In addition to legal remedies, the record indicates that there are non-legal resources available to educate consumers about antiques and collectibles and thus reduce consumers' susceptibility to the practice of passing off. For example, several newsletters and hobby newspapers regularly warn and advise buyers of antiques and collectibles about reproductions of specific items and classes of items [64] Many comments also indicate that there are collector clubs for many categories of collectibles that provide members with similar information. Commission staff will explore whether there is a role for the Commission in these efforts to increase consumer awareness.

IV. Conclusion

The comments uniformly favor retention of the Rule and state that there is a continuing need for the Rule with regard to currently covered products, i.e., imitation numismatic and political items; that the Rule provides benefits to consumers and industry; that the Rule does not impose substantial economic burdens; and that the benefits of the Rule outweigh the minimal costs it imposes. Although the comments addressing the impact of the Rule on small entities were minimal, these comments, including comments from major national associations in the numismatic and political items trade, indicate that the Rule does not place significant burdens on small entities. Accordingly, the Commission certifies that the Rule has not had a significant impact on a substantial number of small entities.

Although many comments recommended that the Act and Rule be expanded to cover all antiques and collectibles, the Commission does not have the authority under the Act to expand the Rule in this manner. In addition, there are a variety of legal and non-legal resources that address many of the issues raised by the commenters favoring expansion of the Act's coverage. Accordingly, the Commission has determined to retain the current Rule and is terminating this review.

List of Subjects in 16 CFR Part 304

Hobbies, Labeling, Trade practices.

Authority: The Federal Trade Commission Act, 15 U.S.C. 41–58 and the Regulatory Flexibility Act, 5 U.S.C. 601.

[64] See Chervenka, 497, 3 (publisher of Antique & Collectors Reproduction News) and Antique Week, 499, attachments.

By direction of the Commission.

Benjamin I. Berman,

Acting Secretary.

[FR Doc. 98–17929 Filed 7–6–98; 8:45 am]

BILLING CODE 6750–01–M

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

RIN 0960–AE53

Administrative Review Process; Identification and Referral of Cases for Quality Review Under the Appeals Council's Authority To Review Cases on Its Own Motion

AGENCY: Social Security Administration (SSA).

ACTION: Final rule.

SUMMARY: We are amending our regulations to include rules under which a decision or order of dismissal that is issued after the filing of a request for a hearing by an administrative law judge (ALJ) may be referred to the Appeals Council for possible review under the Appeals Council's existing authority to review cases on its own motion. These final rules codify identification and referral procedures that we currently use to ensure the accuracy of decisions that ALJs and other adjudicators make at the ALJ-hearing step (hearing level) of the administrative review process. The rules also codify new quality assurance procedures to ensure the quality of dispositions at the hearing level.

DATES: This rule is effective August 6, 1998.

FOR FURTHER INFORMATION CONTACT: Harry J. Short, Legal Assistant, Office of Process and Innovation Management, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–6243 for information about this notice. For information on eligibility or claiming benefits, call our national toll-free number, 1–800–772–1213.

SUPPLEMENTARY INFORMATION:

Background

Under procedures set forth in §§ 404.967 ff. and 416.1467 ff., and pursuant to a direct delegation of authority from the Commissioner of Social Security, the Appeals Council, a component in our Office of Hearings and Appeals (OHA), reviews hearing decisions and orders of dismissal issued by ALJs and decisions issued by certain other adjudicators. The Appeals Council may review an ALJ's decision or dismissal of a hearing request at the request of a party to the action or, pursuant to §§ 404.969 and 416.1469, on its own motion. Through the exercise of its authority to review cases, the Appeals Council is responsible for ensuring that the final decisions of the Commissioner of Social Security in claims arising under titles II and XVI of the Social Security Act (the Act), as amended, are proper and in accordance with the law, regulations, and rulings.

The Appeals Council's authority to review cases on its own motion also applies, at present, to two types of hearing-level cases that do not result in decisions by ALJs. Under §§ 404.942 and 416.1442, attorney advisors in OHA are authorized until July 1, 1998, to conduct certain prehearing proceedings and to issue, where warranted by the documentary evidence, wholly favorable decisions. Under the provisions of §§ 404.942 (e)(2) and (f)(3) and 416.1442 (e)(2) and (f)(3), such decisions are subject to review under the own-motion authority of the Appeals Council established in §§ 404.969 and 416.1469. In addition, under §§ 404.943 and 416.1443, adjudication officers are authorized, for test purposes, to conduct certain prehearing proceedings and to issue, where warranted by the documentary evidence, wholly favorable decisions. Under the provisions of §§ 404.943(c)(2)(ii) and 416.1443(c)(2)(ii), such decisions are also subject to review on the Appeals Council's own motion.

Under our regulations on the Appeals Council's procedures, if the Appeals Council decides to review a case in response to a request for review or on its own motion, it may issue a decision or remand the case to an ALJ. The Appeals Council may also dismiss a request for hearing for any reason that the ALJ could have dismissed the request.

A decision by the Appeals Council ''to review'' a hearing-level decision means that the Appeals Council assumes jurisdiction and causes that decision not to be the final decision of the Commissioner of Social Security. A decision that the Appeals Council ''reviews'' will be replaced by a new final decision or dismissal order of the Appeals Council or, if a hearing or other hearing-level proceedings are required, by a decision or dismissal order issued following remand of the case from the Council to an ALJ.

A decision by the Appeals Council to review a case is made when, following a consideration of the case to determine if review is appropriate, the Council issues a notice of its decision to review. The Council's standard notice of review

advises the parties of the reasons for the review and (unless the Council issues a wholly favorable decision upon taking review) the issues to be considered in proceedings before the Council or before an ALJ on remand. In instances in which the Council reviews a hearing level decision that has been issued based on the documentary evidence without the holding of an oral hearing by an ALJ, the parties have the right to such a hearing, except where the parties waive that right in writing.

The existing provisions in §§ 404.969 and 416.1469 on the Appeals Council's authority to review cases on its own motion provide that the Appeals Council itself may decide to review a case within 60 days after the date of the hearing decision or dismissal and that, if the Council does review a case under this authority, it will provide notice to the parties to the hearing decision or dismissal action. Sections 404.969 and 416.1469 do not currently address the procedures used in identifying and referring cases to the Appeals Council for it to consider for possible review on its own motion.

The Appeals Council *may* review any case on its own motion pursuant to §§ 404.969 and 416.1469. The conditions under which the Appeals Council *will* review a case, on request for review or on its own motion, are set forth in §§ 404.970 and 416.1470. Those sections provide that the Council will review a case if: (1) There appears to be an abuse of discretion by the ALJ; (2) there is an error of law; (3) the action, findings or conclusions of the ALJ are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest. Sections 404.970 and 416.1470 further provide that the Council will also review a case if new and material evidence is submitted that relates to the period on or before the date of the ALJ's decision and the Council finds, upon evaluating the evidence of record and the additional evidence, that an action, a finding or a conclusion of the ALJ is contrary to the weight of the evidence currently of record as a whole.

In fiscal year 1996 (FY '96), the Appeals Council received 99,735 requests for review. In FY '97, the number of requests for review received by the Appeals Council rose to 112,528. Most of these requests were for review of unfavorable decisions and dismissal actions; some concerned partially favorable decisions; and a few concerned decisions that were wholly favorable regarding the benefits claimed, but were found by a party to the decision to be less than fully satisfactory for some other reason.

In FY '96, the Appeals Council considered 8,502 cases for possible review under its own-motion authority; in FY '97, the Council considered 8,012 cases for possible review under that authority. Almost all of these cases involved favorable hearing-level decisions that were referred to the Appeals Council under one of two types of identification and referral procedures we currently use—random sample procedures, which generated the majority of this workload, and ''protest'' procedures.

Existing Identification and Referral Procedures

The Appeals Council considers, for possible review on its own motion, a national random sample of favorable ALJ decisions that have not been implemented, and, as resources permit, a random sample of unappealed denial decisions and dismissals. We conduct these random sample procedures pursuant to sections 205(a), 702(a)(4) and 1631(d) of the Act, which give the Commissioner of Social Security general responsibility and authority for program administration and oversight.

