

Legislative History and Technical Explanation of H.R. 4547, the Strengthening Protections for Social Security Beneficiaries Act of 2018

I. NEED FOR LEGISLATION

In 1939, Congress first authorized the SSA to make benefit payments to another person or organization when it was in the best interest of the beneficiary. This individual or organization,¹ known as a representative payee, receives the benefits on behalf of the individual and is required to use the benefits to meet the individual's needs. The SSA generally assumes that adult beneficiaries are able to manage their own benefits, but will assess a beneficiary's financial capability if needed and before appointing a payee. However, the SSA automatically assigns a representative payee to most child beneficiaries and to individuals who are found legally incompetent by a court. In 2017, about 5.8 million representative payees managed benefits on behalf of about 8.1 million Social Security beneficiaries and Supplemental Security Income (SSI) recipients.

A number of organizations, as well as stakeholder groups, have raised concerns about the representative payee program. The Social Security Advisory Board has released two reports calling for the need to improve the representative payee program and provided recommendations.² The National Academy of Sciences (NAS) conducted two reviews of the representative payee program³ and identified numerous areas for improvement in the SSA's administration of the program. In a 2013 report, the Government Accountability Office (GAO) found that the SSA struggles to effectively administer the representative payee program and must improve oversight of those serving as payees.⁴ The SSA Office of Inspector General (OIG) includes the representative payee program as one of the SSA's "major management and performance challenges" and has raised concerns with multiple aspects of the program, including whether the SSA is adequately screening payees and providing sufficient payee oversight.

Finally, there have been numerous instances of representative payee misconduct and abuse that have come to light, including:

- In February 2009, local fire officials in Iowa closed down a decrepit 19th-century schoolhouse being used as a bunkhouse for several dozen Texas men with intellectual disability. The men were under the care of Henry's Turkey Service, which served as their representative payee, their

¹ Individual payees include relatives, such as a parent or spouse, legal guardians, friends, or other individuals. Organizational payees include community-based non-profit social service agencies; federal, state, and local government institutions; public and private residential institutions; and financial organizations. Public officials also are considered organizational payees since they serve on behalf of a state or local government.

² Social Security Advisory Board, *Representative Payees: A Call to Action* (2016), available at: http://ssab.gov/Portals/0/OUR_WORK/REPORTS/Rep_Payees_Call_to_Action_Brief_2016.pdf. Social Security Advisory Board, *Improving Social Security's Representative Payee Program* (2018), available at: http://www.ssab.gov/Portals/0/OUR_WORK/REPORTS/ImprovingRepPayee2018.pdf.

³ National Academy of Sciences, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse* (2007), available at: <https://www.nap.edu/catalog/11992/improving-the-social-security-representative-payee-program-serving-beneficiaries-and>, and National Academy of Sciences, *Informing Social Security's Process for Financial Capability Determination* (2016), available at: <https://www.nap.edu/read/21922/chapter/1>.

⁴ Government Accountability Office, *SSA Representative Payee Program: Addressing Long-Term Challenges Requires a More Strategic Approach* (2013), available at: <http://www.gao.gov/assets/660/654893.pdf>.

landlord, their creditor, and their employer, through a local turkey-processing facility. The men had been subject to decades of neglect and abuse, paid subminimum wages, denied access to their benefits, and lacked medical care. Over the years, concerns raised with government officials about the treatment of the men had gone unheeded until the sister of the one of the men contacted the press. Although the SSA had had periodic contact with the payee, the accounting forms filed by the payee did not reveal a problem and the payee did not meet the statutory criteria for an on-site review, so none was conducted.

- In October 2011, in Philadelphia, a landlord found four mentally disabled adults locked in a basement in the home of a tenant, Linda Weston, who was serving as the representative payee for three of the victims. Ms. Weston had a previous criminal history prior to her appointment as a payee, which was unknown to the SSA. She was eventually charged with murder, sex trafficking, forced labor, fraud, and other crimes, and is now serving life in prison.
- In July 2017, the owners of Ayudando Guardians, Inc., which served as both an organizational representative payee and as a guardian for individuals in New Mexico and Arizona, were indicted for fraud, theft, and money laundering involving millions of dollars. Both the state of New Mexico and the SSA previously identified concerns with the organization, but failed to follow up, nor did they share information with each other, until whistleblowers complained.

