



B-329926

September 10, 2018

The Honorable Jason Smith
House of Representatives

Subject: *Social Security Administration: Applicability of the Congressional Review Act to Sections of the Hearings, Appeals, and Litigation Law Manual*

Dear Mr. Smith:

This is in response to your request¹ for our opinion whether two sections of the Social Security Administration's (SSA or Administration) Hearings, Appeals, and Litigation Law Manual (HALLEX) are rules for purposes of the Congressional Review Act (CRA).² These sections concern the use of information from the Internet, including social media networks, when adjudicating claims for benefits under the Social Security Act (Act). As explained below, we conclude that these sections are not subject to review under CRA because they are rules of agency procedure or practice that do not substantially affect claimants' rights or obligations.³

BACKGROUND

The HALLEX Sections

If SSA denies an application for disability benefits, there are two levels of appeal within the Administration. The first is a hearing by an administrative law judge. If the

¹ Letter from Representative Jason Smith to Comptroller General (Feb. 16, 2018).

² CRA was included as part of the Small Business Regulatory Enforcement Fairness Act of 1996. Pub. L. No. 104-121, title II, subtitle E, 110 Stat. 857, 868 (Mar. 28, 1996) (*codified at* 5 U.S.C. §§ 801-808).

³ Our practice when rendering opinions is to contact the relevant agencies and obtain their legal views on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP. We contacted the General Counsel of SSA to obtain the agency's views. Letter from Assistant General Counsel, GAO, to General Counsel, SSA (Mar. 29, 2018). We received a response on April 19, 2018. Letter from General Counsel, SSA, to Assistant General Counsel, GAO (Apr. 19, 2018) (SSA Letter).

administrative law judge denies the claim, the claimant may request review by the Appeals Council. If a claim is denied by the Appeals Council, a claimant may file a lawsuit in a federal district court.⁴

The HALLEX “defines procedures for carrying out policy and provides guidance for processing and adjudicating [SSA] claims at the hearing, Appeals Council, and civil actions levels,” that is, at all of these levels.⁵ It communicates guiding principles and procedures to hearing level and Appeals Council adjudicators, *i.e.*, administrative law judges, administrative appeals judges, appeals officers, as well as to their support staff.⁶

Two sections of the HALLEX are at issue in this opinion. HALLEX I-2-5-69 (Using the Internet as a Source of Information in Case Adjudication)⁷ applies at the hearing level of SSA’s administrative review process, while HALLEX I-3-2-40 (The Internet and Case Adjudication)⁸ applies at the Appeals Council level of the administrative review process. Both sections pertain to the evidence SSA will consider in an applicant’s claim for disability benefits.

Specifically, these sections of HALLEX state that when an adjudicator (either an administrative law judge or Appeals Council adjudicator) decides a claim for benefits, he or she may not obtain or rely on information from the Internet, including information from social medial networks.⁹ The HALLEX sections include two exceptions to this rule, under which adjudicators may consider information from the Internet or a social media network if: (1) the information has been corroborated by an agency Cooperative Disability Investigations Unit (CDIU)¹⁰ and has been “associated with the record”;¹¹ or (2) the information was submitted by the claimant

⁴ SSA Pub. No. 05-10141, The Appeals Process (2018).

⁵ HALLEX I-1-0-1.

⁶ *Id.* at I-1-0-3.

⁷ HALLEX I-2-5-69 was last updated on August 30, 2013.

⁸ HALLEX I-3-2-40 was last updated on February 28, 2015.

⁹ HALLEX I-2-5-69A and I-3-2-40A.

¹⁰ The purpose of CDIU is to focus solely on allegations of disability fraud, and its primary mission is to obtain evidence that can resolve questions of fraud before benefits are ever paid. For example, CDIUs frequently investigate issues relating to feigned impairments, concealed medical improvement, concealed work activities, identity fraud, and inconsistent statements or facts. HALLEX I-1-3-1.