The Appeals Council also considers, for possible review on its own motion, a random sample of wholly favorable decisions issued by attorney advisors under the provisions of §§ 404.942 and 416.1442. Wholly favorable decisions issued by adjudication officers under the provisions of §§ 404.943 and 416.1443 are also identified by random sampling for referral to the Appeals Council for possible own-motion review. These procedures have been established in accordance with commitments we made, in publishing the final rules for the attorney advisor and adjudication officer provisions, to assess carefully the quality of the decisions issued by the attorney advisors and the adjudication officers (see 60 FR 34126, 34127 (1995) and 60 FR 47469, 47471 (1995), respectively).

Our existing identification and referral procedures also include those under which the SSA components responsible for effectuating hearing-level decisions—SSA Processing Centers (PCs) and Field Offices (FOs)—refer (''protest'') certain cases to the Appeals Council for possible review under its own motion authority. The PCs, which include our Program Service Centers and the Office of Disability and International Operations, refer cases directly to the Appeals Council; FOs forward cases to a PC or an SSA Regional Office, which decides if the PC or the Regional Commissioner should make a referral to the Council.

Decisions by ALJs, attorney advisors and adjudication officers are all subject to referral to the Appeals Council under our protest procedures. Almost all protested decisions are favorable decisions because almost all of the ALJ decisions that require implementation are wholly or partially favorable decisions under which benefit payments are to be effectuated (initiated or continued), and because all decisions issued by attorney advisors and adjudication officers are wholly favorable. In protesting a decision, an effectuating component may recommend that the decision be made more or less favorable or unfavorable. The Appeals Council, however, will decide whether to review such a case, and the appropriate disposition if it decides to review a case, based on its consideration of the record and the hearing-level decision.

Effectuating components refer a case if they believe the need for referral is clear (not dependent on a judgment factor) because: (1) the decision contains a clerical error which affects the outcome of the claim; (2) the decision is contrary to the Act, regulations or rulings; or (3) the decision cannot be effectuated because its intent is unclear as to an issue affecting the claim's outcome.

Effectuating components refer cases to the Appeals Council by written memoranda. If the Council decides to review a referred case, it provides the parties a copy of the effectuating component's referral memorandum with the notice by which it advises the parties that it will review the case.

We are amending our regulations to include rules on the existing random sample and protest procedures discussed above. We have decided to codify these procedures in connection with the decision we made, in furtherance of the *Plan for a New Disability Claim Process* (59 FR 47887 (1994) (henceforth, the *Disability Redesign Plan*)), to strengthen the Appeals Council's own-motion functions by establishing a new process for identifying and referring cases for possible review under the Council's existing own-motion authority.

New Identification and Referral Procedures

The Appeals Council currently considers only a small percentage of all favorable decisions issued at the hearing level for possible review under its own-motion authority. (The Council's workload in this area represented fewer than 3 percent of such decisions in FY

'96 and FY '97.) In addition, the processes currently used to select decisions for possible review on the Appeals Council's own motion are generally not designed to identify, in any systematic way, hearing-level decisions that are more likely to be incorrect. The random sample processes bringing cases before the Appeals Council do not identify cases other than by techniques designed to assure randomness of selection within broadly identified categories (i.e., allowances, unappealed denials, and dismissals). The identification of ''protest'' cases that occurs in the effectuation process is a secondary function of a process that is principally focused on the prompt payment of benefits.

Based on the above considerations, we are establishing procedures under which our Office of Quality Assurance and Performance Assessment (OQA), the SSA component that oversees SSA's quality assurance function, will examine certain allowance decisions at the hearing level that have been selected through statistical sampling techniques. OQA will refer to the Appeals Council for possible review the decisions it believes meet the criteria for review by the Council. Decisions that have been issued at the hearing level will initially be included in this examination process by random sampling. As we develop the computer systems and other technical capacities needed to support this function, we will use selective sampling techniques that rely on case profiling and other sampling methods that can identify cases which involve problematic issues or fact patterns that increase the likelihood of error.

Under the new process, upon referral of a case by OQA, the Appeals Council will consider the case and OQA's reasons for believing that the decision should be reviewed. The Appeals Council will decide whether to review the case in accordance with §§ 404.969–404.970 and/or 416.1469–416.1470. If it decides to review the case, the Appeals Council will provide the parties a copy of OQA's referral, which will be in writing, with its notice of review. The 60-day time limit for the Appeals Council to initiate review of a case under the authority and standards provided in §§ 404.969–404.970 and 416.1469–416.1470 will apply to cases the Council considers for review in response to referrals from OQA.

The Act does not specify how SSA should review hearing-level decisions. We believe that the new procedures we are establishing, in combination with the existing identification and referral procedures that we are including in our regulations, are appropriate procedures for carrying out the program oversight responsibilities of the Commissioner of Social Security.

An important purpose of the new procedures is to increase our ability to identify policy issues that should be clarified through publication of regulations or rulings. We plan to monitor how our policies are understood and implemented through a post-adjudicative evaluation process in which we will analyze differences of view between the Appeals Council and OQA concerning cases referred under the new procedures. We believe this post-adjudicative process, in conjunction with the new OQA referral process, will increase our ability to identify needed policy clarifications.

Regulatory Provisions

As revised in these final rules, §§ 404.969 and 416.1469 set forth the Appeals Council's own-motion authority and state that we refer cases to the Appeals Council for it to consider reviewing under that authority. Sections 404.969 and 416.1469 also describe the identification and referral procedures we will follow and the actions the Appeals Council will take in cases it considers for possible review on its own motion. These sections apply to all cases that our regulations make subject to own-motion review by the Council.

Sections 404.969(b) and 416.1469(b) specify that we will identify a case for referral to the Appeals Council for possible review under its own-motion authority before we effectuate a decision in the case. These sections provide that we will identify cases for referral through random and selective sampling techniques, that we may examine cases identified by sampling to assess whether the criteria for review by the Appeals Council are met, and that we will also identify cases for referral through the evaluation of cases we conduct in order to effectuate decisions.

Under §§ 404.969(b)(1) and 416.1469(b)(1), we may conduct random and selective sampling of cases involving all types of actions that occur at the hearing level of the administrative review process (i.e., wholly or partially favorable decisions, unfavorable decisions, or dismissals) and any type of title II or title XVI benefits (i.e., different types of benefits based on disability and benefits not based on disability). Our decision to adopt these rules rests on our conclusion that we should increase the number of favorable disability decisions the Appeals Council considers for possible review on its own motion to better balance the Council's review of favorable and unfavorable decisions. However, the Council's existing authority to review cases on its own motion covers all types of title II and title XVI cases adjudicated at the hearing level, and these final rules will allow use of the identification and referral procedures being set forth with respect to all such cases.

Sections 404.969(b)(1) and 416.1469(b)(1) specify that we will use selective sampling to identify cases that exhibit problematic issues or fact patterns that may increase the likelihood of error. Under these provisions, the factors considered in random and selective sampling shall not include the identity of the decisionmaker or the identity of the office issuing the decision.

Sections 404.969(b)(1) and 416.1469(b)(1) also authorize, but do not require, that we examine cases that have been identified through random or selective sampling. Cases may be identified for referral by random or selective sampling. The purpose of the examination of cases that we may conduct is to refine the identification of cases in which one or more of the criteria for own-motion review by the Appeals Council may be met.

Sections 404.969(b)(2) and 416.1469(b)(2) provide that effectuating components will identify cases for referral under criteria they presently use to identify cases that they believe exhibit clear error and other circumstances preventing effectuation of a decision. Any type of decision requiring effectuation may be identified for referral under these provisions.

Under §§ 404.969(c) and 416.1469(c), we will make referrals that occur as the result of a case examination or the effectuation process in writing. The written referral will state the referring component's reasons for believing that the Appeals Council should review the case on its own motion. Sections 404.969(c) and 416.1469(c) also provide that referrals resulting from selective sampling without a case examination may be accompanied by a written statement identifying the issue(s) or fact pattern that caused the referral, and that referrals resulting from random sampling without a case examination will only identify the case as a random sample case. A statement of the issue(s) or fact pattern identified in selective sampling may be computer generated.

