit checks, thereby falsely representing the rights of her deceased mother to receive the payments, in violation of 42 U.S.C. § 408(a)(3). *Id.*

The defendant, among other things, challenged the legal sufficiency of the nine counts pertaining to the check endorsements. However, the defendant did not argue that a Treasury check endorsement could not equate to a false statement made for use in determining rights to payment under Title 42, as prohibited under 42 U.S.C. § 408(a)(3). Instead, the defendant argued that the counts were duplicitous, a defense easily dismissed by the court, which observed that "[c]ounts two through ten are not duplicitous since each alleges a separate offense." *Id.* at 518. Consequently, the District Court for the Northern District of Illinois held that the prosecutor's allegation that the defendant made and caused to be made false statements and representations of a material fact by endorsing several checks, thereby falsely representing the rights of her deceased mother to receive Title II benefits, stated a cause of action under 42 U.S.C. § 408(a)(3).

Check endorsements have also been treated as false statements in at least one reported case under

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18 U.S.C. § 1001. In *Gilbert v. United States*, 359 F.2d 285 (9th Cir. 1966), the defendant, an accountant filing tax returns on behalf of others, was charged with violating 18 U.S.C. § 1001 because he endorsed tax refund checks, a matter within the jurisdiction of a government agency, with the client's name "R. Milo Gilbert, Trustee," when, in fact, he had not informed the clients that they qualified for a refund and did not remit the refund to the clients. The defendant asserted that no falsity was involved with the Treasury check endorsements because the endorsements were precisely what they purported to be—he was, in fact, the authorized tax preparer when he endorsed the checks. *Id.* at 286.

Rejecting the defendant's contention and upholding his conviction, the Ninth Circuit stated that the check endorsements constituted false statements because the defendant's "endorsements themselves constituted representations that he was duly authorized to make them." *Id.* Moreover, the Ninth Circuit also dismissed the defendant's argument that the false representations, if any, were made to a bank, and not to the government directly, as required under 18 U.S.C. § 1001. The court stated that 18 U.S.C. § 1001 contains no language requiring the false statement be made directly to the federal government. The Ninth Circuit noted that "[the defendant] certainly was aware that the endorsement of the checks was the first crucial step in their journey to the Treasury Department where they would be ultimately presented for payment." *Id.* at 287.

*Gilbert* and *Morrison* have both been cited with approval. See *United States v. Adair*, No. 88-1264, 1988 WL 114791 (6th Cir. Oct. 31, 1988) (citing *Morrison*); *United States v. Yermian*, 708 F.2d 365 (9th Cir. 1983) (citing *Gilbert*). Nevertheless, it appears that *Gilbert* and *Morrison* may represent the sole published authority specifically supporting the theory that a Treasury check endorsement made with knowledge that the signer is not entitled to or eligible for the funds, constitutes an actionable false statement under the criminal false statement provisions of the U.S. Code.

## **B. Comparison of other criminal prosecutions involving wrongful endorsement of Treasury checks**

Cases involving the wrongful and knowing receipt of federal funds through the endorsement

of Treasury checks are more often prosecuted under 18 U.S.C. § 641, which "deals generally with conversion of government property." *United States v. Irvin*, 67 F.3d 670 (8th Cir. 1995). Section 641 makes it a crime to

Embezzle[ ], steal[ ], purloin[ ], or knowingly convert[ ] to his use or the use of another, or without authority, [to] sell[ ], convey[ ] or dispose[ ] of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or...[to] receive[ ], conceal[ ], or retain[ ] the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted.

18 U.S.C. § 641. A § 641 violation is a felony only if the value of the property converted exceeds \$1,000; otherwise it is charged and punished as a misdemeanor.

In *Irvin*, the defendant received a Treasury check in the amount of \$836,939.19. He knew that this check was not correct and that, upon his discharge from the United States Army, the government actually owed him only \$183.69. *Id.* at 671. Irvin deposited the check in his personal savings account and used the proceeds to pay off his father's mortgage, purchase two vehicles, and for other transactions. *Id.* Irvin claimed that he believed that the Treasury check was a "miraculous answer to his prayers" rather than a government mistake. *Id.* Stating that § 641 could apply even when the perpetrator does not obtain the funds through fraud, the Eighth Circuit held that the defendant violated § 641 for knowingly converting federal funds. *Id.* at 672. Under the theories espoused in *Gilbert* and *Morrison*, it appears that the government might also have proceeded under 18 U.S.C. § 1001.

Likewise, in *United States v. McRee*, 7 F.3d 976 (11th Cir. 1993), the defendant received and deposited a Treasury check she knew had been issued in error by the Internal Revenue Service, in the amount of \$359,380.25. The defendant then engaged in a series of transactions designed to transform the money into "spendable cash," engaging in over thirty checking transactions involving amounts less than \$10,000.00, in order to avoid applicable bank reporting requirements for transactions involving more than \$10,000.00.

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In connection with this scheme, the defendant was charged with violating 18 U.S.C. § 641, among other statutes. She argued that she could not be convicted under § 641 because she did not obtain the Treasury check through fraud and that the funds ceased to constitute federal funds upon issuance of the Treasury check. The Eleventh Circuit held that the Treasury check represented federal funds, and the government, at all times, retained a property interest in the money. *Id.* at 981. The Eleventh Circuit further held that conversion in violation of § 641 may occur even where the initial possession of the funds is entirely lawful. *Id.* Again, under the theories espoused in *Gilbert* and *Morrison*, it appears the government could also have proceeded under 18 U.S.C. § 1001.

