

**SOCIAL SECURITY ADMINISTRATION****20 CFR Part 404**

[Regulations No. 4]

RIN 0960-AG18

**Update to Divided State Retirement Systems Coverage Group List and Technical Coverage Corrections Required by the Social Security Protection Act of 2004****AGENCY:** Social Security Administration (SSA).**ACTION:** Final rules.

**SUMMARY:** We are issuing these final rules to reflect in our regulations four self-implementing provisions in the Social Security Protection Act of 2004 (SSPA). One provision adds two States (Kentucky and Louisiana) to a list of States that are permitted to divide public employee retirement systems based on whether the State and/or local employees in positions under the systems want Social Security and/or Medicare coverage or not. The other three provisions make technical corrections to the Social Security Act (the Act) and the Internal Revenue Code (IRC) regarding various Social Security coverage issues.

**DATES:** These regulations are effective July 21, 2005.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Johnson, Social Insurance Specialist, Office of Income Security Programs, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235-6401, (410) 965-7959 or TTY (410) 966-5609. For information on eligibility, claiming benefits, or coverage of earnings, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778.

**SUPPLEMENTARY INFORMATION:****Electronic Version**

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**Background**

Under section 218 of the Act, 42 U.S.C. 418, the Commissioner of Social Security has an agreement with each State allowing for the extension of Social Security coverage to services performed by individuals as State and local employees. Under section 218(d) of the Act, 42 U.S.C. 418(d), provisions

of these agreements may extend coverage, on the basis of referendums provided for in that section, to services by employees participating in retirement systems (*i.e.*, State or local pension, annuity, retirement, and similar funds or systems), or to services by a subgroup of employees in such a system. See also 42 U.S.C. 418(a), (b)(4) and (b)(5); 20 CFR 404.1202, 404.1206 and 404.1214.

The SSPA, Public Law 108-203, was enacted on March 2, 2004. Section 416 of the law, effective January 1, 2003, amends section 218(d)(6)(C) of the Act by adding Louisiana and Kentucky to a list of States that are permitted to divide their public employee retirement systems based on the employees' desire for coverage. In the 23 "divided retirement system" States, the State has the option to extend Social Security and/or Medicare coverage by referendum to the affected services of only those employees, in a particular voting group of employees, who vote to be covered, with services of all future employees who join the group being covered automatically. Employees under a retirement system who participate in such a group referendum and do not wish their services to be covered under Social Security could vote to be (and are) excluded. (In other States, a majority vote in favor of Social Security coverage by a group of employees in a retirement system results in coverage of the affected services of all employees in the voting group.)

Section 422 of the SSPA, applicable to years beginning before, on or after December 31, 1994, conforms section 211(a)(7) of the Act, 42 U.S.C. 411(a)(7), to a corresponding provision of IRC, 26 U.S.C. 1402(a)(8), by excluding certain retirement income and benefits, received after retirement by duly ordained, commissioned, or licensed ministers or members of religious orders, from the definition of net earnings from self-employment.

Section 423 of the SSPA is effective upon enactment and clarifies that, for purposes of the definitions of wages in sections 209(a) of the Act and 3121(a) of the IRC, cash remuneration for domestic employment performed in a private home of the employer on a farm operated for profit is considered wages when it exceeds an applicable dollar threshold in section 3121(x) of the IRC, 26 U.S.C. 3121(x). See 42 U.S.C. 409(a)(6)(B); 42 U.S.C. 3121(a)(7)(B). Section 423 also amends section 210(f)(5) of the Act and section 3121(g)(5) of the IRC to clarify that domestic service in the private home of an employer on a farm operated for

profit is not included within the definition of agricultural labor under those statutory sections.