Sections 404.969(d) and 416.1469(d) specify that the Appeals Council's notice of review will include a copy of any written referral provided to the Appeals Council. These provisions also include language clearly stating our long-standing policy that issuance of the notice of review establishes when a decision to conduct a review occurs (see

Hearings and Appeals Litigation Law Manual (HALLEX), section I–3–301).

Sections 404.969(d) and 416.1469(d) also state our policy that when the Appeals Council is unable to decide whether to review a case on its own motion within the 60-day period in which it may do so, it may consider whether the decision should be reopened under the provisions of §§ 404.987 and/or 416.1487, which authorize the Council to reopen a decision that has become administratively final on its own initiative or at the request of a party to the decision, if a condition for reopening stated in §§ 404.988 or 416.1488 is present. Inclusion of this statement in the regulations clarifies our long-standing policy that the Appeals Council may also reopen final decisions in accordance with §§ 404.987, 404.988, 416.1487, and 416.1488 after the 60 days for initiating review under §§ 404.969 and 416.1469 have expired (see Social Security Acquiescence Ruling (AR) 87–2(11)).

Sections 404.969(d) and 416.1469(d) also state, finally, that if the Appeals Council decides to review a decision on its own motion or to reopen a decision as provided in these rules, the notice of review or the notice of reopening issued by the Appeals Council will include, where appropriate, information concerning the interim benefit provisions of section 223(h) or section 1631(a)(8) of the Act, as appropriate. This provision reflects existing practices we follow under these statutory provisions.

Public Comments

These regulatory provisions were published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on September 25, 1997 (62 FR 50266). We received statements in response to the NPRM from 15 individuals and organizations. The individuals responding included ALJs employed by SSA and attorneys who represent individuals claiming rights under the Social Security and supplemental security income (SSI) programs. The organizations responding included a number of legal aid groups and four professional associations: The Association of Administrative Law Judges, Inc., the National Association of Disability Examiners, the National Council of Disability Determination Directors, and the National Organization of Social Security Claimants' Representatives.

Some commenters endorsed the proposed rules, with or without recommending changes in the rules; others opposed the rules, with or without recommending changes in the event of their adoption. Other commenters accepted the general appropriateness of rules like those proposed while also recommending changes in the final rules or requesting assurances about how the rules would be applied. Generally, the commenters who opposed the rules raised issues about the bases for the proposed rules and contended that they were intended to intimidate ALJs and would be unfair to claimants in general and to individuals whose cases were included in the new procedures. Comments favoring adoption of the rules generally emphasized the appropriateness of better balancing the review of favorable and unfavorable decisions issued at the ALJ-hearing step of the administrative review process.

The NPRM referred to the component that would perform the case examinations included in the proposed new quality assurance procedures as the ''Office of Program and Integrity Reviews.'' (*See* 62 FR 50266, 50268.) Since publication of the NPRM, this component's name has been changed to the ''Office of Quality Assurance and Performance Assessment.'' We have used the new name and its acronym, ''OQA,'' in the above discussion of these final rules and in the following discussion of the public comments and our responses.

Because some of the comments were detailed, we have condensed, summarized or paraphrased them. We have, however, tried to summarize the commenters' views accurately and to respond to all of the significant issues raised by the commenters that are within the scope of the proposed rules. For the reasons explained below in our responses to specific comments, we have not adopted the recommendations against promulgating these final rules or some of the specific recommendations we received for changing the rules as proposed. However, in response to the comments, as discussed below, we are clarifying the intent of the rules in several respects and making five clarifying changes in the regulatory language. For reasons discussed following the discussion of the comments and our responses, we are also making one editorial change in the regulatory language that is not in response to a specific comment.

Comment: One commenter thought that the proposed rules would blur the roles of the Appeals Council and OQA and shift to the Appeals Council trend-spotting and policymaking functions that should be performed by OQA.

Response: The Appeals Council has traditionally used its adjudicative experience as a basis for providing comments and recommendations in SSA's policymaking processes. An important purpose of the new procedures is to make better use of the Council's adjudicative experience for policymaking purposes. If the case disposition the Appeals Council makes in response to a referral from OQA indicates that the case may pose a significant policy or program issue, a post-adjudicative evaluation will be performed. OHA will participate in such evaluations to assure that the Council's adjudicative experience is reflected in the assessment of the policy and program issues the cases present. These procedures represent a new way to make use of the Appeals Council's experience in our policymaking processes; the procedures do not, in our judgment, blur the Council's role as an adjudicative body.

Comment: One commenter stated that we should specify, as we have already done with respect to our selective sampling procedures, that the identity of the decisionmaker or the office issuing a decision will also not be a factor in our random sampling and ''protest'' procedures.

Response: Because the random sampling procedures we are adopting may be applied to variously defined categories of cases (e.g., unfavorable decisions issued between given dates), we believe it would be appropriate to specify, in accordance with our intent, that the identity of the decisionmaker or of the office issuing the decision will not be a factor in either our random or our selective sampling procedures. Accordingly, we have modified the provisions of §§ 404.969(b)(1) and 416.1469(b)(1), and the description of these regulatory provisions set forth above, to make this point clear.

We believe that the identity of the decisionmaker or office would clearly not be a factor that might be encompassed within the criteria stated in §§ 404.969(b)(2) and 416.1469(b)(2) for identifying cases for referral as a result of the effectuation process. Therefore, we are not modifying the language of those provisions in response to this comment.

Comment: Several commenters were concerned about the proposed provisions of §§ 404.969(d) and 416.1469(d) that stated: ''If it is unable to decide within the applicable 60-day period whether to review a decision or dismissal, the Appeals Council may consider the case to determine if the decision or dismissal should be reopened pursuant to § 404.987 [416.1487].'' These commenters expressed views to the effect that these

provisions would effectively do away with the 60-day limit on own-motion review and make the grounds for own-motion review applicable for reopening purposes.

Response: As we discussed in the preamble to the NPRM and in the above description of the regulatory provisions, the language in question in this comment is intended to allow the Appeals Council to ''consider whether the decision should be reopened under the provisions of §§ 404.987 and/or 416.1487, which authorize the Council to reopen a final decision on its own initiative or at the request of a party to a decision, if a condition for reopening stated in §§ 404.988 and/or 416.1488 is present.'' The regulatory provisions as proposed reflected that intent by stating that the Council will consider if it should reopen the decision or dismissal action ''pursuant to § 404.987 [416.1487]'', because those sections make reopening contingent on satisfaction of the requirements set forth in §§ 404.988 and 416.1488. However, to make it unmistakably clear that we intend this provision to allow a decision to be reopened only if a condition for reopening described in §§ 404.988 or 416.1488 is present and the time limits established in those sections are also satisfied, we have modified the regulatory language to provide that the Appeals Council may determine if a decision or dismissal received under §§ 404.969 or 416.1469 ''should be reopened pursuant to §§ 404.987 and 404.988 [416.1487 and 416.1488].''

Comment: Several commenters thought that the intent of the proposed provisions concerning reopening in §§ 404.969(d) and 416.1469(d) should be clarified relative to the decision of the United States Court of Appeals for the Eleventh Circuit in *Butterworth* v. *Bowen,* 796 F.2d 1379 (11th Cir. 1986).

Response: In *Butterworth,* the Court of Appeals for the Eleventh Circuit held that the Appeals Council could reopen an ALJ's decision only if the case is ''properly before'' the Council, and that the circumstances in which the Council would have an ALJ's decision properly before it did not include those in which it had considered, but not timely taken, own-motion review. The court concluded that: ''[W]e have not held that the Secretary is precluded from initiating the reopening and revising of cases. We have only given section 404.969 its necessary force and recognized that it limits somewhat the reopening jurisdiction of the Appeals Council.''

We acquiesced in the holding in *Butterworth* by publishing AR 87–2(11). We issued this ruling because we determined that the court's holding conflicted with our longstanding policies that the Appeals Council may reopen any ALJ decision if the requirements in §§ 404.987 and 404.988 or 416.1487 and 416.1488 are met, and that such reopening actions are subject only to the time limits set forth in those regulations and not to time limits in any other regulations, including the 60-day time limit in §§ 404.969 and 416.1469.