¹¹ HALLEX I-2-5-69B and I-3-2-40B.

or his or her appointed representative.¹² According to SSA, it decided that adjudicators could use social media information provided by CDIUs because those units, which work to uncover fraud in SSA's programs, have the tools and resources to authenticate the information.¹³

In a letter to our Office, SSA explained that they adopted these sections of HALLEX because the popularity of Internet sites and social media networking tools, such as Facebook and Twitter, raised questions about the role, if any, these tools should play in the adjudication of disability claims. SSA decided to preclude an adjudicator from searching the Internet and social media sites for information about claimants because the adjudicator could not reliably authenticate the information.¹⁴ SSA also expressed concern that entering an individual's personally identifiable information (PII) into Internet search engines could compromise the confidentiality of the claimant's PII.¹⁵

Congressional Review Act

CRA was enacted in 1996 to strengthen congressional oversight of agency rulemaking. The statute requires all federal agencies to submit a report on each new rule to both Houses of Congress and to the Comptroller General before it can take effect.¹⁶ In addition, the agency must submit to the Comptroller General a complete copy of the cost-benefit analysis of the rule, if any, and information concerning the agency's actions relevant to specific procedural rulemaking requirements set forth in various statutes and executive orders governing the regulatory process.¹⁷ CRA also provides for expedited procedures under which Congress may pass a joint resolution of disapproval for a rule subject to the Act that, if enacted into law, overturns the rule.¹⁸

¹² *Id.* at I-2-5-69B and I-3-2-40B.

¹³ SSA Letter at 4.

¹⁴ *Id.*

¹⁵ In this regard, SSA stated that it has obligations to preserve the confidentiality of a claimant's PII under both the Social Security Act and the Privacy Act. SSA was also concerned that connecting to social media sites could compromise the integrity of SSA's computer networks by exposure to malware or malicious viruses. SSA Letter at 4.

¹⁶ 5 U.S.C. § 801(a)(1)(A). The report must contain a copy of the rule, "a concise general statement relating to the rule," and the rule's proposed effective date. *Id.*

¹⁷ 5 U.S.C. § 801(a)(1)(B).

¹⁸ 5 U.S.C. §§ 801-802.

CRA adopts the definition of rule under the Administrative Procedure Act (APA), which states in relevant part that a rule is “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”¹⁹ CRA excludes three categories of rules from coverage: (a) rules of particular applicability; (b) rules relating to agency management or personnel; and (c) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties.²⁰

SSA did not send a report on either of these HALLEX sections to Congress or the Comptroller General. In its letter to us, SSA stated its view that these sections are not subject to review under CRA because they fall within either the exception for rules relating to agency management or personnel, or for rules of agency procedure that do not substantially affect non-agency parties’ rights or obligations.²¹

ANALYSIS

To determine whether the HALLEX sections at issue are rules subject to review under CRA, we first address whether they meet the APA definition of a rule and then, if they do, whether any of the CRA exceptions apply. These HALLEX sections clearly meet the criteria of an APA rule. First, they are agency statements that publicly articulate the agency’s evidentiary rules governing the use of evidence from the Internet in the adjudication of a disability claim. Second, they are of general applicability, applying to all proceedings both at the hearing level and at the Appeals Council level of SSA’s administrative review process. Additionally, the HALLEX sections are of future effect since they describe how evidence from the Internet may be used beginning on the dates the sections were included in the Manual.

The next question is whether these HALLEX sections fall within one of the exceptions enumerated in CRA. Two of the exceptions do not apply since the sections are rules of general and not particular applicability, and they are not rules relating to internal agency management or personnel. Therefore, the exception for rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties is the only relevant exception here.

The CRA exception was modeled on the APA, which excludes “rules of agency organization, procedure, or practice” from notice-and-comment rulemaking

¹⁹ 5 U.S.C. § 804(3) (*citing* 5 U.S.C. § 551).

²⁰ 5 U.S.C. § 804(3). The statute provides for certain other exceptions that are not relevant here.

²¹ SSA Letter at 3-5.

requirements.²² The purpose of the APA exception is to ensure “that agencies retain latitude in organizing their internal operations”²³ and includes, for example, agency procedures governing the conduct of its proceedings.²⁴ Courts have determined that rules were procedural under the APA exception when the rules did not have a “substantial impact” on non-agency parties,²⁵ and this rationale was included in the CRA exception for procedural rules.²⁶ We can thus look to APA case law, as well as our opinions, to guide us in determining whether the HALLEX sections are procedural rules exempt from CRA requirements.

In *American Hospital Ass’n v. Bowen*, for example, the court found that a Department of Health and Human Services (HHS) internal agency manual governing procedures for medical peer review inspections in the Medicare program was a rule of agency procedure or practice.²⁷ In 1982, Congress amended the Medicare Act to require that HHS contract with Peer Review Organizations (PROs), which are private organizations of doctors that monitor the quality and appropriateness of health care provided to Medicare beneficiaries.²⁸ HHS’s manual was designed to establish a frequency and focus of PRO review, and urged enforcement agents to concentrate their limited resources on particular areas where PRO attention will be most fruitful.