Section 425 of the SSPA, also effective upon enactment, clarifies that, for purposes of the definitions of net earnings from self-employment under section 211(a)(5)(A) of the Act and section 1402(a)(5)(A) of the IRC, non-partnership income from a trade or business which is community income under the laws of a community property State is treated as the gross income and deductions of the spouse carrying on the relevant trade or business. If the spouses operate the trade or business jointly, such self-employment income is treated as the gross income and deductions of each spouse on the basis of his or her respective share of the gross income and deductions. We are revising our regulations as explained below to conform to the statutory changes.

**Explanation of Changes****§§ 404.1055 and 404.1056**

We are revising § 404.1055, per SSPA section 423, by deleting the last sentence of paragraph (a) which refers to domestic services performed on a farm. We are revising § 404.1056 by deleting all references to domestic employment in paragraph (a)(6). We are also fixing a typographical error in paragraph (a)(11) by correcting the spelling of "commercial".

**§ 404.1086**

We are revising § 404.1086, per SSPA section 425, by revising existing paragraph (a)(1) and removing paragraphs (a)(2) and (b). The paragraphs being removed discuss the meaning of "management and control" for a business (other than a partnership) operated by a husband and wife in a community property State and the treatment of partnership income derived in a community property State by a husband or wife who is a partner in a partnership or a husband and wife who are both partners in the same partnership, which are no longer applicable policies. The new language provides that the gross income and deductions derived from a trade or business in a community property State will be taxed and credited to the spouse who is carrying on the trade or business or to each spouse based on his or her distributive share of the gross income and deductions if the trade or business is jointly operated.

**§ 404.1091**

We are revising § 404.1091, per SSPA section 422, to provide that ministers and members of religious orders should

exclude any parsonage or housing allowances included in retirement pay after the minister retires or any other retirement benefit received after retirement pursuant to a church plan as defined in section 414(e) of the IRC, when computing net earnings from self-employment. This provision is effective for years beginning before, on or after December 31, 1994. This technical correction in the SSPA conforms provisions in the Act to an IRC change made via section 1456(a) of Public Law 104-188. We are also fixing a typographical error in existing paragraph (c), which is being redesignated as paragraph (d), by removing the word "one" from the first sentence.

#### § 404.1207

We are revising § 404.1207(a), per SSPA section 416, to include the States of Kentucky and Louisiana in the list of States that are permitted to divide public employee retirement systems based on whether the employees in positions under the systems want Social Security and/or Medicare coverage or not.

#### Regulatory Procedures

Pursuant to section 702(a)(5) of the Social Security Act, 42 U.S.C. 902(a)(5), SSA follows the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 in the development of its regulations. The APA provides exceptions to its prior notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures on the basis that they are impracticable, unnecessary, or contrary to the public interest.

In the case of these final rules, we have determined that, under 5 U.S.C. 553(b)(B), good cause exists for dispensing with the notice and public comment procedures on these rules because such procedures are unnecessary. Good cause exists because these regulations merely reflect the self-implementing provisions in sections 416, 422, 423 and 425 of Public Law 108-203 that we have been following operationally since enactment. Therefore, opportunity for prior comment is unnecessary, and we are issuing these regulations as final rules.

In addition, we find good cause for dispensing with the 30-day delay in the effective date of a substantive rule, provided for by 5 U.S.C. 553(d). These revisions reflect the provisions enacted in the SSPA. However, without these changes, our rules will conflict with current law and may mislead the public. Therefore, we find that it is in the

public interest to make these rules effective upon publication.

#### Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the criteria for a significant regulatory action under Executive Order 12866, as amended by Executive Order 13258. Thus, they were subject to OMB review. We have also determined that these rules meet the plain language requirement of Executive Order 12866, as amended by Executive Order 13258.

#### Regulatory Flexibility Act

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

#### Paperwork Reduction Act

These final rules impose no additional reporting or recordkeeping requirements subject to OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance)

#### List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-age, survivors and disability insurance, Reporting and recordkeeping requirements, Social Security.

Dated: April 15, 2005.