The benefit of proceeding under 18 U.S.C. § 1001 is the absence of a monetary requirement. The Ninth Circuit has stated:

The offense of making a false statement does not include monetary value as an element. Compare 18 U.S.C. § 1001 with 18 U.S.C. § 641 (setting \$1,000 cut-off for felonies). It is therefore immaterial whether the false statement involved more or less than \$1,000. *Cf. United States v. Medina de Perez*, 799 F.2d 540, 542 (stating that pecuniary loss is not an element of § 1001).

*United States v. Headdress*, No. 00-30303, 2001 WL 1006097 (9th Cir. Aug. 13, 2001). Consequently, a misdemeanor offense under § 641, if it involves a false statement, may be charged as a felony under 18 U.S.C. § 1001.

It is clear, of course, that even when a criminal provision of the U.S. Code provides for a misdemeanor and is more closely related to the facts of a criminal act, the prosecutor is free to proceed under an available felony provision of Title 18, if the prosecutor so chooses.

It is well settled that "when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). See also *Garrett v. United States*, 471 U.S. 773, 778 (1985); *United States v. Cavada*, 821 F.2d 1046, 1048 (5th Cir. 1987). The only exception arises where Congress clearly intended that one statute supplant another. The fact that one statute is more specific than the other is not sufficient. See *United States v. Zabel*, 702 F.2d

704, 707-08 (8th Cir. 1983). Nor does the fact that one statute prescribes a felony and the other prescribes a misdemeanor affect the prosecutor's authority to choose among statutes. See *Cavada*, 821 F.2d at 1048-49; *United States v. Hopkins*, 916 F.2d 207, 212 (9th Cir. 1990); *United States v. Barrett*, 837 F.2d 933 (10th Cir. 1988); *United States v. Edmonson*, 792 F.2d 1492 (9th Cir. 1986). This conclusion has also been reached in prosecutions under the Social Security Act. *United States v. Smith*, 523 F.2d 771, 780 (5th Cir. 1975).

Note. On July 15, 2004, President Bush signed into law H.R. 1731, the Identity Theft Penalty Enhancement Act, Pub. L. No. 108-275. Section 4 of this new law amends 18 U.S.C. § 641 to permit the aggregation of amounts, from all counts for which a defendant is convicted in a single case, for purposes of calculating the value of stolen property.

### **C. Check endorsements constitute false statements in a civil prosecution under the Social Security Act**

In a recent administrative matter, *In re Clara Sloan*, CR No. 1081, 2003 HHSDAB LEXIS 116 (Sept. 10, 2003), an Administrative Law Judge (ALJ) of the Health and Human Services Departmental Appeals Board (DAB) endorsed the theory that a signature on a Treasury check constitutes a false statement to the SSA under 42 USC § 1320a-8, the civil false statement provision under the Act, if the endorser knew or should have known that he was not eligible to receive the funds.

42 U.S.C. § 1320a-8 prohibits individuals from

mak[ing], or caus[ing] to be made, a statement or representation of a material fact for use in determining any initial or continuing right to or the amount [of Title II benefits] that the person knows or should know is false or misleading or knows or should know omits a material fact or makes such a statement with knowing disregard for the truth.

A material fact is one that the Commissioner of Social Security may consider in evaluating whether an applicant is entitled to benefits under Title II. 42 U.S.C. § 1320a-8(a)(2). A penalty of up to \$5,000 may be imposed for each false

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statement. In addition, an assessment may be imposed in an amount up to twice the amount of benefits received as a result of the false statement or representation.

Sloan received Title II survivor's benefits as representative payee for her disabled son and also received mother's benefits for herself based on her role as caretaker of her son. 20 C.F.R. §§ 404.339, 404.350, and 404.2010. Under Title II of the Act, no benefits may be paid to a beneficiary during any month the beneficiary is incarcerated. 20 C.F.R. § 404.468. Because Sloan's benefits were derived solely from her role as caretaker for her son, any incarceration of her son would extinguish her eligibility for mother's benefits as well. *Id.*

Sloan's son was incarcerated on two separate occasions during the 1980's and 1990's, and because she failed to notify the SSA of the incarceration, Sloan received over \$45,000.00 in Title II benefits for which she and her son were not eligible.

The SSA Office of the Inspector General (OIG) received an allegation regarding Sloan, and eventually charged Sloan with fourteen violations of 42 U.S.C. § 1320a-8, based on fourteen benefit checks signed by Sloan. (The failure to notify SSA constituted a felony under 42 U.S.C. § 408(a)(4), but did not constitute a violation of 42 U.S.C. § 1320a-8.)

Sloan requested a hearing and admitted she signed the checks. She claimed she did not realize that the son's incarceration extinguished eligibility under the Title II benefits program. A Social Security employee testified that Sloan received yearly notification of the requirement to report any incarceration of the beneficiary and further testified that SSA considered each check endorsement as a statement that the beneficiary (or representative payee) continued to be eligible to receive the funds.

SSA/OIG argued that whether checks continue to be endorsed is certainly a fact that the Commissioner may consider in making a continuing eligibility determination, because each signature represents the beneficiary's assertion that eligibility continues. SSA/OIG further argued that the yearly notification received by Sloan showed that Sloan knew, or should have known, her duty to report the incarceration and return any benefits received. The ALJ agreed and imposed a civil monetary penalty in the amount of \$35,000, as requested by the SSA/OIG. Ms. Sloan appealed,

and the DAB declined to disturb the ALJ's order, as did the Commissioner of Social Security. Ms. Sloan is pursuing an appeal to the Court of Appeals for the Ninth Circuit.

