CONGRESS OR THE SOCIAL SECURITY ADMINISTRATION: WHO DEFINES A SPECIAL NEEDS TRUST?

INTRODUCTION

The U.S. Census Bureau estimates that there are approximately 56.7 million people with disabilities living in the United States.[1] This figure represented 18.7% of the national population in 2010.[2] Among individuals with disabilities between the ages of twenty-one and sixty-four, only 41.1% are employed.[3] Accordingly, people with disabilities rely on more than sixty federal and state programs for their special needs.[4]

An individual's "special needs" are specific to that person, as they are defined by the resulting challenges and life circumstances of his or her disabling condition.[5] For an individual whose disability inhibits earning sufficient income, the Social Security Administration ("SSA") provides for this special need through Supplemental Security Income ("SSI") payments.[6] For an individual whose disability precludes affording healthcare, the Center for Medicaid and Children's Health Insurance Program ("CHIP") Services meets this special need through funding healthcare services.[7]

Due to many factors, including budget cutbacks and rationing of services, government benefits are not able to provide all of the supplemental goods and services necessary for the special needs of

1. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, CURRENT POPULATION REPORTS 4 (2012) (reflecting estimates of the civilian noninstitutionalized population, thus the population of individuals with disabilities living in institutional settings, such as nursing homes, military barracks, and correctional facilities, are not included in this estimate).

2. *Id.*

3. *Id.* at 10.

4. *See id.* at 1.

5. *See* Kristen M. Lewis, *Planning for Beneficiaries with Special Needs*, 13 NAEPC J. EST. & TAX PLAN. 1, 2 (2012) ("The term 'special needs' has no universally accepted definition . . . .").

6. *See generally Understanding Supplemental Security Income SSI Home Page -- 2013 Edition*, U.S. SOC. SECURITY ADMIN., http://www.socialsecurity.gov/ssi/text-understanding-ssi.htm (last visited Oct. 29, 2013).

7. *See generally Medicaid Information by Topic*, MEDICAID.GOV, http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/By-Topic.html (last visited Aug. 30, 2013).

an individual with a disability.[8] For this reason, the family of an individual with a disability often wants to contribute additional funds to compensate for the inadequacies of government benefits.[9] The family members, however, will likely face challenges in this attempt to plan for the long-term needs of their loved one. For example, both of the aforementioned benefits programs require that an individual with a disability have an economic need for the benefit, thus the agencies evaluate income as one factor in determining whether an individual with a disability is eligible to receive SSI or Medicaid.[10] If a family member has transferred his or her own assets to provide for the individual with a disability, these assets may be counted as the individual's resources and disqualify him or her from receiving government benefits. Likewise, if an individual with a disability receives a sum of money through a settlement or inheritance, this sum may be counted as income and result in disqualification.

Over the past twenty years, estate planning attorneys have advanced the practice of special needs trusts ("SNT"), also referred to as supplemental needs trusts, to alleviate the problems in planning for the special needs of an individual with a disability.[11] A family member (or other third party) or the individual with a disability may establish an SNT, naming the individual with a disability as the beneficiary, and transfer assets into the trust to be used for additional purchases that SSI and Medicaid do not cover.[12] The funds in an SNT are not counted as the resources or income of the beneficiary, thus the SNT compensates an individual with a disability for the inadequacies of government benefits without jeopardizing his or her eligibility to continue receiving benefits.[13] In other words, the individual with a disability can continue to rely on SSI for financial support and Medicaid for healthcare services while receiving additional funds for supplemental goods and services for his or her special needs.[14]

Congress has explicitly recognized the utility of SNTs in providing for a beneficiary with a disability in 42 U.S.C. §

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8. *See* Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 95 (2000).

9. *See id.* at 94 ("The SNT is an emerging tool that mitigates the inadequacies of government benefit programs for people with disabilities.").