The Social Security Subcommittee has examined the challenges and concerns surrounding the representative payee program over several years, including in hearings on June 5, 2013, February 7, 2017, and March 22, 2017.

II. BACKGROUND ON REPRESENTATIVE PAYEE PROGRAM

The SSA's representative payee program has evolved significantly over the past decades, through legislation in 1990⁵ and 2004⁶, the adoption of new policies and operational practices by the SSA, and the use of data analytics to analyze risk factors for payee misuse.

H.R. 4547 improves specific aspects of the representative payment program, including payee selection, oversight and monitoring of payees, and coordination with other agencies and levels of government who also play a role in protecting vulnerable individuals who may have or require representative payees.

Selecting Qualified Payees

The SSA must evaluate the suitability of a payee before making an appointment. The SSA has developed a preference list that it uses in selecting a payee, which generally prioritizes family members, friends, legal guardians, conservators, or any person who shows strong concern for the beneficiary. A creditor of the beneficiary cannot be appointed as payee unless the creditor falls into one of numerous statutory exceptions. Under the Social Security Act, individuals convicted of Social Security-related crimes cannot be appointed payees. Following the Weston case, the SSA adopted a policy of barring individuals convicted of certain felony crimes from being appointed as payees, but did not apply that policy to existing payees.

⁵ The Omnibus Budget Reconciliation Act of 1990, P.L. 101-508.

⁶ The Social Security Protection Act of 2004, P.L. 108-203.

Oversight and Monitoring of Current Payees

The SSA primarily relies on annual accounting reports and periodic on-site reviews to monitor the performance of representative payees and ensure benefits are being used properly. The Social Security Act requires on-site reviews for certain organizational and individual payees, and the SSA conducts additional discretionary reviews of other payees.

Annual Accounting Form

As a result of the 1984 *Jordan v. Schweiker* case⁷, all representative payees other than state mental hospitals are required to file with the SSA an annual accounting of their use of beneficiaries' funds. This includes parents who are the payee for their child and are living together in the same household, and individuals who are the payee of their spouse. The brief form requires payees to summarize expenditures in two broad categories (food and housing, and other spending on the beneficiary) and to report how much money was saved. The SSA checks whether the total of the amounts reported matches the benefit amount (within a 10 percent margin), but there is no verification of the expenditures or amounts reported.

On-site Monitoring

By law, the SSA is required to conduct periodic on-site reviews for three categories of payees: individual payees with 15 or more beneficiaries; all non-profit, community-based social service organizations; and any other type of agency with 50 or more beneficiaries. The law also requires the SSA to conduct on-site reviews of state mental institutions. In addition, the SSA conducts several types of discretionary reviews of individual and organizational payees, including reviews based on allegations of misuse or other misconduct by a payee; reviews suggested by the SSA's two predictive models – one for individuals and one for organizations – based on risk indicators drawn from the SSA's administrative data about payees and beneficiaries; and reviews of organizations newly-approved to collect a fee for their payee services. These reviews are conducted by employees of the SSA or an outside vendor contracted by the SSA. In FY 2016, 2,590 reviews of individual or organizational payees were conducted; this included 1,300 statutory reviews and 1,017 reviews based on the predictive models.

In the aftermath of the abuse discovered at Henry's Turkey Service, the SSA contracted with the National Disability Rights Network (NDRN) to have the states' Protection and Advocacy (P&A) systems conduct on-site reviews of certain payees nationwide, and began to conduct additional discretionary reviews in addition to the statutorily-required reviews.

Coordination Between the SSA and States

Child welfare agencies, Adult Protective Service (APS) agencies, and state guardianship courts all work with individuals who are receiving benefits from the SSA and may be in need of a representative payee, or who may require a change of payee, but there is currently no systematic sharing of information between the SSA and these entities. For example, the SSA does not know if a child or adult has been removed from their home due to abuse, and thus would not be aware of a need to reassess the suitability of a payee. Similarly, there is no process for state guardianship courts to become aware that a representative payee has been removed, nor is the SSA aware when a guardian has been removed.