#### IV. Future considerations

Of course, as electronic banking continues to become more prevalent, the instances of issued and endorsed physical Treasury checks may decline. On April 26, 1996 President Clinton signed into law the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1358 (codified at 31 U.S.C. § 3332). This law requires all federal payments to be issued electronically by January 2, 1999, with exceptions to be determined by Treasury in cases of hardship and other circumstances. 31 U.S.C. § 3332(f). Treasury's use of direct deposit into bank accounts has increased as a portion of all federal benefit payments from fifty-eight percent in 1996 to seventy-seven percent in 2002. Michael S. Barr, *Banking the Poor*, 21 YALE J. ON REG. 121, 185 (2004). The 1996 Welfare Reform law mandated that states convert from paying federal welfare benefits in the Temporary Assistance for Needy Families program by check to making such payments electronically. The Personal Responsibility & Work Opportunity Reconciliation Act of 1996 (Welfare Reform Law), Pub. L. No. 104-193, 110 Stat. 2105, 2324 (1996).

Unfortunately, the knowing receipt of federal benefits by electronic funds transfer or direct deposit does not appear, under any theory, to amount to an actionable false statement. In *United States v. Spear*, 734 F.2d 1 (8th Cir. 1984), the defendants appealed their convictions for conversion of Social Security benefits under 18 U.S.C. § 641, and other crimes. Regarding the § 641 charge, the defendants continued to receive a deceased relative's Social Security benefits by direct deposit into an account held jointly with the beneficiary. In dicta, the Eighth Circuit strongly suggested an action under 42 U.S.C. § 408 of the Act would not lie for the wrongful receipt of benefits by direct deposit. "[T]he conduct for which the [defendants] were prosecuted plainly does not fit within any of the provisions of section [42 U.S.C. § 408]." *Id.* at 2.

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## V. Conclusion

Charging a Treasury check endorsement as an actionable false statement—a false statement that the signer is entitled to or eligible to receive the funds—can provide an alternative means of prosecution under 18 U.S.C. § 1001 and 42 U.S.C. § 408 in circumstances that are otherwise problematic. In connection with the Act, proceeding under the signed check theory can avoid problems of proof that may arise in other contexts, especially if the defendant's false statements to SSA are arguably ambiguous, or if the beneficiary made no statements to the SSA during the period of improper receipt of benefits. Moreover, many times a beneficiary will claim that SSA was fully informed of facts that would alter or terminate eligibility, but continued to send the benefit checks, which the beneficiary continued to receive, endorse, and negotiate. In such instances, the check endorsement may constitute a later false statement of continuing eligibility to SSA.

Under Title 18 of the U.S. Code, charging violations of § 1001 rather than § 641, focusing on the Treasury check endorsements instead of the possible charge of conversion, can permit the illegal receipt of federal funds to be charged as a felony rather than a misdemeanor in circumstances where the check amount does not meet the felony threshold under § 641.

Legislation adopted in the past decade has required the federal government to increase use of electronic funds transfers in place of Treasury checks. As banking practices advance, it is likely that the use of electronic funds transfers will increase, replacing Treasury checks to a great extent. In order to prosecute the illegal receipt of federal funds effectively, it may be advisable to formulate new legislation to specifically criminalize the knowing receipt of federal funds improperly obtained through electronic funds transfers. In the meantime, strengthening 18 U.S.C. § 641 to permit the aggregation of all converted amounts for which a defendant is convicted, for purposes of calculating the value of stolen property, will allow a continuing pattern of conversion of small amounts to be charged as a felony. ❖

## ABOUT THE AUTHOR

❑ **Judith Ringle** is a general attorney for the Social Security Administration Office of the Inspector General, where she has been employed for the past eight years. Prior to her tenure as a general attorney, she served as Attorney-Advisor, Trial Attorney, and Counsel to the Inspector General for the Commodity Futures Trading Commission. ❖

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# Prosecuting Representative Payee Fraud: Protecting the Needy from Predators

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## I. Introduction

When the Social Security Administration (SSA) determines that a beneficiary cannot manage his Title II or Supplemental Security

Income (SSI) benefits, SSA selects a representative payee, who must use the payments for the beneficiary's needs and is responsible for receiving and spending benefits on the beneficiary's behalf. The representative payee also has the authority to decide how benefits will be spent on behalf of the beneficiary. About 5.3 million representative payees manage payments for approximately 6.7 million beneficiaries for all

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of SSA's Title II programs, while approximately 2.3 million recipients of Title XVI SSI benefits have representative payees. *See* Testimony of Patrick P. O'Carroll, Jr., Acting Inspector General/SSA, U.S. House Committee On Ways and Means, Subcommittees on Human Resources, *Fraud and Abuse in the Supplemental Security Income Program*, (May 20, 2004), available at [http://www.ssa.gov/oig/communications/testimony\\_speeches/05202004testimony.htm](http://www.ssa.gov/oig/communications/testimony_speeches/05202004testimony.htm). In managing the representative payee process, SSA strives to provide appropriate safeguards to ensure that the individuals chosen meet their responsibilities to the beneficiaries they serve. *See, e.g., SSA's Representative Payee Program: Safeguarding Beneficiaries From Abuse, Hearings Before the Special Committee on Aging*, U.S. Senate, 101st. Cong. 1st. Sess., S. Hrg. No. 101-182 (June 6, 1989), Consultant's Report at 7-8, note 5.