10. *See Supplemental Security Income (SSI) Eligibility Requirements*, U.S. SOC. SECURITY ADMIN., http://www.socialsecurity.gov/ssi/text-eligibility-ussi.htm (last visited Oct. 28, 2013); *Eligibility*, MEDICAID.GOV, http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Eligibility.html (last visited Oct. 28, 2013).

11. *See* Rosenberg, *supra* note 8, at 93–95.

12. *See id.* at 94–95.

13. *See id.*

14. *See id.* at 93–95.

1382b(e)(5) and 42 U.S.C. § 1396p(d)(4)(A).[15] Through these statutes, Congress exempted SNTs from the trusts that are generally counted as resources in SSI and Medicaid determinations.[16] Following this mandate, the SSA instructed its decision-making personnel that SNTs are not countable resources for eligibility purposes.[17] The SSA includes this direction in its Program Operations Manual System ("POMS"), which the SSA distributes to its 1,300 state and local offices as the guiding authority for the personnel making eligibility determinations.[18] The POMS also lists the criteria for personnel to evaluate whether a trust qualifies as an SNT.[19] The SSA criteria, however, include additional requirements beyond what Congress included in the federal statutes. Therefore, an effective SNT must comply not only with Congress's statutes but also with the SSA's additional requirements in the POMS.[20]

Although the power of the SSA to administer the SSI program necessarily requires formulating policy and making rules,[21] the practical effects of the SSA's adding and changing the requirements for an SNT call into question whether the SSA is acting beyond the scope of its authority. This issue arises because the POMS provides interpretive rules within the SSA; therefore, the agency may supplement or amend the POMS at any time without opportunity for public notice and comment.[22] These unforeseen changes often lead to harsh consequences for individuals receiving benefits who are beneficiaries of an SNT.

Part I of this Comment will provide background information on the SSA and SNTs. This Part will examine the SSA's purpose as well as its decision-making process using the POMS and the interplay between the SSA and Medicaid. Additionally, this Part will address the two types of SNTs and the criteria set forth in federal statutes and the POMS in order for each type of SNT to be exempt from countable resources in SSI eligibility determinations.

In Part II, this Comment will analyze the practical implications of the SSA changing and adding the POMS requirements for an SNT

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15. *See* 42 U.S.C. §§ 1382b(e)(5), 1396p(d)(4)(A) (2012).

16. *See id.*

17. U.S. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM § SI 01120.203(B)(1)(a) [hereinafter POMS], *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120203.

18. *See* Gay Gellhorn, *Disability and Welfare Reform: Keep the Supplemental Security Income Program but Reengineer the Disability Determination Process*, 22 FORDHAM URB. L.J. 961, 971–72 (1995).

19. *See* POMS, *supra* note 17.

20. *See* Lewis, *supra* note 5, at 4.

21. *See* Morton v. Ruiz, 415 U.S. 199, 231 (1974).

22. *See* 5 U.S.C. § 553(b)(A) (2012) (stating that the general notice requirement in rulemaking does not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

without notice. First, this Part will discuss why the SSA may change the POMS without notice and not offend administrative law or due process. This Part will then evaluate whether the SSA should be able to change and add requirements to the SNT given that Congress has provided SNT requirements through federal statute. Lastly, this Part will hypothesize the practical implications of various agencies being able to redefine concepts that Congress has defined and explore whether the public interest warrants legislation.

I. BACKGROUND

A. *The Social Security Administration*

Congress established the SSA as an independent agency to administer the old-age, survivor, and disability insurance program and the SSI program.[23] The SSI program provides benefit payments to individuals who are over the age of sixty-five or who are blind or disabled, provided that the individual meets the eligibility requirements.[24] Congress defined the eligibility requirements, specifying the income and resources thresholds for the SSA to use in eligibility determinations.[25] However, the procedural or administrative measures for carrying out eligibility determinations are explicitly left under the authority of the Commissioner of the SSA.[26]