The American Hospital Association sued HHS, arguing that the agency had circumvented the notice and comment requirements of the APA when it issued the manual. The court rejected this claim and explained that the “critical feature” of the procedural rule exception “is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which

²² 5 U.S.C. § 553(b)(A). See also B-238859, Oct. 23, 2017, at 12 (“The CRA legislative history discussion of this exception is limited, but states that it was modeled on the APA”).

²³ *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980).

²⁴ See, e.g., *Pub. Citizen v. U.S. Dep’t of State*, 276 F.3d 634 (D.C. Cir. 2002) (holding a change in agency’s FOIA practices was a procedural rule); *James V. Hurson Assocs. v. Glickman*, 229 F.3d 277 (D.C. Cir. 2000) (holding changes to how the agency would review label applications was a procedural rule); *Nat’l Whistleblower Ctr. v. Nuclear Regulatory Comm’n*, 208 F.3d 256 (D.C. Cir. 2000) (holding adjustments to filing deadlines was a procedural rule).

²⁵ *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979).

²⁶ See B-275178, July 3, 1997, at 2.

²⁷ 834 F.2d 1037 (D.C. Cir. 1987).

²⁸ The Peer Review Improvement Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 324, 382-93 (1982).

parties present themselves or their viewpoints to the agency.”²⁹ The court went on to conclude that the manual met the procedural exception because it did not impose new burdens on entities providing Medicare services, nor did it affect their rights or obligations under the program.³⁰

In B-329916, May 17, 2018, we found that an Internal Revenue Service (IRS) statement on electronically filed tax returns was a rule of agency procedure or practice that fell within the procedural rule exception to CRA.³¹ In the statement, IRS explained that, beginning in the 2018 tax filing season, it would not accept electronically filed individual income tax returns where the taxpayer did not address health coverage reporting requirements.³² Previously, IRS had accepted these returns, and verified compliance with the reporting requirements after the taxpayer filed a return and paid taxes due or received a refund.

In holding that the IRS statement met the CRA exception, we explained that the critical question is whether the agency action alters the rights or interests of the regulated entities.³³ We found that the statement had no effect on taxpayers’ rights or obligations. The IRS statement merely shifted the timing of a step in the agency’s compliance procedures: verification of compliance with reporting requirements occurred at the time of tax filing rather than after a return had been accepted.³⁴

²⁹ 834 F.2d at 1046 (*citing Batterton*, 648 F.2d at 707).

³⁰ *Id.* at 1050-51. Similarly, in *United States Department of Labor v. Kast Metals Corp*, the court found that an Occupational Safety and Health Administration (OSHA) plan, which established the criteria OSHA used to select employers for routine safety and health inspections, was a procedural rule. The court found that the plan did not directly guide public conduct, but rather, was an internal agency procedure, concerned with the funneling of agency inspection resources. 744 F.2d 1145 (5th Cir. 1984).

³¹ See *also* B-291906, Feb. 28, 2003.

³² The requirements, included in the Patient Protection and Affordable Care Act, pertain to reporting full-year health coverage, claiming a coverage exemption, or reporting a shared responsibility payment.

³³ See *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994).

³⁴ We noted that our holding was in marked contrast to the types of agency statements we previously held did have substantial effects on the rights or obligations of non-agency parties: EPA interim guidance that altered existing regulations and gave recipients of government assistance significant rights that they did not previously possess, B-281575, Jan. 20, 1999; and a national forest plan amendment that changed permissible activities in designated land use areas, B-238859, Oct. 23, 2017.

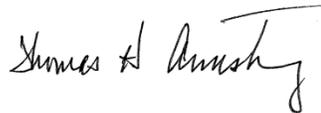
The adjudication of SSA claims is an agency proceeding, and the HALLEX sections at issue here define procedures that govern the use of evidence from the Internet during those proceedings. Moreover, the HALLEX sections, like the peer review manual in *American Hospital Ass'n* and the IRS statement on electronically filed returns, do not impose new burdens on claimants or alter claimants' rights or obligations during the SSA appeal process. To the contrary, the HALLEX limitations on the use of information from the Internet are binding only on SSA officials and do not apply when claimants submit such information. Therefore, the HALLEX sections are procedural rules that meet the CRA exception.

CONCLUSION

The HALLEX sections are not subject to review under CRA because they fall under the exception for rules of agency procedure or practice that do not substantially affect the rights or obligations of non-agency parties.

If you have any questions about this opinion, please contact Robert J. Cramer, Managing Associate General Counsel at (202) 512-7227 or Shirley Jones, Assistant General Counsel at (202) 512-8156.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas H. Armstrong". The signature is written in a cursive style with a prominent horizontal line above the first name.

Thomas H. Armstrong
General Counsel