⁷ *Jordan v. Schweiker*, 1983 U.S. Dist. LEXIS 18484 (W.D. Okla. Mar. 17, 1983) and subsequent procedural history.

III. EXPLANATION OF KEY PROVISIONS

TITLE I. STRENGTHENING OVERSIGHT AND BENEFICIARY PROTECTIONS

SECTION 101: STRONGER MONITORING OF REPRESENTATIVE PAYEES

Explanation of provision

The provision strengthens oversight of representative payees by requiring additional types of on-site reviews of representative payees, improving the effectiveness of the reviews, and providing for an increased number of reviews.

The SSA would be required to make annual grants to the P&A system of each state to conduct all reviews of representative payees serving Social Security beneficiaries or SSI recipients. In addition, the P&As would conduct educational visits for new fee-for-service payee organizations, issue corrective action plans for payees not in compliance with the SSA's requirements, and refer beneficiaries to other programs and services as warranted. Both organizational and individual payees would be subject to the reviews. The provision establishes a minimum total amount for the grants of \$25 million (indexed for inflation), which will support a higher number of reviews than are conducted today.

Grant funds would be distributed according to how many beneficiaries with representative payees reside in the state, with a minimum for smaller states to ensure a viable review program. The SSA also would issue an annual grant to a highly-qualified national disability association to provide training and other support for the review program to the SSA and the P&A agencies. The Committee expects the SSA, P&A system, and national association to work together in partnership to ensure an effective and efficient review process, over which the SSA would retain oversight responsibilities. The grants to P&A agencies would begin August 1, 2018, and the national training and support grant would begin May 1, 2018.

The provision also adds to the list of payees subject to statutory review payees who collect a fee for their services and allows P&A agencies to conduct reviews based on allegations they receive of payee misconduct.

Reason for change

On-site reviews are the SSA's most critical tool for monitoring payee performance, and they uncover much more abuse and misconduct than the annual accounting form. SSA field office employees conduct the majority of these reviews today, and the SSA uses a vendor to conduct additional reviews. However, the existing program is limited in both the number of reviews conducted and the quality of those reviews.

The new provision recognizes the superior training, experience, and track record of the nationwide P&A system, which began to do reviews on behalf of the SSA after the Henry's Turkey Service abuses were uncovered. The SSA turned to the NDRN (the nationwide representative of the state P&A systems) in 2009 because of their previously-established relationship through the Protection and Advocacy for Beneficiaries of Social Security program, and NDRN's long experience protecting and advocating for persons with disabilities.

The P&A system continued to conduct reviews for the SSA until June 2016 (completing 4,165 payee reviews in total) when the SSA awarded a contract to a logistics and information technology vendor that had not previously conducted these types of reviews, disregarding the expectation of Congress to select a more-qualified reviewer. In language accompanying the December 2015 Continuing Resolution that funded the SSA, the Congress made clear that the SSA should select a reviewer with “significant and demonstrable experience monitoring representative payees, identifying and preventing fraud and abuse, and addressing problems found among individuals with different types of disabilities and among different types of service providers.”

The use of a non-specialist vendor with no prior experience monitoring representative payees or the care of individuals with disabilities, in lieu of the P&A system or other qualified national association, jeopardizes the safety and well-being of beneficiaries. The provision establishes the new review program effective immediately upon the conclusion of the current contract year for the existing vendor, and the Committee expects that there will be no contract extension for the existing vendor.

Because P&A agencies are located in each state and territory, and have extensive contacts in their local communities, they receive reports from the community alerting them to beneficiaries who may be experiencing neglect or abuse. While the SSA’s predictive models for assessing the risk of misuse by individual and organizational payees have been demonstrated to be more effective than randomly-selected reviews or the use of annual accounting forms, the models also are inherently limited because they can only identify higher-risk payees on the basis of the SSA’s own administrative or program data. The models do not incorporate other information that might indicate risk, such as housing code violations, reports of abuse of residents, high staff turnover, and so forth. Because of P&A agencies’ relationships in their local communities, in combination with their other work, they may be in a better position to identify and review risky payees.