The Commissioner serves as the President of the SSA.[27] The Commissioner is granted the authority to prescribe rules for, and to exercise authority and control over, all personnel.[28] As such, the Commissioner has established four levels of administrative review for eligibility determinations: Initial Application, Reconsideration, Hearing before an Administrative Law Judge, and Appeals Council Review.[29] In the Initial Application stage, the local SSA office receives a Social Security claim and screens the claimant for income and resources eligibility before making any decision regarding disability status.[30] In the resources screening, the personnel in the local offices follow the instructions of the POMS.[31]

The Commissioner distributes the POMS to the local offices to serve as the interpretive rules for processing Social Security claims

23. *See* 42 U.S.C. § 901 (2012).
24. *See id.* § 1381.
25. *See id.* § 1382(a).
26. *See id.* § 1383b(a).
27. *See id.* § 902(a)(1).
28. *See id.* § 902(a)(4)–(5).
29. *See* Gellhorn, *supra* note 18, at 976.
30. *Id.* at 971–72.
31. *Id.* at 972.

and making eligibility determinations.[32] The U.S. Supreme Court recognizes the POMS as the Commissioner's own interpretation of the Social Security Act; therefore, although the POMS is an administrative interpretation and not the product of formal rulemaking, the POMS "warrant[s] respect."[33] The Sixth Circuit has agreed that although the POMS does not have the force and effect of law, it is "nevertheless persuasive."[34] Given that the personnel at the Initial Application stage use the POMS as the primary source of information and that the reviewing courts consider the POMS as persuasive authority, a social security claimant is well advised to comply not only with federal statutory authority but also with the POMS provisions. As this Part will discuss in further detail, the POMS includes directions for evaluating SNTs,[35] thus an individual with a disability should have an SNT that complies not only with statutory requirements but also with the POMS.

If the Initial Application decision finds that an individual with a disability is eligible to receive SSI, that person is generally categorically eligible to receive Medicaid benefits.[36] Although Medicaid is a state-run program with its own state plan for administering benefits,[37] thirty-three states allow the SSA to make Medicaid eligibility determinations on their behalf.[38] Congress explicitly allows the Commissioner of the SSA to enter into an agreement with the state under which the SSA makes eligibility determinations for people receiving SSI.[39] In seven states, however, individuals receiving SSI must file a separate application with the state Medicaid agency, yet, even in these states, the Medicaid agency makes its eligibility determinations based on the SSI rules.[40] Thus, the persuasive effect of the POMS not only dictates whether an individual with a disability will receive SSI but also whether that individual will receive Medicaid benefits.

32. Wash. State Dept. of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003).

33. *Id.*

34. Davis v. Sec'y of Health & Human Servs., 867 F.2d 336, 340 (6th Cir. 1989).

35. *See* POMS, *supra* note 17.

36. *See* U.S. SOC. SEC. ADMIN., ANNUAL REPORT OF THE SUPPLEMENTAL SECURITY INCOME PROGRAM 23 (2008).

37. *See Federal Policy Guidance*, MEDICAID.GOV, http://www.medicaid.gov/Federal-Policy-Guidance/Federal-Policy-Guidance.html (last visited Oct. 28, 2013).

38. *See* U.S. SOC. SEC. ADMIN., *supra* note 36.

39. *See* 42 U.S.C. § 1383c(a) (2012).

40. *See Relationship Between SSI and Medicaid*, U.S. SOC. SECURITY ADMIN., http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/633/~/relationship-between-ssi-and-medicaid (last updated Aug. 30, 2013, 4:30 PM).

B. SNTs

1. Establishing an SNT

There are two distinct types of SNTs: the self-settled, or first-party, SNT and the third-party SNT.[41] A self-settled SNT arises when an individual with a disability who receives public benefits establishes a trust funded with his or her own assets and for his or her own benefit.[42] By contrast, a third-party SNT involves another person—any person other than the individual with a disability—who transfers his or her assets into a trust for the benefit of the individual with a disability.[43] These two types of SNTs must meet distinct federal and POMS requirements, as set forth below, in order to be exempt from countable resources in SSI determinations.

a. The Self-Settled SNT

A self-settled SNT is funded with the assets of the individual with a disability.[44] The self-settled SNT is commonly utilized where an individual with a disability who receives government benefits is awarded funds from a personal injury settlement or an unprotected inheritance.[45] To avoid this sum being counted as income to disqualify the individual from government benefits, the individual may establish a self-settled SNT that complies with federal and SSA requirements.