In accordance with the provisions of 20 CFR § 404.985(e)(4) and 416.1485(e)(4), we are rescinding AR 87–2(11). Sections 404.985(e)(4) and 416.1485(e)(4) provide that an AR may be rescinded as obsolete if we subsequently clarify, modify or revoke the regulation or ruling that was the subject of the circuit court holding for which the AR was issued. As explained in a notice of the rescission of AR 87–2 that we are publishing concurrently with these final rules (*see* the notices section of this **Federal Register**), we are rescinding this AR as obsolete based on the language that we are including in §§ 404.969(d) and 416.1469(d) in these final rules to clearly state our policy that the Appeals Council has authority to reopen, in accordance with the requirements of §§ 404.987, 404.988, 416.1487, and 416.1488, ALJ decisions that come before it for possible own-motion review. This language establishes that a case that has come before the Appeals Council under the provisions of §§ 404.969 or 416.1469, and for which the 60-day period for taking own-motion review has lapsed, is properly before the Council for the purpose of considering reopening under the existing regulations on reopening. This language also establishes that it is our intent that the Appeals Council's authority to reopen an ALJ's decision in accordance with the provisions of those regulations, which establish conditions for reopening that differ from the conditions for own-motion review, should not be subject to the 60-day time limit in §§ 404.969 and 416.1469.

Comment: Several commenters believed that fundamental fairness requires the Agency to accord ALJ decisions such finality as to preclude the Appeals Council from reopening ALJ decisions referred to it for possible own-motion review.

Response: Our regulations on reopening and revising determinations and decisions allow us to reopen final, favorable and unfavorable determinations and decisions under stated conditions, on our initiative and at the request of claimants. These regulations enable us to provide relief to individuals whose claims should not have been denied and to protect the integrity of the Social Security and SSI programs by reopening favorable determinations and decisions that should not have been made. If an individual is dissatisfied with a revised determination or decision made after reopening, the individual may request further administrative or judicial review, as appropriate. We believe that our rules on reopening are fundamentally fair and that they do not deny appropriate finality to ALJ decisions or to any of our final dispositions, all of which are subject to the same rules of reopening.

Comment: Two commenters thought that, since these rules contemplate that the number of favorable decisions reviewed by the Appeals Council will increase, the rules should provide for informing claimants of their rights to interim benefits under sections 223(h) and 1631(a)(8) of the Act.

Response: Sections 223(h) and 1631(a)(8) of the Act provide that, where an ALJ has determined after a hearing that an individual is entitled to Social Security benefits based on disability or is eligible for SSI benefits based on disability or blindness, and the Commissioner of Social Security has not issued a final decision within 110 days after the date of the ALJ's decision, such benefits shall be currently paid for the months during the period specified in section 223(h) or section 1631(a)(8), as appropriate. Any benefits paid under these sections will not be considered overpayments unless the benefits were fraudulently obtained. We have implemented sections 223(h) and 1631(a)(8) through guidance provided in our Program Operations Manual System (POMS), sections DI 42010.205 ff. and SI 02007.001 ff., and in our HALLEX, section I–3–655. We pay interim benefits under our procedures if an ALJ has issued a favorable decision in a claim for initial or continuing benefits based on disability or blindness, the Appeals Council has either initiated review of the decision under its own-motion authority or reopened the decision pursuant to our reopening regulations, 110 days have elapsed since the date of the ALJ's decision, and the Commissioner has not issued a final decision.

The notice the Appeals Council issues upon initiating own-motion review or reopening of a decision covered by section 223(h) or section 1631(a)(8) advises claimants of the interim benefit provisions of those sections. However, we believe it would be appropriate, in response to this comment, to include language in §§ 404.969(d) and 416.1469(d) to inform claimants that they will be advised of the interim

benefit provisions of section 223(h) or section 1631(a)(8), if appropriate, where the Appeals Council reviews a favorable ALJ decision on its own motion or reopens such a decision as provided in the regulations. Accordingly, we have added such language and modified the description of these regulatory provisions set forth above to reflect this addition.

Comment: One commenter stated that the proposed rule changes were being made ''pursuant to'' section 304(g) of Pub. Law 96–265, the provision of the Social Security Disability Amendments of 1980 commonly referred to as the Bellmon Amendment. Two other commenters also thought that the proposed rules relied on this statutory provision for their basis or authority.

Response: As discussed above and in the preamble to the NPRM, we are amending our regulations to include these new quality assurance procedures to further the goals of the *Disability Redesign Plan*. More specifically, we are including these procedures to better balance the Appeals Council's review of favorable and unfavorable decisions and to increase our ability to identify policy issues that should be clarified through publication of regulations or rulings.

The statutory authority under which we are adopting these rules includes sections 205(a), 702(a)(5), and 1631(d) of the Act, which give the Commissioner of Social Security broad authority to establish rules and procedures governing the process for determining claims for benefits under titles II and XVI. We are also proceeding under sections 205(b) and 1631(c)(1) of the Act, which, in addition to directing the Commissioner to hold hearings and render decisions on the basis of evidence adduced at the hearing, also provide that: ''[t]he Commissioner * * * is further authorized, on the Commissioner's own motion, to hold such hearings and to conduct such investigations and other proceedings as the Commissioner may deem necessary or proper for the administration of this title.''

These rules are not being promulgated to carry out the provisions of section 304(g) of Pub. Law 96–265 although this provision remains in effect and supports the general proposition that SSA should conduct some form of own-motion review of disability decisions issued by ALJs. Because authority beyond that provided in the Act is not required for the purposes of these rules, we have decided not to revise the authority citations for Subpart J, Part 404, and Subpart N, Part 416, to include references to section 304.

Comment: One commenter thought that the new quality assurance procedures would misinterpret section 304(g) of Pub. Law 96–265 to justify focusing exclusively on allowance decisions.

Response: In promulgating these rules, we are interpreting section 304(g) of Pub. Law 96–265 to be consistent with the Commissioner of Social Security exercising his discretion to design and implement a program, like that established in these rules, for having the Appeals Council consider for review, on its own motion, disability decisions issued by ALJs. We believe this interpretation comports with the intent of section 304(g).

As discussed above and in the NPRM, these rules are intended to achieve a better balance in the Appeals Council's review of favorable and unfavorable decisions. While more than half of the unfavorable decisions issued by ALJs in recent years have been made subject to possible review by the Appeals Council as a result of claimant appeals, the number of favorable decisions the Council considers for possible review has represented less than three percent of the favorable decisions of ALJs (see above). We believe that we can achieve a better balance in the review of favorable and unfavorable decisions by including in the workload of favorable decisions the Council considers a relatively small number of cases that have been referred to the Council because they involve problematic issues or fact patterns that may increase the likelihood of error. As previously discussed, we believe that post-adjudicative evaluation of such cases can increase our ability to identify significant policy and program issues and to make appropriate improvements in our policies. Under these new rules, the Council's review functions should be better balanced in the sense that the amount of meaningful information they generate concerning issues and fact patterns that cause erroneous allowances will more nearly balance the extensive information that is already available, as a result of the request for review process and judicial review, about issues and fact patterns that cause erroneous disallowances.

The preambles to the NPRM and these final rules specify that the Appeals Council's existing authority to review cases on its own motion covers all types of title II and title XVI cases. These rules will allow use of the identification and referral procedures they set forth with respect to all such cases. Sections 404.969(b)(1) and 416.1469(b)(1), as proposed and as adopted, state: ''We may use random and selective sampling to identify cases involving any type of action (i.e., wholly or partially favorable decisions, unfavorable decisions, or dismissals) and any type of benefits (i.e., benefits based on disability and benefits not based on disability).'' Thus, while we currently see a need to better balance the review of favorable disability decisions by ALJs with the review of unfavorable disability decisions by ALJs, we are not preoccupied with the review of the former type of cases and are, instead, mindful of the need to ensure that we will have the flexibility in the future to use these new random and selective sampling techniques to bring to the Council's attention any mix of cases that it needs to consider to contribute in the most meaningful manner possible to our ability to assure the quality of our decisionmaking.

Comment: One commenter referred to the proposed procedures as the ''Bellmon Review Program II'' and contended that the ''selective sampling'' procedures proposed in the NPRM were actually ''targeting'' procedures.