In addition, in order to ensure sufficient training, coordination, and administrative efficiency for the 57 separate P&A systems and the SSA, the provision requires the SSA to award annually a training and support grant to a highly-qualified national association with extensive knowledge and demonstrated experience in providing training, technical assistance, and administrative oversight to P&A systems that monitor representative payees.

Finally, the provision requires the SSA to award grants of \$25 million per year to the P&A systems for the reviews, but does not specify a specific number of reviews. Instead, it directs the Commissioner to consult with the P&A systems to carry out the review activities, including agreeing on the numbers and types of reviews conducted, which the Committee expects will be higher than the number of reviews conducted today. The Committee also expects the SSA and the national association to appropriately balance the number of statutory reviews, reviews selected by the predictive models, and reviews proposed by the P&A systems based on allegations or concerns, in recognition of risk-factors that may not be captured under the predictive models.

The Congress expects that the terms, conditions, and business processes for the new P&A-led representative payee monitoring system, including for the national association to provide training and support to such system, will be generally similar to the terms, conditions, and business processes that the SSA currently uses for representative payee reviews conducted by non-SSA entities.

SECTION 102: REDUCING THE BURDEN ON FAMILIES

Explanation of Provision

This provision exempts from the requirement to file an annual accounting form representative payees who are a parent or legal guardian living with the child receiving Social Security or SSI benefits, a parent living with an adult who is receiving benefits, and spouses. However, these payees would still be legally required to use the benefits on behalf of the individual. The provision is effective upon enactment.

Reason for Change

The 1984 *Jordan* decision required nearly all representative payees to provide an annual accounting to the SSA of their use of the individual's benefits. (The court exempted state mental hospitals from this requirement, relying instead on periodic on-site reviews.) However, the SSA's payee oversight process has changed significantly since the court first imposed this requirement. In addition, experience with the accounting form reveals that it is of limited effectiveness in preventing payee misconduct, while at the same time it is a costly and time-consuming workload for the SSA.

The SSA's payee oversight encompasses the annual accounting form and a variety of periodic on-site reviews of payee performance, including both individual and organizational payees. According to the SSA, over 99 percent of misuse cases are discovered from sources other than the accounting form. Similarly, since 2011, the SSA has found misuse of benefits in only 0.0005 percent of submitted accounting forms.⁸ The NAS also found in its 2007 study that the SSA does not discover misuse by using the annual accounting form. Moreover, the SSA's payee-misuse predictive models, which are drawn from analysis of data about misuse cases, recognize that non-relatives are more likely to misuse benefits than relatives.

In addition, the *Jordan* court predicted that the fiscal and administrative burdens of mandatory accounting would not be great. However, this has not been the reality. The number of annual accountings required has created a substantial administrative burden for the SSA,⁹ and the total administrative cost of the process is about \$95 million per fiscal year. Of the more than 6.7 million forms required annually, about 20-24 percent cannot be processed automatically and require manual intervention or follow up (costing about \$30 million); in addition, about 14-18 percent of payees fail to respond initially to the form and require additional follow-up (at a cost of about \$37 million).¹⁰

Eliminating the requirement for parents or legal guardians who live with the beneficiary, and spouses, to submit annual accountings does not mean that such beneficiaries would no longer have any protections or oversight by the SSA. First, the statutory requirement that benefits must be used for the beneficiary is unchanged, as is the requirement that the SSA individually evaluate the suitability of any potential payee. Second, elimination of the accounting form for family payees generates substantial administrative savings, some of which will be used for an expanded and higher-quality review program that encompasses all types of payees – family members, other individuals, and organizations – as set forth in section 101 of this bill. Third, the SSA has developed predictive models to identify payees with an increased risk of misuse, with analysis specific to individual payees, including family members. It

⁸ December 7, 2017, letter from the SSA to Chairman Johnson and Ranking Member Larson.