As part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Congress established rules for the treatment of trusts as income or resources in Medicaid determinations.[46] Although Congress set forth a general rule that trusts are countable resources, Congress explicitly excluded from this general rule the SNT, which Congress described in § 1396p(d)(4)(A):

> A trust containing the assets of an individual under age 65 who is disabled (as defined in § 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.[47]

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41. Cynthia L. Barrett, *The Special Needs Trust*, SH059 A.L.I.-A.B.A. 395, 398 (2003).
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See* John J. Campbell, *Basic Strategies for SSI Planning*, 1 NAT'L ACAD. ELDER L. ATT'YS J. 311, 315 (2005).
47. 42 U.S.C. § 1396p(d)(4)(A) (2012).

In the Foster Care Independence Act of 1999 ("FCIA"), Congress enacted anti-fraud provisions for the SSI program, including provisions pertaining to the treatment of trusts for eligibility purposes.[48] Congress again excluded SNTs from consideration as an available resource; however, Congress did not include a list of SNT criteria. Instead, Congress stated that the SNT must meet the requirements applicable to OBRA trusts for Medicaid.[49] Thus, Congress has consistently referred to the definition in § 1396p(d)(4)(A) when addressing SNTs.

The requirements of an SNT under Congress's definition in § 1396p(d)(4)(A) can be summarized as follows: (1) the beneficiary is under age sixty-five and has a disability; (2) the purpose of the trust is to benefit the beneficiary; (3) the settlor of the trust is a parent, grandparent, legal guardian, or court; and (4) the trust contains a Medicaid payback upon the death of the beneficiary.[50] Nevertheless, even a trust that complies with Congress's requirements may not be a valid SSI-exempt trust if it does not also meet the additional criteria in the SSA's POMS. The POMS not only places additional requirements on top of the basic federal scheme but the POMS also focuses on other aspects of the trust, such as its irrevocability.[51] Furthermore, a state Medicaid manual may serve as a third source of SNT requirements; however, in most states, the SSA makes the Medicaid determination, using the POMS requirements to do so. In the remaining states, the state Medicaid manuals may place additional requirements on SNTs, though the Medicaid qualifications must be no more stringent than the SSI qualifications. The various state Medicaid manuals will not be discussed in this Part, as the following requirements represent the majority of states.

(1) Beneficiary: The federal statute states that an SNT must contain the assets of "an individual under age 65 who is disabled (as defined in § 1382c(a)(3) of this title)."[52] Regarding age, the POMS is consistent with the reading on the face of the federal statute, that a trust established before the beneficiary reaches the age of sixty-five continues to qualify even after the beneficiary reaches that age.[53] The POMS further states, however, that "additions to or augmentation of a trust" after the age of sixty-five may be counted as resources.[54] As to the beneficiary's disability, the POMS mirrors the federal statute in adopting the definition of "disabled" as it is defined in the Social Security Act.[55]

48. *See* Campbell, *supra* note 46, at 316.
49. 42 U.S.C. § 1382b(e)(5).
50. *See id.* § 1396p(d)(4)(A).
51. *See* POMS, *supra* note 17, § SI 01120.203(C)(2).
52. 42 U.S.C. § 1396p(d)(4)(A).
53. *See* POMS, *supra* note 17, § SI 01120.203(B)(1)(b).
54. *Id.* § SI 01120.203(B)(1)(c).
55. *See id.* § SI 01120.203(B)(1)(d).