## II. Legislative history

### A. Title II programs

The Social Security Act (the Act) was enacted as Pub. L. No. 74-271, 49 Stat. 620 (1935), and approved on or about August 14, 1935. The Act has been amended, in part, a number of times. SSA was established and approved as an independent agency on or about August 15, 1994, by Pub. L. No. 103-296, § 101, 108 Stat. 1464 (1995). A Commissioner of Social Security was approved and made responsible for the exercise of all powers and the discharge of all duties of SSA. As a statutory agency, SSA was given responsibility for administering benefits programs under Title II (42 U.S.C. §§ 401-434), and Title XVI (42 U.S.C. §§ 1381-1383a) of the Social Security Act of 1935 (42 U.S.C. §§ 301-1399).

Title II of the Act, also known as the Old Age, Survivor's, and Disability Insurance (OASDI) and Disability Insurance (DI) benefits programs, are primarily responsible for monthly benefits to covered workers who have reached the age of eligibility (sixty-two) and have retired. Since its initial enactment in 1935, the Act has been frequently modified, and has added other types of benefits that protect and cover workers who become severely disabled before reaching retirement age. However, the Act's original purpose, "to ameliorate...the rigors of life," the tragic consequences of old age, disability, loss of earnings power, and dependency on private or

public charity, remains the same. *See Dvorak v. Celebrezze*, 345 F.2d 894, 897 (10th Cir. 1965).

Title II also contains the Act's primary criminal provisions (cited as 42 U.S.C. § 408(a)(1)-(8)), which include language that carefully spells out the Act's restraints on representative payee fraud. Specifically, 42 U.S.C. § 408(a)(5) provides prosecutors with a felony charge for prosecution of representative payees under the various Title II programs by requiring disclosure of specific events and identification of facts that affect the right to payment and use of benefits by a representative payee on behalf of another.

### B. Title XVI Supplemental Security Income (SSI)

Title XVI of the Act, also known as Supplemental Security Income (SSI), was enacted in 1972 as part of Pub. L. No. 92-603, and has been amended by Pub. L. Nos. 7-35, 97-98, 97-123, 97-248, 97-377, and 97-424; 42 U.S.C. §§ 1381-1383c; and 42 U.S.C. §§ 1384-1385. SSI is the first federally administered cash assistance program in the United States made available to the general public. SSI is designed to provide a floor of income for the aged, blind, or disabled who have little or no income and resources. The program establishes that payment may be received as a right by those United States citizens, or legally admitted aliens residing in the United States, who qualify as aged, blind, or disabled, and who meet income and resource criteria. No work credits are necessary for entitlement under the SSI program.

Like Title II, Title XVI contains criminal provisions (cited as 42 U.S.C. § 1383a(a)(1)-(4)), such as 42 U.S.C. § 1383a(a)(4), which can be used to prosecute representative payees under the SSI program for knowingly and willfully converting SSI benefits "to a use other than for the use and benefit of" the SSI recipient.

## III. Statutory authority for the representative payee program

The Representative Payee Program, enacted by Congress in 1936, authorized SSA to pay recipients' benefits to a "representative payee," if and when doing so would be in the best interest of the intended beneficiary. *See* 42 U.S.C. §§ 405(j)(1)(A), 1631(a)(2)(A). A representative

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payee is an individual or organization authorized to receive and manage benefits on behalf of someone deemed incapable of doing so on his own. Specifically, Title II of the Act states:

(j) Representative payees

If the Commissioner of Social Security determines that the interest of any individual under this subchapter would be served thereby, certification of payment of such individual's benefit under this title may be made, regardless of the legal competency or incompetency of the individual, either for direct payment to the individual, or for his or her use and benefit, to another individual, or an organization. . . .

42 U.S.C. §§ 405(j)(1)(A).

Title XVI § 1631(a)(2)(A) of the Act (parallel cite is 42 U.S.C. § 1383(a)(1)-(4)) states:

(i) Payments of the benefit of any individual may be made to any such individual or to the eligible spouse (if any) of such individual or partly to each.

(ii)(I) Upon a determination by the [Secretary] that the interest of such individual would be served thereby, such payments shall be made, regardless of the legal competency or incompetency of the individual or eligible spouse, to another individual, or an organization, with respect to whom the requirements of subparagraph (B) have been met (in this paragraph referred to as such individual's "representative payee") for the use and benefit of the individual or eligible spouse.

(ii)(II) In the case of an individual eligible for benefits under this subchapter by reason of disability, the payment of such benefits shall be made to a representative payee if the Commissioner of Social Security determines that such payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as determined by the Commissioner) and the individual is incapable of managing such benefits.

For parallel cites see 42 U.S.C. §§ 1383(a)(2)(A)(i), 1383(a)(2)(A)(ii)(I), and 1383(a)(2)(A)(ii)(II) respectively.

The Code of Federal Regulations explains the function of representative payees:

A representative payee may be either a person or an organization selected by us [the Social Security Administration] to receive benefits on behalf of a beneficiary. A representative payee will be selected if we believe that the interest of a beneficiary will be served by representative payment rather than direct payment of benefits. Generally, we appoint a representative payee if we have determined that the beneficiary is not able to manage or direct the management of benefit payments in his or her interest.