Response: The issues and controversies that arose concerning the Bellmon Review Program of the 1980s are beyond the scope of the NPRM by which we proposed these new quality assurance procedures. However, for the reasons discussed below, we believe that it is important to distinguish these new procedures from that earlier program.

In *Association of Administrative Law Judges* v. *Heckler,* 594 F.Supp. 1132, 1143 (D.D.C. 1984), the court concluded that an incautiousness which it perceived in the Agency's use of terms such as ''targeting'' could have ''tended to corrupt'' the ability of the ALJs to decide cases impartially. It is our intent, in promulgating these new procedures, to use terminology that properly reflects the appropriate purpose of these rules and to avoid using terms, such as ''targeting,'' that could incorrectly cause the procedures to seem intimidating. Given the controversy that came to be associated with the Bellmon Review Program, the new program we are establishing could also be made incorrectly to seem intimidating by referring to it as the ''Bellmon Review Program II.''

Comment: One commenter contended that the distinction between ''targeting'' ALJs and ''targeting'' profile cases is immaterial because selective sampling is necessarily ''chilling'' if it is associated with allowance rates or ''targeting'' of any sort, especially in the ''close'' cases that ALJs are called on to decide.

Response: We believe that there are multiple, meaningful differences

between case-selection procedures that identify case samples based on case profiles, while also excluding the identity of the ALJ or the hearing office as factors that may be considered in the selection of cases, and case-selection procedures that use the identity of the ALJ or the hearing office in the selection of cases. We also believe that the case-selection procedures we are establishing will have no chilling effect on the ability of ALJs to decide cases impartially, free from Agency influence.

In the Bellmon Review Program of the 1980s, favorable decisions of individual ALJs were initially included in the program based on the rate at which the ALJ allowed cases. The rate at which the Appeals Council reviewed an ALJ's decisions on its own motion was thereafter used to determine both the percentage of the ALJ's decisions included in the ongoing program and the time during which the ALJ's decisions would continue to be subject to possible review under the program. By contrast, under the program we are now establishing, no case will be included in the program based on the ALJ's allowance rate, or any other characteristic of the ALJ or of his or her record in deciding cases, because this program excludes the identity of the ALJ as a selection factor. These final rules will not cause the favorable decisions of any ALJ to be included in our random or selective sampling procedures, either at the start of the program or through its operation, at a higher rate than are the favorable decisions of any other ALJ, except as chance in random selection or in the distribution of cases presenting problematic issues or fact patterns causes minor variations.

Under the new program, we will not advise adjudicators of the particular case profiles that we are using at any given time to identify cases for possible inclusion in the selective sampling portion of the new procedures. Our selective sampling of cases will also typically involve one or more random elements as a result of the techniques used in gathering and controlling the size of samples. For example, from all the cases that exhibit a profile, we might actually select only those in which the final digit of the Social Security number is odd and/or the decision is issued between certain dates. Thus, even if an ALJ becomes aware of the use of a particular profile, the ALJ will not necessarily know that a decision fitting that profile will be included in the sample we gather concerning it. The ALJ will also not know whether a case that is included in a selective sample will be referred by OQA to the Appeals Council for possible own-motion review. By contrast, under the Bellmon Review Program of the early 1980s, an ALJ could know that 100%, 75%, 50%, or 25% of his or her favorable decisions would be subject to consideration for possible own-motion review by the Appeals Council. To appreciate the contrast between the new procedures we are establishing and past practices, it should also be noted that, prior to 1975, the Appeals Council, through its staff, routinely considered *all* ALJ favorable decisions for possible review on the Council's own motion.

Under the current process, the unfavorable decisions of ALJs are substantially more likely than their favorable decisions to be reviewed (by the Appeals Council or a Federal court). Our decision to better balance the Appeals Council's review of favorable and unfavorable decisions by establishing these new procedures will lessen this existing imbalance in a non-threatening way and, we believe, promote independence and impartiality in decisionmaking.

Comment: One commenter thought the proposed procedures would be ''chilling'' based on the view that no need exists to affect actual cases and that the Agency could improve decisionmaking sufficiently through education, training and improved policymaking.

Response: We believe it is necessary to have the Appeals Council review and act on cases referred to it under these procedures, where a condition warranting review is present. The Appeals Council's issuance of decisions reversing an adjudicator's decision and orders of remand serves to correct error in individual cases. The Council's actions also instruct individual adjudicators in the correct application of Agency policy. We believe we cannot commit resources to increasing the Appeals Council's consideration of favorable decisions without also making the fullest possible use of its review functions to improve decisionmaking. While we also intend to use knowledge and information gained through the new procedures to improve policymaking (and to train adjudicators in the resulting policy improvements), that intent does not obviate the need to use the Appeals Council's review functions in all appropriate ways.

We do not believe the independence of ALJs to issue favorable decisions will be ''chilled'' by subjecting such decisions to possible change as a consequence of these identification and referral procedures. The Commissioner's responsibility to administer the Social Security and SSI programs and to make final decisions determining eligibility for benefits imposes on the Commissioner a duty to ensure consistency and impartiality in the decisionmaking process. The decisionmaking authority of ALJs is an authority to decide cases impartially in a manner consistent with Agency policy; that authority is not such that it should be ''chilled'' by any appropriate action the Commissioner may take to ensure that his final decisions, favorable as well as unfavorable, comply with the law, regulations and rulings. Establishing quality assurance procedures that make it possible for the Appeals Council to better balance its review of favorable and unfavorable decisions is an appropriate action by the Commissioner of Social Security.

Comment: Citing a memorandum that the Appeals Council recently issued in connection with a specific case, one commenter contended that SSA intends to pressure ALJs through feedback mechanisms reminiscent of a feedback system associated with the Bellmon Review Program.

Response: In addition to providing feedback to ALJs through decisions and remand orders of the Appeals Council, the Bellmon Review Program of the early 1980s included, as a controversial element that was never fully implemented, a companion, multi-stage system that was intended to provide individualized, extra-adjudicative feedback and counseling on the results of own-motion review under the program and, thereby, to promote long term improvement in the decisionmaking of the affected ALJs. We have not proposed, either in the *Disability Redesign Plan* or in the NPRM for these rules, to establish any ongoing, systematic process for providing ALJs extra-adjudicative, individualized feedback in which we would try to use the results of own-motion review by the Appeals Council to change an ALJ's decisionmaking practices. These final rules intend that the quality of ALJ decisionmaking should be improved principally through the instructional effect of the remand orders and reversal decisions that the Appeals Council will issue to individual ALJs under its own-motion authority, and through the publication of clarifying regulations and rulings that we will develop based on these new quality assurance procedures and make available to all adjudicators, with additional training as appropriate.

These rules establish no program for providing individualized feedback and contemplate no feedback activities that could properly be viewed as threatening by individual ALJs or the Corps of ALJs as a whole. The memorandum cited in this comment was issued in a trial-run

we conducted of these new procedures in which the Appeals Council did not actually exercise its own-motion authority. The memorandum was issued to provide some feedback in a situation in which the Appeals Council had not exercised its own-motion authority and, thus, could not provide feedback in the form of an order of remand or a reversal decision.

Comment: One commenter contended that the elimination of the request for Appeals Council review step in the administrative review process contemplated in the *Disability Redesign Plan* will greatly reduce the number of appealed denial decisions, and that SSA's past practices provide a convincing basis for concluding that the vast majority of decisions subject to selective sampling will be allowance decisions.

Response: The *Disability Redesign Plan* contemplates that favorable and unfavorable decisions would be subject to review on the Appeals Council's own motion in a redesigned disability claims process in which the request for review step is eliminated. We have recently begun testing elimination of that step of the existing process in a limited number of disability claims in which an ALJ issues a decision that is less than fully favorable (62 FR 49598 (1997)). If we eliminated the request for review step as it is presently constituted in the disability claims process (as we would do only after we have completed the above test, evaluated the test results, consulted with key stakeholders, and promulgated the necessary regulations through public notice and comment procedures), we would seek to refer to the Appeals Council, for possible review on its own motion, that mix of favorable and unfavorable decisions that would best ensure, through their consideration by the Council, the overall quality of ALJ decisionmaking. Considering our responsibility to assure the accuracy of unfavorable as well as favorable decisions, and the adverse effects on our ability to manage the Social Security and SSI programs effectively that could be expected to arise if we did not assure the quality of the unfavorable decisions subject to judicial review, we would have important reasons to refer to the Appeals Council a sufficient number of unfavorable decisions to permit us to provide meaningful Agency feedback to the ALJs and to identify policy issues that should be clarified through publication of regulations or rulings.