(2) Purpose: Under the federal statute, an SNT for a beneficiary with a disability must be "established for the benefit of such individual."[56] The POMS expressly states that the SSA chooses to interpret this provision to require that the trust be for the "sole benefit" of the individual, therefore the trust does not qualify as an SNT if it provides any benefit to another individual or entity.[57]

(3) Settlor: A valid SNT under the federal statute is established "by a parent, grandparent, legal guardian of the individual, or a court."[58] If the settlor is a parent or grandparent, the POMS further requires the settlor to have legal authority to act with respect to the assets of the individual with a disability.[59] The legal authority must be independent and not merely an agency relationship, such as a power of attorney, because the parent or grandparent's actions would be considered those of the individual with a disability, who is not entitled to serve as settlor.[60] One exception to the requirement of independent legal authority exists where the individual with a disability is legally competent.[61] In such cases, the parent or grandparent may establish the trust as a "seed" trust funded with a nominal amount of his or her own assets, and the legally competent beneficiary may then transfer his or her own assets into the trust.[62] If the court establishes the trust, the POMS states that the trust must be "required by a court order" and that an approval of a trust by the court is insufficient.[63]

(4) Medicaid payback: The federal statute recognizes a valid SNT "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual."[64] Although the statute is ambiguous as to the time period in which the "total amount" accrues, the POMS maintains that the total amount is not limited to any particular period of time.[65] Therefore, the trust may be required to reimburse the state for assistance paid even before the trust was established.[66]

(5) Irrevocability: Although the federal statute recognizes an SNT without regard to revocability, the POMS requires that the SNT be irrevocable.[67] If the beneficiary has the power to revoke,

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56. 42 U.S.C. § 1396p(d)(4)(A).
57. *See* POMS, *supra* note 17, § SI 01120.203(B)(1)(e).
58. 42 U.S.C. § 1396p(d)(4)(A).
59. *See* POMS, *supra* note 17, § SI 01120.203(B)(1)(g).
60. *See id.*
61. *See id.* § SI 01120.203(B)(1)(f).
62. *See id.*
63. *See id.*
64. 42 U.S.C. § 1396p(d)(4)(A) (2012).
65. *See* POMS, *supra* note 17, § SI 01120.203(B)(1)(h).
66. *See id.*
67. *See id.* § SI 01120.203(C)(2)(a).

terminate, or direct the use of the trust's assets, then the trust is not considered an SSI-exempt SNT.[68]

b. The Third-Party SNT

A third-party trust is funded with the assets of a person who is not the beneficiary.[69] A third-party SNT typically occurs in the context of parents, acting as the third party, transferring their assets into a trust for the benefit of their child with a disability.[70] In order to avoid these assets being counted as resources and disqualifying the individual from receiving benefits, an SNT must comply with federal statutes and SSA requirements.

There is no federal statute specific to third-party SNTs. The above-mentioned federal statutes exempting SNTs in Medicaid and SSI situations are limited to situations involving a self-settled trust, which is funded with the assets of the individual with a disability. The federal statutes do not apply to third-party SNTs, thus third-party SNTs are not subject to the requirements of the definition in § 1396p(d)(4)(A).[71] Accordingly, a third-party trust need not have a beneficiary within a certain age range or meeting a certain definition of "disability"; the trust need not be for the sole benefit of the beneficiary; the settlor need not be a parent or grandparent; and, most importantly, there is no Medicaid payback provision.[72] Thus, the settlor may name remainder beneficiaries to take the trust assets upon the death of the beneficiary.[73] Although § 1396p(d)(4)(A) does not place requirements on third-party SNTs, third-party SNTs must comply with another section—§ 1382b(e), which addresses third-party trusts in general and places requirements on the settlor—in order for SSI exemption.[74]

Similar to the federal statutory scheme, the POMS does not discuss third party SNTs directly; however, the POMS provides the following definition for general third-party trusts:

> A third-party trust is a trust established with the assets of someone other than the beneficiary. For example, a third-party trust may be established by a grandparent for a grandchild. Be alert for situations where a trust is allegedly established with the assets of a third party, but in reality is

68. *See id.*
69. *See* Barrett, *supra* note 41.
70. *See id.*
71. *See id.*
72. *See* Lewis, *supra* note 5, at 8.
73. *See* Barrett, *supra* note 41.
74. *See* 42 U.S.C. § 1382b(e) (2012).