**Jo Anne B. Barnhart,**  
*Commissioner of Social Security.*

■ For the reasons set out in the preamble, we are amending subparts K and M of part 404 of chapter III of title 20 of the Code of Federal Regulations as set forth below:

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

##### Subpart K—[Amended]

■ 1. The authority citation for subpart K of part 404 is revised to read as follows:

**Authority:** Secs. 202(v), 205(a), 209, 210, 211, 229(a), 230, 231, and 702(a)(5) of the Social Security Act (42 U.S.C. 402(v), 405(a), 409, 410, 411, 429(a), 430, 431, and 902(a)(5)) and 48 U.S.C.1801.

■ 2. Section 404.1055 is amended by removing the last sentence of paragraph (a).

■ 3. Section 404.1056 is amended by revising paragraphs (a)(6) and (a)(11) to read as follows:

#### § 404.1056 Explanation of agricultural labor.

(a) \* \* \*

(6) If you do nonbusiness work, it is agricultural labor if you do the work on a farm operated for a profit. A farm is not operated for profit if the employer primarily uses it as a residence or for personal or family recreation or pleasure. (See § 404.1058(a) for an explanation of nonbusiness work.)

\* \* \* \* \*

(11) Work connected with the commercial canning or freezing of a commodity is not agricultural labor nor is work done after the delivery of the commodity to a terminal market for distribution for consumption.

\* \* \* \* \*

■ 4. Section 404.1086 is revised to read as follows:

#### § 404.1086 Community income.

If community property laws apply to income that an individual derives from a trade or business (other than a trade or business carried on by a partnership), the gross income and deductions attributable to such trade or business shall be treated as the gross income and deductions of the spouse carrying on such trade or business or, if such trade or business is jointly operated, treated as the gross income and deductions of each spouse on the basis of his or her respective distributive share of the gross income and deductions.

■ 5. Section 404.1091 is amended by redesignating existing paragraph (c) as paragraph (d), adding a new paragraph (c) and removing the word "one" from the first sentence of the redesignated paragraph (d) to read as follows:

#### § 404.1091 Figuring net earnings for ministers and members of religious orders.

\* \* \* \* \*

(c) *Housing allowance when included in retirement pay.* You must exclude any parsonage or housing allowance included in your retirement pay or any other retirement benefit received after retirement pursuant to a church plan as defined in section 414(e) of the Internal Revenue Code when computing your net earnings from self-employment. For example, if a minister retires from Church A and the rental value of a parsonage or any other allowance is included in his/her retirement pay, the parsonage allowance must be excluded when determining net earnings from self-employment. However, if this same retired minister goes to work for Church B and is paid a parsonage allowance by Church B, this new income must be

included when computing net earnings from self-employment.

\* \* \* \* \*

#### Subpart M—[Amended]

■ 6. The authority citation for subpart M of part 404 continues to read as follows:

**Authority:** Secs. 205, 210, 218, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 410, 418, and 902(a)(5)); sec. 12110, Pub. L. 99–272, 100 Stat. 287 (42 U.S.C. 418 note); sec. 9002, Pub. L. 99–509, 100 Stat. 1970.

■ 7. Section 404.1207 is amended by revising the second sentence of paragraph (a) to read as follows:

#### § 404.1207 Divided retirement system coverage groups.

(a) *General.* \* \* \* The States having this authority are Alaska, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin.

\* \* \* \* \*

[FR Doc. 05–14385 Filed 7–20–05; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 20

[Docket No. 2004N–0214]

#### Public Information Regulations

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending its public information regulations to implement more comprehensively the exemptions contained in the Freedom of Information Act (FOIA). This action incorporates exemptions one, two, and three of the FOIA into FDA's public information regulations. Exemption one applies to information that is classified in the interest of national defense or foreign policy. Exemption two applies to records that are related solely to an agency's internal personnel rules and practices. Exemption three incorporates the various nondisclosure provisions that are contained in other Federal statutes.