Comment: Pointing out that the time the Appeals Council currently requires to process its large request-for-review workload is high, several commenters expressed the view that it would be unconscionable to devote limited resources to the Council's own-motion workloads and thereby subject claimants who have requested review to additional delays.

Response: We recognized in the *Disability Redesign Plan* (59 FR 47889–47890) that placing additional resources into the existing disability claim process is not a viable alternative for increasing our ability to provide high-quality, responsible service to the public, and that we need to undertake longer-term strategies to address the service delivery problems affecting the disability process. We are adopting these final rules to take a step in accomplishing the goals of the disability redesign, the effectuation of which will inevitably entail acceptance of some temporary reductions in some aspects of service delivery in exchange for achieving long-term improvements. However, it should also be noted that the rules we are adopting give us substantial flexibility to determine the number of cases the Appeals Council considers for possible own-motion review as a result of random and selective sampling, and that we expect the rules to result in no change in the number of cases that are ''protested'' to the Council by effectuating components. Therefore, we anticipate that we will be able to manage the implementation of the new procedures in a way which minimizes any temporary reductions in service.

Comment: One commenter stated that use of statistical case profiles in selecting cases to be brought before the Appeals Council is not within the Appeals Council's ''own-motion jurisdiction,'' that the ''mindset'' associated with use of such a procedure is one that easily allows for disregarding the established administrative review process.

Response: Under section 702(a)(7) of the Act, which accords the Commissioner of Social Security full authority to assign duties and delegate authority to officers and employees of SSA, the Commissioner has delegated to the Appeals Council exclusive authority to decide to conduct and to perform own-motion review of hearing-level decisions. However, there are other functions that must be accomplished for SSA to carry out head-of-agency, own-motion review of hearing-level decisions issued nationwide. Such other functions include identifying and referring to the Appeals Council cases that the Council may consider for possible review under its own-motion authority. SSA has heretofore assigned identification and referral functions to various components, including those that perform random sampling and those that ''protest'' ALJ decisions. Under these final rules, the responsibility for identifying and referring cases to the Council is expanded to include OQA and the components that will perform operational-support functions in our new selective sampling and examination procedures.

The use of case profiles in selective sampling is a function within the Agency's authority that may properly be assigned to the Appeals Council, OHA, and other SSA components. Promulgating regulations to include such procedures in the set of procedures SSA uses to exercise the Commissioner's own-motion authority does not denote a mindset prone to disregard the administrative appeals process. Instead, that action constitutes an appropriate initiative to improve the disability claims process through rulemaking.

Comment: One commenter stated that the proposed quality review program would likely ignore the substantial evidence rule as related to the findings and conclusions of ALJs, and that the proposed program will allow the Appeals Council to ''second guess'' the ALJ's findings and conclusions concerning the credibility of evidence based on ''factors outside the record.'' Another commenter stated that we must make it clear that the standard for review will be the substantial evidence standard.

Response: The Appeals Council retains authority under §§ 404.969, 404.970, 416.1469 and 416.1470 to review a case, on request for review or on its own motion, for any reason. It is the practice of the Appeals Council, generally, to deny a request for review, or to decline to review a case on its own motion, if the case does not meet at least one of the criteria for review stated in §§ 404.970 and 416.1470, which set forth the reasons for which the Appeals Council ''will'' review a case. (*See* HALLEX sections I–3–301–I–3–307.)

Under the provisions of §§ 404.970(a) and 416.1470(a), the Appeals Council will review a case if the ALJ's decision is not supported by substantial evidence or if another of the criteria for review stated in those sections is met. Under the provisions of §§ 404.970(b) and 416.1470(b), if new and material evidence is submitted to the Appeals Council that relates to the period on or before the date of the hearing-level decision, the Appeals Council will consider the ''entire record'', including the new and material evidence submitted, and will decide to review the case if ''it finds that the [ALJ's] action, findings, or conclusion is contrary to the

weight of the evidence currently of record.''

The additional evidence that the Appeals Council considers under §§ 404.970(b) and 416.1470(b) (if the evidence is new and material and relevant to the period at issue) is typically submitted by claimants or their representatives. In addition, under our existing ''protest'' procedures, effectuating components sometimes attach to their memoranda to the Appeals Council potential evidentiary items encountered in the activities these components conduct to effectuate decisions. Thus, for example, if an updated earnings report that has been secured to determine benefit amounts appears to show that the claimant engaged in substantial gainful activity after the date on which the hearing-level decision found that disability began, the effectuating component may submit the earnings report to the Appeals Council as an attachment to a protest memorandum. Under these final rules, effectuating components will attach such items to the written referrals they make under §§ 404.969(c) and 416.1469(c).

Evidence that the Appeals Council considers under §§ 404.970(b) and 416.1470(b) to determine whether to review a case is not part of the record of the decision that has been made at the hearing level, of course, but it is part of the administrative record in any further proceedings that may occur in the case. If the Council reviews the case and a new decision is issued, any evidentiary items received under these provisions are made part of the record for decision that is established, either by an ALJ following remand or, if the Appeals Council is able to issue a fully favorable decision, by the Council.

When a case-examination is conducted by OQA under the new quality assurance procedures established by these final rules, the OQA analyst who conducts the examination may consult with a medical or psychological consultant to gain insight into whether the decision at the hearing level was supported by the record upon which it was based. Insights gained through such consultations may be reflected in the written referrals that OQA will prepare, as provided in §§ 404.969(c) and 416.1469(c), to state its reasons for believing that the Appeals Council should review the decision on its own motion. However, the written referrals made by OQA will attach no statement or writing by a consultant that could activate the additional-evidence provisions of § 404.970(b) or § 416.1470(b). Those provisions will also not be activated by the written referral itself, which will document the procedural history of the case and express OQA's reasons for believing the case should be reviewed. The written referral will not constitute an evidentiary item to be weighed in decisionmaking. In deciding whether to review cases referred by OQA, the Appeals Council will apply the criteria set forth in §§ 404.970(a) and 416.1470(a). If the Council reviews the case, OQA's written referral will be included in the procedural portion of the overall administrative record of the case, but will not be part of the evidentiary record upon which any subsequent decision is based.

Comment: Several commenters thought that the selective sampling of allowance decisions would be unfair to individuals whose cases meet an applicable case profile. The reasons given for this view included that such individuals would effectively face a higher standard of proof than other individuals (as a result of the chilling effect on ALJ readiness to reach a favorable decision and the existence of a pre-judgment in favor of denial), and that the decisions of these individuals would be placed at special risk by being subjected to procedures that other favorable decisions do not face.

Response: We have already discussed our reasons for believing that these new procedures will not intimidate ALJs or chill their decisional independence. We further note here that use of selective sampling to identify cases based on the presence of problematic issues or fact patterns involves, not a pre-judgment that these cases should be denied, but a judgment that the chance of error in the cases so identified is elevated as compared to the chance of error in cases that do not involve such issues and patterns, and that consideration of the cases presenting such issues and patterns provides an increased opportunity to identify error and policy issues that should be clarified through publication of regulations or rulings.

It is true, of course, that the cases of claimants whose allowance decisions are selected for consideration for own-motion review will be subjected to an examination not given to other cases and/or possible review by the Appeals Council. However, for the reasons discussed below, we believe that these rules minimize the number of cases we need to expose to possible review on the Council's own motion.

Cases selected for possible own-motion review will be equally affected whether chosen by random or selective sampling procedures. The effects of own-motion procedures (which can include providing some individuals who receive unfavorable decisions additional administrative consideration through no action of their own) could not be wholly eliminated except by subjecting all cases to own-motion consideration or by eliminating own-motion functions altogether. The first of these options is not currently feasible, and the second would be inconsistent with the responsibility of the Commissioner of Social Security to ensure consistency and uniformity in the allocation of benefits through his final decisions.