20 C.F.R. § 404.2001(a).

#### **IV. Qualifications and guidelines for selecting a representative payee**

SSA is responsible for appointing, as representative payee, the best qualified party, including an individual, agency, organization, or institution, available and willing to serve as the beneficiary's payee. *See SSA Programs and Operations Manual (POMS), GN 00502.100(A), GN 00502.130, available at <http://policy.ssa.gov/poms.nsf/poms>. Before appointing a representative payee, SSA must find the beneficiary incapable of managing, or directing the management, of his own benefit payment. POMS, GN 00502.020. The qualifications and guidelines for the Representative Payee Program are codified in both Title II and Title XVI. SSA has delegated the responsibility of identifying and administering representative payees through a carefully-crafted process designed to select the representative payee best suited to manage the funds of a beneficiary when it is determined that the individual is unable to manage his own affairs. *See* 42 U.S.C. §§ 405(j)(1)(A), 1631(a)(2)(A). *See also* POMS, GN 00502.100(A).*

##### **A. Beneficiaries who must have a representative payee**

SSA has identified certain individuals who, when receiving benefits from any Social Security Title II or Title XVI program, must have a representative payee appointed to manage their funds. These individuals include:

- most children under the age of eighteen;
- legally incompetent adults; and

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- anyone determined by SSA to be incapable of managing or directing the management of his funds.

*See* 20 C.F.R. § 404.2021.

## **B. Who may qualify to serve as a representative payee**

Generally, SSA will approve most applicants who wish to become a representative payee, including the following:

- someone (other than a convicted felon) who is concerned with the welfare of the beneficiary, usually a parent, spouse, close relative, guardian, or friend;
- an institution such as a nursing home or health care provider;
- a public or nonprofit agency or financial organization; or
- providers or administrative officers at homeless shelters.

*See* 20 C.F.R. § 404.2021.

Moreover, before appointing a representative payee, SSA must evaluate medical or other types of evidence about the recipient's capability of managing his SSA benefits. In deciding whether there is a need for a representative payee, SSA will consider lay, medical, and legal evidence. Lay evidence must be supplied in all cases, and medical evidence must be given whenever possible. Legal evidence is required when there is an allegation of legal incompetency. *See* 20 C.F.R. § 404.2015; POMS, GN 00502.020, available at <http://policy.ssa.gov/poms.nsf/poms>. Under both Title II and Title XVI (SSI) programs, an applicant for selection as a representative payee must disclose to SSA his relationship to, or responsibility for, the care of the beneficiary before any funds will be paid. *See* 20 C.F.R. § 404.2025(a) (Title II); 20 C.F.R. § 416.625(a) (Title XVI). This is accomplished by completing an application on Form SSA-11-BK to serve as payee.

Form SSA-11-BK must be completed in a face-to-face interview. During the interview of a representative payee applicant, SSA must:

- require the representative payee applicant to submit documented proof of identity;

- verify the Social Security account number or employer identification number of the applicant;
- determine whether the applicant has been convicted of a Social Security felony under either 42 U.S.C. § 408 or § 1332 (*See* 42 U.S.C. §§ 408, 1011, or 1383a); and
- determine whether the applicant has ever been dismissed as a representative payee for misuse of a beneficiary's funds. *See* 42 U.S.C. § 405(j)(2).

*See* POMS, GN 00502.115(A), available at <http://policy.ssa.gov/poms.nsf/poms>.

During an interview with SSA, prospective representative payees are instructed on their duties and responsibilities, and are required to sign an acknowledgment, under penalty of perjury, that they understand their obligation to the beneficiary. Once incapability has been established, SSA will select a representative payee from among interested persons, agencies, or institutions, giving special consideration to whether the proposed representative is in a position to look after the beneficiary's needs. *See* 20 C.F.R. §§ 404.202; 416.620. The selection of a representative payee is an exercise of discretionary authority; thus SSA has no duty to independently investigate or verify information provided by the potential representative payee. *See* *Watson v. Califano*, 487 F.Supp. 179 (S.D.N.Y. 1979).

## **C. Limits and restrictions on a representative payee**

SSA places limits on what representative payees can do once they are selected to manage the affairs of a beneficiary. The duties and obligations of a representative payee to his beneficiary are recognized by SSA as lawful only for benefits paid by SSA on behalf of the beneficiary. A representative payee only has the legal authority to decide how the Social Security and/or SSI payment will be used for the beneficiary's care and well-being. Thus, a representative payee is not legally authorized by SSA to:

- use a beneficiary's money for anything other than the beneficiary's needs;
- spend a beneficiary's funds in a way that would leave him or her without necessary

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items or services (housing, food, clothing, medical care);

- put a beneficiary's Social Security and/or SSI payments in his or another person's account;
- use a beneficiary's "dedicated account" funds for purposes not related to the child's impairment (for example, medical treatment, education, job skills training, etc.);
- keep the beneficiary's conserved funds if he is no longer the representative payee;
- charge the beneficiary for services unless authorized by SSA;
- make medical decisions;
- sign legal documents, other than Social Security documents, on behalf of a beneficiary; and
- have legal authority over earned income, pensions, or any income from sources other than Social Security and/or SSI payments.

See POMS, GN 00602.130.

#### **D. Duties and responsibilities of the representative payee**

SSA requires that an individual assume several duties and obligations on behalf of a beneficiary when appointed as representative payee. The most important duty of a representative payee is to know the needs of the beneficiary and to use the benefits in the best interests of the beneficiary. See 20 C.F.R. § 404.2035. The representative payee must use SSA benefits for the current basic needs of the beneficiary, such as food, clothing, and shelter. See 42 U.S.C. §§ 405(j), 1383(a)(2) (2002). SSA regulations define "for the use and benefit" of the recipient to include costs of current maintenance, 20 C.F.R. § 404.2040(a)(1), and define "current maintenance" to include customary charges by a state, federal, or private institution where the beneficiary is receiving care. See 20 C.F.R. § 404.2040(b). In addition to the basic duties and responsibilities of the representative payee, SSA requires the following:

- After the appointment of a representative payee, SSA benefits payments are mailed to the payee and are to be put in a bank account specifically designated as a payee account. No commingling of beneficiary funds and representative payee funds is allowed. A

representative payee serves in a fiduciary relationship with the beneficiary and must administer the benefits in the beneficiary's best interest.