**DATES:** The rule is effective August 22, 2005.

**FOR FURTHER INFORMATION CONTACT:** Betty B. Dorsey, Division of Freedom of

Information (HFI–35), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–6567.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

FDA is amending its public information regulations to incorporate exemptions one, two, and three of the FOIA (5 U.S.C. 552). The FOIA provides that all Federal agency records shall be made available to the public upon request, except to the extent those records are protected from public disclosure by one of nine exemptions (5 U.S.C. 552(b)) or one of three special law enforcement record exclusions (5 U.S.C. 552(c)). FDA originally issued its public information regulations implementing the FOIA in 1974 (39 FR 44602, December 24, 1974). As noted at the time, FDA's 1974 regulations explicitly addressed four of the nine FOIA exemptions—those that were then perceived to be of particular importance to the agency and those relating to trade secrets, internal memoranda, personal privacy, and investigatory files (39 FR 44602). FDA now finds it necessary to address exemption one (5 U.S.C. 552(b)(1)), given the President's designation of the Secretary of Health and Human Services to classify information under Executive Order 12958 (66 FR 64347, December 12, 2001). Because exemption two (5 U.S.C. 552(b)(2)) applies to, among other types of records, internal matters whose disclosure would risk circumvention of a legal requirement, this exemption is of fundamental importance to homeland security in light of recent terrorism events and heightened security awareness. In addition, FDA now finds that exemption three (5 U.S.C. 552(b)(3)), which incorporates the various nondisclosure provisions that are contained in other Federal statutes, is becoming increasingly relevant to the agency.

In the **Federal Register** of September 2, 2004, we published a direct final rule (69 FR 53615) to revise subpart D of FDA's public information regulations in part 20 (21 CFR part 20) to incorporate these three exemptions. In the same issue of the **Federal Register**, we published a companion proposed rule (69 FR 53662) to provide a procedural framework in which the rule could be finalized in the event we received any significant adverse comments regarding the direct final rule. We withdrew the direct final rule.

We received significant adverse comment on the direct final rule. Accordingly, we published a document in the **Federal Register** of January 18, 2005 (70 FR 2799), withdrawing the

direct final rule. We applied the comments regarding the withdrawn direct final rule to the companion proposed rule and considered them in developing this final rule.

In addition to the changes in the proposed rule, this document also clarifies and updates § 20.82(b)(3). While this regulation had previously listed specific statutory provisions that prohibit public disclosure, this list was incomplete (e.g., it did not reference the Ethics in Government Act (5 U.S.C. app. 107(a)(2))) and was out-of-date (e.g., it listed 42 U.S.C. 263i, which is now codified at 21 U.S.C. 360nn). The amendment replaces this list of statutory provisions with a statement that FDA will not make available for public disclosure information that is prohibited from public disclosure under statute.

##### II. Comments on the Proposed Rule

This section discusses the two comments we received.

*Issue 1:* One comment suggested adding a statement that a request for records should not be denied without good cause.

*Our Response:* FDA is not adopting this comment because it is not necessary. Under the FOIA, an agency may not withhold a record or a portion of a record unless it falls within an FOIA exemption or exclusion. These exemptions and exclusions, including the three exemptions in the proposed rule, reflect the balance under the FOIA between providing the public with access to Government documents and the need of the Government to keep information in confidence. See, for example, *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152–53 (1989). Thus, if a record or portion of a record falls within an FOIA exemption, this in and of itself indicates that the Government has good cause for withholding it. Even when an exemption applies, however, FDA's regulations state that the agency will nonetheless make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the interests of persons in trade secrets and confidential commercial or financial information, and the need for the agency to promote frank internal policy deliberations and to pursue its regulatory activities without disruption (§§ 20.20(a) and 20.82(a)).

*Issue 2:* The second comment stated that the proposed amendments to FDA's public information regulations were unnecessarily restrictive. It went on to suggest several changes to them. Regarding proposed § 20.65 (the