> created with the beneficiary's property. In such cases, the trust is a grantor trust, not a third-party trust.[75]

This definition is located in the section of the POMS that discusses trusts generally and outlines the characteristics that will render trusts countable or not countable as resources.[76] In order for a third-party SNT, or any third-party trust for that matter, to be SSI-exempt, the trust must meet the general irrevocability requirement of "trusts which are not resources" under this provision.[77]

(1) Settlor: The federal statute applicable to SSI-exempt third-party trusts limits, in certain circumstances, the methods in which a settlor may execute the trust. The settlor of a third-party trust may be any person who is not the beneficiary.[78] Typically, there are two available methods for the settlor to execute a third-party SNT.[79] The first method is through an inter vivos gift, or a gift made during the third party's life, using a trust document or a will substitute such as a revocable living trust.[80] The second, more common method is through a testamentary transfer, which occurs after the death of the third party pursuant to his or her will.[81] Under the federal statute, however, if the settlor is the spouse of the beneficiary of the third-party trust, the trust must be created under the settlor's will and not through a will substitute such as a revocable living trust in order to be exempted from countable resources in SSI determinations.[82]

(2) Irrevocability: Although the federal statutes do not place any requirements on third-party trusts regarding revocability, the POMS defines "trusts which are not resources" as those in which the settlor does not have the legal authority to revoke the trust, terminate the trust, or direct the use of the trust assets for his or her own support.[83] Additionally, a trust may be countable as a resource if the beneficiary has the authority under the trust instrument to terminate the trust and gain access to the trust assets or to direct the use of the trust assets.[84] Therefore, a third-party SNT must be irrevocable and outside the reach of both the settlor and the beneficiary in order to be exempt from countable resources.

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75. POMS, *supra* note 17, § SI 01120.200(B)(17), *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120202.
76. *See id.* § SI 01120.200.
77. *See id.* § SI 01120.200(D)(2).
78. *See* Lewis, *supra* note 5, at 8.
79. *See* Barrett, *supra* note 41.
80. *See* Lewis, *supra* note 5, at 9.
81. *See* Barrett, *supra* note 41.
82. 42 U.S.C. § 1382b(e) (2012).
83. POMS, *supra* note 17, § SI 01120.200(D)(2), *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120202.
84. *Id.* § SI 01120.200(D)(1)(b).

2. *The Continued Validity of the SNT*

A valid, SSI-exempt, self-settled or third-party SNT must not only be drafted to meet all of the federal and POMS requirements but also continue to abide by these requirements in order to be SSI-exempt. The SSA requires benefits recipients to provide ongoing reporting of any change in circumstances and redetermines eligibility every one to six years.[85] If changes in the SNT or in the POMS render the SNT unable to meet the POMS requirements, the SNT will be treated as a countable resource upon redetermination.

The parties to the SNT must ensure that the administration of and any changes to the SNT do not interrupt its continued compliance with the POMS requirements. The SSA has the authority to review not only how the trust was initially established but the SSA may also consider how the trust is later administered.[86] Thus, any administration of the SNT not in accordance with the POMS, and any additions or amendments to the terms of the SNT not in accordance with the POMS, could result in the SNT becoming a countable resource.

Aside from acts of the parties to the SNT, the continued validity of an SNT may also be undermined by changes to the POMS requirements on SNTs. For example, in November 2010, the SSA amended the POMS provisions on SNTs concerning early termination provisions in self-settled trusts.[87] The new POMS provision stated that an SNT that was previously exempt from resource counting would continue to be exempt, provided that the SNT would be amended to conform with the new requirements within ninety days.[88] If the SNT, however, was not amended within the ninety-day period to conform with the new rule, it would fail to meet the requirements and begin counting as a resource.[89] As seen in this example, when the SSA makes changes to the POMS requirements for an SNT, the SSI recipient is forced to seek an attorney to amend his SNT to comply with the POMS requirements, which is a costly and time-consuming task. If the SSI recipient cannot afford this expense or hardship, the SNT will be treated as a countable resource.