Our decision to promulgate these rules rests on the judgment that use of selective sampling procedures, together with our existing random sampling and ''protest'' procedures, represents the best way to minimize the number of cases we need to subject to possible own-motion review while also maximizing the use we can make of our own-motion capacities to identify erroneous decisions and to monitor operation of the claims process effectively. Use of case examinations by OQA in conjunction with selective sampling refines the identification of cases that should be subjected to consideration by the Appeals Council for own-motion review and reduces the number of cases that we need to subject to such consideration.

In our judgment, the procedures we are adopting in these final rules to improve the disability claims process are in accord with the following views the United States Supreme Court expressed in *Califano* v. *Boles,* 443 U.S. 282, 285 (1979), concerning how fairness can best be assured to individuals seeking Social Security benefits:

> * * * the Court has been sensitive to the special difficulties presented by the mass administration of the social security system. After the legislative task of classification is completed, the administrative goal is accuracy and promptness in the actual allocation of benefits pursuant to those classifications. The magnitude of that task is not amenable to the full trappings of the adversary process lest again benefit levels be threatened by the costs of administration. *Mathews* v. *Eldridge,* 424 U.S. 319, 343–349, 96 S.Ct. 893, 906–910, 47 L.Ed.2d. 18 (1976); *Richardson* v. *Perales,* 402 U.S. 389, 406, 91 S.Ct. 1420, 1430, 28 L.Ed.2d. 842 (1971). Fairness can best be assured by Congress and the Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error.

Comment: Several commenters expressed concern that SSA has not specified the case profiles that will be used in selective sampling. One commenter contended that this

omission violated the principle that regulations should not be vague and indefinite. Another commenter contended that SSA would expose ALJs to claims of bias by not identifying through notice and comment procedures the types of cases to be ''targeted.''

Response: We are not specifying the problematic issues or fact patterns that will be used in defining the case profiles to be employed in selective sampling because these issues and fact patterns will change over time and we will need flexibility to address such changes. In addition, as we explained above in discussing the distinctions between ''targeting'' and the selective sampling procedures we are establishing, we do not plan to advise adjudicators of the particular case profiles we are using at any given time. Considering that it will also always be clear that neither the identity of the decisionmaker nor the identity of the office issuing the decision has been a factor in the selection of a case, we believe that these rules will not in any way expose decisionmakers to charges of bias.

Comment: One commenter believed that the proposed rules would create ''internal procedures'' and a new layer of administrative ''review'' without providing claimants the right to participate in those procedures/review and to understand the criteria that the examining component and the Appeals Council apply, until a determination to review the favorable decision has been made.

Response: These final rules add no new layer of administrative review. The only ''review'' of an ALJ's decision that can occur under our regulations, as currently established and as amended by these rules, is the ''review'' that occurs if and when, following its preliminary consideration of a case, the Appeals Council decides to review a case and announces its decision to review in a notice of review. For the purposes of the Social Security and SSI claims process, ''own motion'' review means a review that is initiated absent any motion/appeal or input by the claimant. The activities SSA conducts to decide whether to exercise its own-motion authority (*i.e.*, identification and referral procedures and the preliminary consideration of cases that the Appeals Council conducts, with the assistance of its staff) *are* internal functions; they constitute the way this large Agency decides whether to exercise its authority to initiate review of cases unilaterally. Where the claimant has not requested review, the proceedings in which the claimant has a due process right of participation are limited to those that occur if the Appeals Council decides, for the Agency, to review the case.

Under these final rules, the Appeals Council retains exclusive authority to decide to review a hearing-level case. The criteria the Council will apply in deciding whether to review cases will remain, as discussed above, those it currently applies under §§ 404.969, 404.970, 416.1469, and 416.1470. In addition, the examination of cases that OQA conducts under these final rules will be for the purpose of assessing whether the criteria for review by the Appeals Council may be met (or, in OQA'a view, are met). To make this point clear, we have modified the provisions of §§ 404.969(b)(1) and 416.1469(b)(1) that state the purpose of the case examinations. We have also modified the explanation of the case examination set forth above.

Comment: Two commenters likened the procedures proposed in the NPRM to the procedures of the SSA Representation Project, a test project of the 1980s in which an SSA representative could participate in certain ALJ hearings and refer cases to the Appeals Council for possible own-motion review. It was contended that OQA's function in the new procedures would be like that of the SSA representative and would involve the kind of advocacy that was criticized in *Salling* v. *Bowen*, 641 F. Supp. 1046 (W.D.Va. 1986).

Response: Under these final rules, OQA will examine cases that have been initially identified through random and selective sampling procedures to determine if a case should be the subject of a referral and, if that issue is resolved in the affirmative, to state its reasons for believing that the decision is not supported and should be considered by the Appeals Council for possible review under its own-motion authority. OQA, as the SSA component responsible for SSA's quality assurance functions, will examine cases with no prior involvement in those cases that might, even arguably, affect its ability to impartially assess whether a referral is warranted under the applicable law, regulations and rulings. The Appeals Council, which will decide if own-motion review is appropriate, has, like ALJs and all other SSA decisionmakers, no adjudicative duty other than to assure that cases are decided impartially in accordance with Agency policy as established through law, regulations, and rulings.

Based on the above considerations, we see no significant similarity between the SSA Representation Project and the quality assurance procedures we are establishing in these final rules. We also believe that these procedures support our ability to continue to provide informal, nonadversarial adjudication of cases in a high-volume process.

Comment: One commenter indicated that, if SSA did not abandon the proposed rules, it should amend the rules to provide that SSA will not use the data gathered to keep records on ALJs or individual hearing offices regarding allowance or own-motion rates or any similar information, to prohibit the instituting of any form of continuing education for ''targeted'' ALJs, and to provide for publishing any data gathered in the program to all ALJs without mention of the name of any ALJ or hearing office.

Response: As we discussed above, there will be no ''targeting'' of ALJs under these rules, which preclude consideration of the identity of a decisionmaker or of a decisionmaking office and of any data concerning matters such as a decisionmaker's allowance or own-motion rate, in the random sampling, selective sampling, and case-effectuation procedures we are establishing in these final rules. We intend that these rules should improve decisional quality principally through the instructional effects of the Appeals Council's adjudicative actions and through the policy clarifications we will develop based on these new quality assurance procedures. The rules establish no program for providing individualized feedback, contemplate no feedback activities that should be threatening to individual ALJs or the Corps of ALJs as a whole, and do not authorize or contemplate publishing data on named ALJs or hearing offices.

We are not adopting the recommendation of this commenter that we should modify these final rules to prescribe the uses that will be made of data gathered as a result of the quality assurance procedures we are establishing by these rules. The uses of management information is not a matter within the scope of these rules.

Comment: One commenter believed that the new process would be subject to the same harsh criticism as the ''targeted'' reviews of the early 1980s absent satisfaction of the following requirements: ''Both the process for selecting decisions to review and the criteria used in the review must be scrupulously fair and free from bias. Selection of cases must be made randomly. Individual ALJs cannot become targets. Allowance and denial rates have no part in the selection process. Reviewers must be clear that their standard for review is one of substantial evidence supporting the ALJ's decision.''

Response: For reasons discussed above generally in response to other comments, and as we further explain below specifically, we believe that the new quality assurance procedures we are establishing in these final rules exhibit each of the characteristics urged by this commenter. We note that while the new procedures provide for selective as well as random sampling, our selective sampling of cases will typically involve random elements and will be scrupulously fair and free from bias.

Individual ALJs cannot become targets under those procedures and allowance and denial rates have no part in the selection process. The new procedures and these rules cause no change in the criteria for reviewing hearing level decisions and orders of dismissal, or in the practices the Appeal Council follows in applying the substantial evidence standard and other criteria in deciding whether to review a case.

Other Changes

We have modified the provisions of §§ 404.969(b)(2) and 416.1469(b)(2), and the explanation of those provisions set forth above, to emphasize that a referral resulting from the effectuating process rests on the belief of an effectuating component that a decision cannot be effectuated (for a reason stated in those provisions) and does not represent a pre-judgement by the Agency that review of the decision is appropriate. The Appeals Council retains exclusive authority under these final rules to decide for the Agency whether a hearing-level decision should be reviewed.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these rules do meet the criteria for a significant regulatory action under Executive Order 12866. They were therefore submitted to OMB for review. These rules do not adversely affect State, local or tribal governments. The rules are expected to result in administrative costs of less than $5 million annually and to have no significant impact on program costs. Therefore, we have not prepared a cost benefit analysis under Executive Order 12866.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because these rules affect only individuals. Therefore, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These regulations impose no new reporting or record keeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.003, Social Security-Special Benefits for Persons Aged 72 and Over; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

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

20 CFR Part 416

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

Dated: May 27, 1998.