- The representative payee is required to provide SSA with a simple accounting (usually on an annual basis) and a description of how he spent the money. Specifically, the representative payee must keep accurate written records of all payments received from SSA and how they were spent and/or saved. The representative payee must save any money left after meeting the beneficiary's current needs in an interest bearing account or in United States savings bonds.
- The representative payee must respond, on the beneficiary's behalf, to any SSA requests for action or information. Common requests are for the annual representative payee accounting, the SSI redetermination of eligibility, or a continuing disability review. Complete written reports accounting for the use of funds and assisting the beneficiary in the completion of continuing disability reviews and redeterminations of eligibility may also be required.
- Representative payees must return any payments to which the beneficiary is not entitled to SSA. They must also be aware of any other income or funds the SSI beneficiary has. This is important because other income and/or other resources may impact the beneficiary's SSI eligibility and/or payments.
- The representative payee is responsible for reporting to SSA any change in circumstances that could affect the recipient's eligibility (e.g., income, resources, change of address, living arrangements, return to work, etc.). They must also report any changes or events which could affect the beneficiary's eligibility for benefits or payment amount, such as a change in the amount of a pension, wage changes (number of hours worked or hourly wage change), etc.
- Representative payees must return any conserved funds to SSA, if the representative payee stops serving the beneficiary.

See 20 C.F.R. § 404.2035.

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## V. Prosecuting representative payees

### A. Representative payee penalties for violation of Title II and Title XVI

The Social Security Act prescribes criminal penalties for violation of its provisions concerning fraud, disclosure of certain information, and representation. *See* 42 U.S.C. §§ 408(a)(5) and 1383a(a)(4). The purpose of the Act's criminal provisions is to protect Social Security beneficiaries and the general public, as well as governmental interests, by maintaining the integrity of the claims process and the Trust Funds. Representative payee fraud can also be the result of omission when a beneficiary, or his representative payee, fails to report a change in circumstance, such as a marriage, a new source of income, incarceration, removal from custodial care, or the death of a parent or spouse, while continuing to spend checks or direct deposits by SSA. Violations by a representative payee that could result in criminal prosecution for Social Security fraud include:

- forging or falsifying Social Security Administration (the Agency or SSA) documents;
- conspiring to obtain or allow a false, fictitious, or fraudulent claim;
- making or causing to be made a false statement or representation of a material fact for use in determining rights to Social Security benefits;
- making or causing to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under the Social Security Act;
- concealing or failing to report any event affecting the initial or continued right to payment received or to be received by a person individually or on behalf of another; and
- converting all or any part of a payment received on behalf of a beneficiary to a use other than for the use and benefit of that beneficiary.

*See* 42 U.S.C. §§ 408(a)(1)-(8), 1383a(a)(1)-(4).

A representative payee may also be subject to criminal prosecution even if the attempted fraud

was unsuccessful and SSA did not make a payment as a result. The penalty upon conviction for violation of the criminal provisions of Title II and Title XVI of the Act may be a fine (\$250,000), imprisonment (five years), or both. *See* 42 U.S.C. §§ 408(a)(1)-(8) and 1383a(a)(1)-(4).

### B. 42 U.S.C. § 408(a)(5)

Criminal liability under 42 U.S.C. § 408(a)(5) arises if an individual knowingly and willfully converts to an unauthorized use, a benefit that he has accepted as payee on another's behalf. For example, a criminal violation occurs if a defendant applies (a formal application to become representative payee is required by SSA) to become representative payee for the use and benefit of another and, having received payments of a benefit from SSA on behalf of another, knowingly and willfully converts the payments to his own use rather than for the use, and benefit of the intended beneficiary. A common violation occurs when a representative payee intentionally conceals the death of another in order to continue to receive and spend the benefits payments made by SSA to the representative payee.

A fiduciary relationship exists between beneficiary and representative payee. If a representative payee misuses benefits, the representative payee may be removed by SSA. 42 U.S.C. §§ 405(j)(1)(A) and 1383(a)(2)(A)(iii). Moreover, a representative payee's misuse of the beneficiary's funds is a felony. 42 U.S.C. § 408(a)(5). Given the criminal penalty for misuse of funds, some courts have inferred a fiduciary relationship between beneficiary and representative payee, although the statute and implementing regulations do not provide for such a relationship. *See Garvey v. Worcester Housing Auth.*, 629 F.2d 691 (1st Cir.1980); *Bradley v. Austin*, 841 F.2d 1288 (6th Cir.1988).

### C. Examples of representative payee fraud

The following demonstrate actual scenarios of representative payee fraud (only the names have been changed to protect the guilty):

John Boyee has been declared to be legally incompetent and lives alone in an apartment. He is a daily visitor to the Los Francisco Community Services (LFCS) agency, which provides limited case management and a free lunch program. The

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LFCS staff interacts with Boyee on a daily basis, and can determine his current needs, pay his rent, and assist him with obtaining medical treatment. LFCS applied for and was appointed representative payee for Boyee, and began receiving his monthly benefits payments. LFCS discovered that its management of Boyee's affairs was so efficient that more than half of his monthly SSA benefits payment was unused. As representative payee, LFCS was required to conserve any money left at the end of the month for the sole use and benefit of Boyee. Instead of conserving Boyee's remaining benefits at the end of the month, LFCS cooked their books, pocketed the extra cash each month, and submitted annual representative payee reports in which they made misrepresentations as to the management of Boyee's affairs.