⁹ NAS, 2007

¹⁰ December 7, 2017, letter from the SSA to Chairman Johnson and Ranking Member Larson.

uses these models to conduct additional reviews, and they have been shown to be more effective at uncovering misuse than random audits. And fourth, other provisions of this bill help to ensure higher-quality payees and alert the SSA to situations that may merit additional review of a payee.

Finally, in light of its limited usefulness, the Committee believes the accounting form is an unnecessary and burdensome intrusion of government into a family's finances in cases where the beneficiary and the payee are living in a single household or functioning as a marital unit. Since the court's decision in *Jordan* over 30 years ago, the representative payee program has changed dramatically. Congress has repeatedly strengthened the program and is adding a robust new review process with the passage of this legislation. In combination with additional measures by the SSA, these have greatly strengthened the protections for all beneficiaries with representative payees. Implementing this legislation would ensure that the SSA uses its limited resources in a manner consistent with Congressional intent, aligning these resources according to where the greatest risk of payee misconduct lies.

The Committee expects that some of the administrative savings from this proposal would be reallocated to improve on-site monitoring of payees under the program set forth in section 101 of this bill.

SECTION 103: PROTECTING BENEFICIARIES THROUGH INFORMATION SHARING

Explanation of Provision

The provision requires the SSA to conduct monthly electronic data exchanges with state foster care programs in order to identify when a child receiving Social Security benefits has entered or exited foster care, or changed foster care placement, and the SSA would be required to redetermine the appropriate representative payee when a change in placement occurred. Additionally, the GAO would be required to produce a report on minor beneficiaries in foster care and their representative payees.

The provision also requires a feasibility study to test a partnership with state APS agencies. The project will test ways to improve information sharing for the purposes of identifying changes in the capability of individuals and improving the SSA's monitoring of those serving as representative payees. The project must be completed and a report submitted by June 30, 2022.

The provision requires the SSA to contract with the Administrative Conference of the United States (ACUS) to conduct a study on the legal and practical barriers to information sharing between the SSA and state courts. The report is due June 30, 2020.

Reason for Change

State entities, such as child welfare agencies, APS agencies, and courts have information that could improve the SSA's ability to detect a need for a payee and its suitability determinations of potential payees, as well as alerting the agency to existing payees who merit additional review. The NAS, GAO, and others have provided recommendations for how the SSA can improve data sharing with states. However, the SSA has taken little action to date, citing limitations under the Privacy Act.

The SSA does not have a way to detect changes in a beneficiary's capability over time, absent a report by the beneficiary or a concerned individual. The 2016 NAS study cited the SSA's lack of a formal process for periodically reviewing changes in capability as a "significant weakness." Through exchanging information with APS agencies, the SSA may be able to learn when a beneficiary is in need

of a representative payee, or needs a change of payee. The Committee understands that the types and structure of the data that APS agencies collect varies significantly from state to state. Therefore, the Committee expects that the SSA will work with a subset of states to assess the administrative feasibility of sharing information with APS agencies. In addition, the Committee is aware of the creation of the National Adult Maltreatment Reporting System and encourages the SSA to explore this database as part of the feasibility study.

If an individual has been removed as a guardian, the SSA is generally not aware of this, and the individual may still be serving as a representative payee. A 2014 study by the ACUS found a need for more interaction between the SSA and the courts.¹¹ Given the potential barriers, complexity, and lack of infrastructure, further study is warranted in order to determine the next steps to improve coordination between the SSA and state courts.

TITLE II – IMPROVING PAYEE SELECTION AND QUALITY

SECTION 201: ADVANCE DESIGNATION OF PAYEE

Explanation of Provision

This provision allows an adult Social Security beneficiary or SSI recipient to designate one or more individuals to serve as a representative payee should the need arise in the future. A beneficiary may not designate an organization to serve as a payee.

The Committee expects that the SSA will provide beneficiaries with this option as part of the initial application for benefits. At the time of designation, the Committee also expects that the SSA will collect information to help the agency identify the designated individual in the future, but it should not require the beneficiary to provide the Social Security number of the designee. The SSA does not need to contact the designated individual until a representative payee selection is being made. Since relationships can change over time, the SSA also must notify beneficiaries each year who they have designated. The Committee encourages the SSA to consider implementing this requirement as part of the annual cost-of-living adjustment notices.