Kenneth S. Apfel,

Commissioner of Social Security.

For the reasons set out in the preamble, subpart J of part 404 and subpart N of part 416 of chapter III of title 20 of the Code of Federal Regulations are amended as set forth below.

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

20 CFR part 404, Subpart J, is amended as follows:

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

Authority: Secs. 201(j), 205(a), (b), (d)–(h), and (j), 221, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), (d)–(h), and (j), 421, 425, and 902(a)(5)); 31 U.S.C. 3720A; sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note).

2. Section 404.969 is revised to read as follows:

§ 404.969 Appeals Council initiates review.

(a) *General.* Anytime within 60 days after the date of a decision or dismissal that is subject to review under this section, the Appeals Council may decide on its own motion to review the action that was taken in your case. We may refer your case to the Appeals Council for it to consider reviewing under this authority.

(b) *Identification of cases.* We will identify a case for referral to the Appeals Council for possible review under its own-motion authority before we effectuate a decision in the case. We will identify cases for referral to the Appeals Council through random and selective sampling techniques, which we may use in association with examination of the cases identified by sampling. We will also identify cases for referral to the Appeals Council through the evaluation of cases we conduct in order to effectuate decisions.

(1) *Random and selective sampling and case examinations.* We may use random and selective sampling to identify cases involving any type of action (i.e., wholly or partially favorable decisions, unfavorable decisions, or dismissals) and any type of benefits (i.e., benefits based on disability and benefits not based on disability). We will use selective sampling to identify cases that exhibit problematic issues or fact patterns that increase the likelihood of error. Neither our random sampling procedures nor our selective sampling procedures will identify cases based on the identity of the decisionmaker or the identity of the office issuing the decision. We may examine cases that have been identified through random or selective sampling to refine the identification of cases that may meet the criteria for review by the Appeals Council.

(2) *Identification as a result of the effectuation process.* We may refer a case requiring effectuation to the Appeals Council if, in the view of the effectuating component, the decision cannot be effectuated because it contains a clerical error affecting the outcome of the claim; the decision is clearly inconsistent with the Social Security Act, the regulations, or a published ruling; or the decision is unclear regarding a matter that affects the claim's outcome.

(c) *Referral of cases.* We will make referrals that occur as the result of a case examination or the effectuation process in writing. The written referral based on the results of such a case examination or the effectuation process will state the referring component's reasons for believing that the Appeals Council should review the case on its own motion. Referrals that result from selective sampling without a case examination may be accompanied by a written statement identifying the issue(s) or fact pattern that caused the referral. Referrals that result from

random sampling without a case examination will only identify the case as a random sample case.

(d) *Appeals Council's action.* If the Appeals Council decides to review a decision or dismissal on its own motion, it will mail a notice of review to all the parties as provided in § 404.973. The Appeals Council will include with that notice a copy of any written referral it has received under paragraph (c) of this section. The Appeals Council's decision to review a case is established by its issuance of the notice of review. If it is unable to decide within the applicable 60-day period whether to review a decision or dismissal, the Appeals Council may consider the case to determine if the decision or dismissal should be reopened pursuant to §§ 404.987 and 404.988. If the Appeals Council decides to review a decision on its own motion or to reopen a decision as provided in §§ 404.987 and 404.988, the notice of review or the notice of reopening issued by the Appeals Council will advise, where appropriate, that interim benefits will be payable if a final decision has not been issued within 110 days after the date of the decision that is reviewed or reopened, and that any interim benefits paid will not be considered overpayments unless the benefits are fraudulently obtained.

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

20 CFR Part 416, Subpart N, is amended as follows:

1. The authority citation for subpart N continues to read as follows:

Authority: Sec. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

2. Section 416.1469 is revised to read as follows:

§ 416.1469 Appeals Council initiates review.

(a) *General.* Anytime within 60 days after the date of a decision or dismissal that is subject to review under this section, the Appeals Council may decide on its own motion to review the action that was taken in your case. We may refer your case to the Appeals Council for it to consider reviewing under this authority.

(b) *Identification of cases.* We will identify a case for referral to the Appeals Council for possible review under its own-motion authority before we effectuate a decision in the case. We will identify cases for referral to the Appeals Council through random and selective sampling techniques, which we may use in association with examination of the cases identified by sampling. We will also identify cases for referral to the Appeals Council through the evaluation of cases we conduct in order to effectuate decisions.

(1) *Random and selective sampling and case examinations.* We may use random and selective sampling to identify cases involving any type of action (i.e., wholly or partially favorable decisions, unfavorable decisions, or dismissals) and any type of benefits (i.e., benefits based on disability and benefits not based on disability). We will use selective sampling to identify cases that exhibit problematic issues or fact patterns that increase the likelihood of error. Neither our random sampling procedures nor our selective sampling procedures will identify cases based on the identity of the decisionmaker or the identity of the office issuing the decision. We may examine cases that have been identified through random or selective sampling to refine the identification of cases that may meet the criteria for review by the Appeals Council.

(2) *Identification as a result of the effectuation process.* We may refer a case requiring effectuation to the Appeals Council if, in the view of the effectuating component, the decision cannot be effectuated because it contains a clerical error affecting the outcome of the claim; the decision is clearly inconsistent with the Social Security Act, the regulations, or a published ruling; or the decision is unclear regarding a matter that affects the claim's outcome.

(c) *Referral of cases.* We will make referrals that occur as the result of a case examination or the effectuation process in writing. The written referral based on the results of such a case examination or the effectuation process will state the referring component's reasons for believing that the Appeals Council should review the case on its own motion. Referrals that result from selective sampling without a case examination may be accompanied by a written statement identifying the issue(s) or fact pattern that caused the referral. Referrals that result from random sampling without a case examination will only identify the case as a random sample case.

(d) *Appeals Council's action.* If the Appeals Council decides to review a decision or dismissal on its own motion, it will mail a notice of review to all the parties as provided in § 416.1473. The Appeals Council will include with that notice a copy of any written referral it has received under paragraph (c) of this section. The Appeals Council's decision to review a case is established by its issuance of the notice of review. If it is unable to decide within the applicable 60-day period whether to review a decision or dismissal, the Appeals Council may consider the case to determine if the decision or dismissal should be reopened pursuant to §§ 416.1487 and 416.1488. If the Appeals Council decides to review a decision on its own motion or to reopen a decision as provided in §§ 416.1487 and 416.1488, the notice of review or the notice of reopening issued by the Appeals Council will advise, where appropriate, that interim benefits will be payable if a final decision has not been issued within 110 days after the date of the decision that is reviewed or reopened, and that any interim benefits paid will not be considered overpayments unless the benefits are fraudulently obtained.

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DEPARTMENT OF STATE

22 CFR Part 140

[Public Notice 2840]

Bureau for International Narcotics and Law Enforcement Affairs; Prohibition on Assistance to Drug Traffickers

AGENCY: Department of State (Bureau for International Narcotics and Law Enforcement Affairs).

ACTION: Final rule.

SUMMARY: The Department of State issues these regulations to implement Section 487 of the Foreign Assistance Act of 1961, as amended (''FAA'') (22 U.S.C. 2291f).

Section 487(a) directs the President to take all reasonable steps to ensure that assistance provided under the Foreign Assistance Act or the Arms Export Control Act is not provided to or through any individual or entity that the President knows or has reason to believe has been convicted of a violation of, or a conspiracy to violate, any law or regulation of the United States, a State or the District of Columbia, or a foreign country relating to narcotic or psychotropic drugs or other controlled substances; or is or has been an illicit trafficker in any such controlled substance or is or has been a knowing assistor, abettor, conspirator, or colluder with others in the illicit trafficking of any such substance. This rule establishes a single government-wide enforcement mechanism for Section 487. The regulations seek to achieve rigorous statutory enforcement in a