Jack Baybee and his grandmother, Granny, live together in a house rented from HUD. Granny is eighty-four years old and suffers from diabetes and advanced cataracts. Granny is unable to walk without substantial aid and is legally blind. Baybee is Granny's representative payee for her Title II Survivor's benefits. Baybee pays Granny's bills, takes care of the house, monitors Granny's medical bills, and takes Granny to church twice each Sunday. Granny died in 1992. However, Baybee, despite his obligation as a representative payee to report Granny's death, failed to do so. Instead, Baybee continued to receive Granny's Title II Survivor's benefits each month and use them for gambling, drugs, and rock-n-roll. Baybee continued to make annual reports to SSA detailing his fictitious administration of dead Granny's affairs.

Suzie Gurl is a self-described crack queen, who lives in a week-to-week motel and has a live-in biker boyfriend who keeps her drug habit well stocked. Gurl has three children under the age of twelve, and one minor child aged sixteen, all of whom have been adjudged as learning disabled, and each of whom has received Title XVI SSI and Title II Survivor's benefits for more than four years. The three children under age twelve were removed from Gurl's custody by State Children's Services for neglect and placed with foster families, and the sixteen-year-old has been incarcerated in a state juvenile facility for three years for sexually abusing his younger siblings. Despite her obligation as a representative payee to do so, Gurl did not notify SSA that her three youngest kids were removed from her care or that

the sixteen-year-old had been incarcerated. Instead, Gurl kept quiet and continued to receive SSI and Survivor's benefits payments, which she used to buy drugs.

Johnny B. Baad (JB), age sixteen, collects Title XVI SSI benefits based on a learning disability and receives Title II Survivor's benefits based on the SSA account of his deceased father, Daddy Sugar. Mae Sugar, JB's mom, has been JB's representative payee since he first began receiving SSA Survivor's benefits when he was twelve months old. Mae Sugar lied to SSA when she applied for JB's Survivor's benefits after the death of Daddy Sugar. JB was not the son of Daddy Sugar, a fact known to Mae and Daddy Sugar, before his death. Mae conceived JB during a two year period just before Daddy's death, when Mae and Daddy were separated. Daddy never acknowledged JB as his child, and had gone so far as to get a blood test just before his death in order to put his affairs in order and to confirm that he was not JB's father. After Daddy's death, Sugar applied for benefits, claiming that JB was Daddy's son. JB received Survivor's benefits based on Daddy Sugar's account for twelve years before Mae's current boyfriend spilled the beans and notified SSA of the fraud.

#### **D. Using Title 18 to charge representative payees**

Most representative payee fraud cases are, by their very nature, crimes of opportunity involving theft of benefits payments or false or fraudulent statements made in matters before an agency. Thus, in addition to violations of the felony fraud provisions of the Social Security Act, almost any representative payee crime can be charged under Title 18 as theft of government property (18 U.S.C. § 641) and/or false statement to a government agency (18 U.S.C. § 1001).

The elements required to prove a violation of Title 18 U.S.C. § 641 are that:

- the defendant stole money with the intention of depriving the owner of the use or benefit of the money;
- the money belonged to the United States; and
- the value of the money was more than \$1,000.

In some instances, it can be advantageous for a prosecutor to charge a representative payee with theft of government property (18 U.S.C. § 641),

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which does not require a finding of fraud as a necessary element. This might be true even though, under the facts of the case, the prosecutor could not charge the case under the Social Security felony fraud statute (where fraud is a necessary element). Social Security benefit funds, whether tendered by check or deposited automatically by electronic wire transfer, are considered "property" and "a thing of value of the United States" within the meaning of 18 U.S.C. § 641. *United States v. Spear*, 734 F.2d 1, 2 (8th Cir. 1984); *United States v. Torres Santiago*, 729 F.2d 38, 40 (1st Cir. 1984). See also *United States v. Howard*, 787 F. Supp. 769, 771 (S.D. Ohio 1992); *United States v. Walker*, 563 F. Supp. 805, 809-10 (S.D. Iowa 1983); *United States v. Edwards*, 473 F. Supp. 81 (D. Mass. 1979).

The elements required to prove a violation of Title 18 U.S.C. § 1001 are:

- the defendant made a false statement;
- the defendant acted wilfully, that is deliberately and with the knowledge that the statement was untrue;
- the defendant made the false statement to a governmental agency; and
- the defendant's statement was material to the agencies' activities and decisions.

To prosecute a representative payee for Social Security fraud, the prosecutor is only required to prove that the statement is "false" in one material aspect. *Cohen v. United States*, 201 F.2d 386, 393 (9th Cir. 1953). While SSA representative payees are almost always aware of their false statement, actual knowledge of the falsity is not always required. *United States v. Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir. 1971). A conviction for making false statements or concealment also requires a showing of materiality.

A statement is material if it could reasonably affect or influence the exercise of a governmental function. *United States v. Facchini*, 874 F.2d 638, 643 (9th Cir. 1989); *United States v. Radetsky*, 535 F.2d 556, 571-72 (10th Cir. 1976); *United States v. Deep*, 497 F.2d 1316, 1321 (9th Cir. 1974); *United States v. Ratner*, 464 F.2d 101, 103 (9th Cir. 1972). Representative payee false statements are always material if they are included on SSA documents affecting the initial, or continued right, of a beneficiary to receive benefits. Similarly, the jurisdictional requirements

of 18 U.S.C. § 1001 are satisfied if the government proves one of the following:

- that the statement was capable of having some nontrivial effect on the agency. *United States v. Facchini*, 874 F.2d 638 (9th Cir. 1989); or
- that the agency had the power to act on the statement. *Ogden v. United States*, 303 F.2d 724, 742-43 (9th Cir. 1964); or
- that there was actual or constructive knowledge of the federal relationship. *Gilbert v. United States*, 359 F.2d 285, 287 (9th Cir. 1966); or
- that there is a relationship between the act and the federal government. *Ebeling v. United States*, 248 F.2d 429, 434 (8th Cir. 1957).