At the time a payee is appointed, the SSA must still determine individually for each beneficiary whether the designated individual is able to serve and meets the suitability requirements. The SSA may for good cause select another payee when appointing the designated payee would not be in the best interest of the beneficiary. The provision is effective two years after enactment.

Reason for Change

The Committee believes individuals, while capable, should have the ability to designate who they would like to have serve as their representative payee should they need a representative payee in the future. The

¹¹ Administrative Conference of the United States, SSA Representative Payee: Survey of State Guardianship Laws and Court Practices (2014), available at: https://www.acus.gov/sites/default/files/documents/SSA%20Rep%20Payee_State%20Laws%20and%20Court%20Practices_FINAL.pdf.

provision also will reduce the burden on the SSA because it will identify likely payees. ACUS included this recommendation in a 1991 report on the representative payee program.¹²

SECTION 202: PROHIBITION ON INDIVIDUALS CONVICTED OF CERTAIN CRIMES SERVING AS REPRESENTATIVE PAYEES

Explanation of Provision

This provision bars individuals convicted of committing, attempting, or conspiring to commit any of twelve listed felonies from serving as a representative payee for an individual receiving Social Security or SSI benefits. Additionally, those already serving as a representative payee who have been convicted of any of the listed felonies must be removed by the SSA within five years. The SSA also must recheck all payees for felony convictions at least every five years. The SSA would be permitted to exempt certain close family members from the criminal bar, on a case-by-case basis, as is done under the SSA's current practice; and such family members would be exempt from the five-year rechecks. The provision is effective for new representative payee appointments occurring on or after January 1, 2019. Prior appointments in violation of this prohibition must be terminated as soon as possible and no later than January 1, 2024.

Reason for Change

This is a codification of the SSA's operational policy barring such individuals from being appointed as a payee, which it instituted after the Weston abuse case. However, the provision extends this prohibition to existing payees, which current SSA policy does not do. The Committee believes that all representative payees (with the exception of certain close family members), including those serving prior to the implementation of the criminal bar policy, should have their background checked for past criminal activity. In recognition of the administrative burden of checking existing payees, the provision allows for a multi-year phase in.

SECTION 203: PROHIBITION ON INDIVIDUALS WITH REPRESENTATIVE PAYEES SERVING AS REPRESENTATIVE PAYEES

Explanation of Provision

This provision prohibits an individual who him or herself has a payee from being appointed as the payee for another Social Security beneficiary or SSI recipient. It is effective for new representative payee appointments made on or after January 1, 2019; prior appointments in violation of this prohibition must be terminated by January 1, 2024.

Reason for Change

This is a codification of existing SSA policy.

¹² Administrative Conference of the United States, The Social Security Representative Payee Program, Recommendation 91-3 (1991), available at: <https://www.acus.gov/sites/default/files/documents/91-3.pdf>.

SECTION 204: REASSESSMENT OF PAYEE SELECTION AND REPLACEMENT POLICIES

Explanation of Provision

The provision requires the SSA to conduct a review and reassessment – with an opportunity for public comment – of the appropriateness of the order of preference it follows in selecting a representative payee. The report is due no later than 18 months after the date of enactment.

Reason for Change

Concerns have been raised at hearings and from other sources about whether the SSA's existing order of preference, which is governed by statute, regulations, and operational instructions, is appropriate, particularly with respect to the appointment of creditors of the individual or for-profit institutions. Despite statutory provisions regarding creditor payees, the order of preference used by the SSA does not incorporate creditor status. In addition, concerns have been raised about whether the SSA's policies and internal controls are sufficient to prevent an inappropriate change of payee in cases where, for example, a nursing home seeks to be appointed a payee in place of the spouse, who had previously been serving effectively as payee. The study should address both existing statute and policy as well as the effectiveness of internal controls and training to ensure compliance with the policy.