If changes in the administration or terms of the SNT, or changes in the POMS requirements of SNTs, render the SNT a

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85. *See Understanding Supplemental Security Income Redeterminations -- 2013 Edition*, U.S. SOC. SECURITY ADMIN., http://www.socialsecurity.gov/ssi/text-redets-ussi.htm (last visited Oct. 28, 2013).

86. *See* Hobbs *ex rel.* Hobbs v. Zenderman, 542 F. Supp. 2d 1220, 1233 (D.N.M. 2008).

87. *See POMS Changes*, DENVER BAR ASS'N, http://www.denbar.org/index.cfm/ID/20104/subID/26763/CLPE// (last visited Aug. 6, 2013).

88. *See* POMS, *supra* note 17, § SI 01120.199, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120199.

89. *See id.*

countable resource upon a redetermination of benefits eligibility, the SSI recipient could be denied further benefits payments. Upon redetermination, if countable resources are in excess of the resource limits, the SSI recipient becomes ineligible and benefits payments are suspended until the recipient's countable resources no longer exceed the limit.[90] If the recipient's countable resources never drop below the minimum limit for a continuous twelve-month period, the SSA will terminate his or her eligibility due to continuous suspension.[91]

The possibility that a recipient's SSI benefits will be suspended and terminated due to a change in the POMS gives rise to a particularly concerning issue. Consider an SSI recipient who is beneficiary of a valid self-settled SNT under federal law that was previously SSI-exempt under the POMS. A change in the POMS renders his or her SNT invalid under the POMS, thus making the SNT no longer SSI-exempt. Although the SSI recipient is the beneficiary of a valid SNT under the requirements of federal law, he or she is forced to choose between paying for costly redrafting of the SNT to meet the additional requirements or facing termination of benefits.

II. ANALYSIS

As discussed above, a change in the POMS could render a previously SSI-exempt, self-settled SNT invalid and eventually lead to termination of benefits, despite the SNT satisfying the federal requirements. The SSI recipient may feel that he or she has been treated unfairly by the SSA's action on two grounds. First, the SSA's changes to the POMS affected the rights of the SSI recipient without prior notice. Second, the SSA changed or added requirements of a valid SNT that are not found in the federal statute. As discussed below, an SSI recipient challenging SSA action would be unsuccessful in asserting the first ground; however, the second ground, while uncertain in terms of judicial treatment, may warrant future legislation.

A. *The SSA May Lawfully Change the POMS Without Notice*

An SSI recipient may feel that he or she has been treated unfairly by the SSA's changing the definition of SNT in the POMS on the grounds that the SSA affected the rights of the SSI recipient without prior notice. The first underlying premise, that the rights of the SSI recipient are affected, is founded on the fact that an SSI eligibility redetermination is an adjudication because it results in an order, representing the final disposition of the agency in a matter

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90. *See* 20 C.F.R. § 416.1324 (2013).
91. *See id.* § 416.1335.

other than rulemaking.[92] As an adjudication, an eligibility redetermination has an immediate effect on the rights of specific individuals.[93] Because the SSA renders eligibility redeterminations based on the POMS, the SSA is making adjudications affecting the rights of the SSI recipients to government benefits based on rules that have not been adopted through rulemaking procedures.[94] Thus, eligibility for benefits may be suspended or terminated without notice of a new rule. Although this first proposition appears to result in injustice, an SSI recipient has no actionable claim on this basis. As shown below, the SSA's additions to or amendments of the POMS provisions without notice do not offend the Administrative Procedure Act or the Fifth Amendment's Due Process Clause.