All of these jurisdictional elements are typically found in representative fraud cases. Interestingly, SSA need not have actually relied on the information for it to be material, *United States v. Myers*, 878 F.2d 1142, 1143 (9th Cir. 1989), and it is not necessary that the government be deceived or suffer monetary loss, *United States v. Jones*, 464 F.2d 1118, 1121-22 (8th Cir. 1972). It is not necessary that a false statement was made directly to an officer or agent of the United States. *United States v. Green*, 745 F.2d 1205, 1208 (9th Cir. 1985); *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir. 1981). The government need not prove that a defendant had "jurisdictional knowledge" (i.e., that defendant knew that his statements were made to, or available to, a government agency). *United States v. Oren*, 893 F.2d 1057, 1065 (9th Cir. 1990); *United States v. Yermian*, 468 U.S. 63, 74-75 (1984); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1985).

## VI. Sample indictments

The following are sample indictment language charging representative payees under Title 42 and Title 18:

COUNT \_\_\_\_

[42 U.S.C. § 408(a)(5)]

Beginning in or around May 1992, and continuing without interruption until in or around January 2000, in Santa Barbara County, within the Central District of California, defendant

\_\_\_\_\_, having made application to receive payment of Social Security child's insurance benefits payments for the use and benefit of another and having received such payments, knowingly and willfully converted such payments to a use other than for the use and benefit of such other person. Specifically, while acting as Representative Payee for her step-son, \_\_\_\_\_, defendant \_\_\_\_\_

converted to her own use Social Security child's insurance benefits payments made to her on behalf of \_\_\_\_\_, and by such action obtained approximately \$116,083 in child's insurance benefits payments to which she knew that she was not entitled.

COUNT \_\_\_\_\_

[42 U.S.C. § 1383a(a)(4)]

Beginning in or around April 1999, and continuing without interruption until in or around September 1999, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, aka \_\_\_\_\_, in a matter within the jurisdiction of the Social Security Administration, having made application to receive Supplemental Security Income Benefits payments as Representative Payee for the use and benefit of her son, \_\_\_\_\_, and having received such benefits payments, knowingly and willfully converted the benefits payments for her own use rather than for the use and benefit of her son. Specifically, defendant \_\_\_\_\_, while acting as Representative Payee for her son, \_\_\_\_\_, failed to disclose \_\_\_\_\_'s death in order to continue to receive and spend Supplemental Security Income Benefits payments paid to \_\_\_\_\_ by the Social Security Administration. By such action, defendant \_\_\_\_\_ stole approximately \$43,474 in Supplemental Security Income Benefits payments to which she knew that she was not entitled.

COUNT \_\_\_\_\_

[18 U.S.C. § 641]

Beginning in or around June 1999, and continuing without interruption until in or around September 2003, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_ did knowingly embezzle, steal, and convert to her own use money of the Social Security Administration, an agency of the

United States, namely, Social Security Supplemental Security Income Benefits payments paid to her as Representative Payee for \_\_\_\_\_ to which she knew that she was not entitled, having a value of approximately \$61,431.

COUNT \_\_\_\_\_

[18 U.S.C. § 1001]

On or about August 29, 2003, in Los Angeles County, within the Central District of California, defendant \_\_\_\_\_, in a matter within the jurisdiction of the Executive Branch of the Government of the United States, knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation. Specifically, on a Statement for Determining Continuing Eligibility for SSI Payments (SSA Form 8203-BK), dated August 29, 2003, defendant \_\_\_\_\_ falsely answered "no" to question #4, which asked: "have you (or your spouse living with you) earned money from work?" In truth and in fact, as defendant \_\_\_\_\_ well knew, at the time he completed the SSA Form he had earned money from his full-time work as a \_\_\_\_\_ while using his son's social security number (XXX-XX-XXXX).

## VII. Conclusion

Representative payee fraud is a serious problem within SSA benefits programs. Hundreds of needy beneficiaries are abused and millions of dollars are lost each year from fraud perpetrated by SSA appointed fiduciaries who abandon their responsibilities or use their position to steal from those payees who are most vulnerable and in need of help. Prosecution of representative payee fraud remains an important priority for the SSA and the United States Attorneys' offices. ❖

## ABOUT THE AUTHOR

**John Webb** is a Senior Attorney with the Office of Chief Counsel for the Inspector General, Social Security Administration, and a Special Assistant United States Attorney with the United States Attorney's Office for the Central District of California, Los Angeles, where he serves as the Identity Theft Coordinator. He is responsible for prosecuting federal crimes

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involving identity fraud and abuse of Social Security programs, and has participated in the indictment and prosecution of individuals related to the terror attacks of 9/11, as well as the planning and implementation of Operation Tarmac/Operation Safe Harbor in Phoenix and Los Angeles. Mr. Webb has served as an instructor at the National Advocacy Center on the topics of identity theft, Social Security number misuse, and Federal Benefits Fraud. Mr. Webb is a regular contributor to the *United States Attorneys' Bulletin*.✘

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# NOTES



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