1. Changing the POMS Without Notice Does Not Offend the Administrative Procedure Act

An SSI recipient adversely affected by a POMS amendment cannot challenge his or her lack of notice of the rulemaking as a violation of the Administrative Procedure Act[95] because this act does not require that changes to the POMS be made through notice and comment rulemaking procedures. In the Social Security Act, Congress grants the SSA rulemaking authority subject to the rulemaking procedures in 42 U.S.C. § 553.[96] The rulemaking procedures under § 553 require notice, submission of comments, and a general statement of the rule's basis and purpose.[97] However, § 553 exempts from the notice and comment procedure all non-legislative rules, which include "interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice."[98]

An interpretive rule is issued by an agency to instruct the public as to the agency's construction of the statute it administers.[99] In order for an agency rule to be exempt from notice and comment rulemaking as a valid interpretive rule, the underlying statute the agency administers must create the legislative basis for "enforcement action or other agency action to confer benefits or ensure the performance of duties."[100] Additionally, the agency's rule

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92. *See* 5 U.S.C. § 551(6)–(7) (2012).

93. *See* Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

94. *See* Gellhorn, *supra* note 18, at 969.

95. *See* 5 U.S.C. §§ 500–96.

96. *See* 42 U.S.C. § 902(a)(5) (2012).

97. *See* 5 U.S.C. § 553.

98. *Id.* § 553(b)(3)(A).

99. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993) (distinguishing from a substantive rule, which is issued by an agency to implement its statute, having the force and effect of law such that rulemaking procedures are required).

100. *Id.* at 1112.

cannot effectively amend the prior legislative rule,[101] grant new rights, or impose new obligations.[102]

The U.S. Supreme Court has definitively classified the POMS as an administrative interpretation of the Social Security Act,[103] thus exempting the POMS from notice and comment rulemaking procedures. The POMS contains valid interpretive rules because the underlying statute, the Social Security Act, creates the legislative basis for SSA action to confer benefits. The SSA then issues the POMS as its interpretation of the Social Security Act as it applies to making eligibility determinations. Because the POMS does not amend the Social Security Act or give rise to new rights or obligations, the POMS contains valid interpretive rules that may be issued and revised without any notice under administrative law principles.

2. *Changing the POMS Without Notice Does Not Offend Due Process*

Although an SSI recipient could challenge the lack of notice prior to suspension as a denial of due process, this challenge would be futile because the SSI recipient's procedural due process rights in eligibility redeterminations are satisfied by the reconsideration process. Due process is at issue where an agency decision affects a small number of people, is based on individual grounds, and requires that the individual have notice and an opportunity to be heard before the agency action becomes final.[104] Because the SSA is making eligibility redeterminations affecting each individual based on his or her income and resources, due process is at issue. An SSI recipient who has previously been receiving benefits payments has a property interest at stake in the eligibility redetermination.[105]

However, the SSI recipient's procedural due process is satisfied in eligibility redeterminations. If an SSI recipient is notified that the SSA is going to suspend or terminate his or her benefits, the recipient can appeal that determination within sixty days of receiving notice.[106] The recipient may choose the method of reconsidering income and resources: case review, informal conference, or formal conference.[107] Because something less than an

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101. *Id.* at 1109 ("[A]n amendment to a legislative rule must itself be legislative.").

102. Metro. Sch. Dist. v. Davila, 770 F. Supp. 1331, 1338 (S.D. Ind. 1991).

103. *See* Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003).

104. *See generally* Londoner v. Denver, 210 U.S. 373 (1908).

105. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 576–77 (1972) (finding that state law can constitute property when there are rules and understanding that secure benefits and that support claims of entitlement to those benefits).

106. *See* 20 C.F.R. § 416.1413b (2013).

107. *See id.*

evidentiary hearing will suffice prior to adverse administrative determinations,[108] the conference available to the SSI recipient likely affords the recipient sufficient procedural due process. The SSI recipient has received notice of the suspension or termination of the SSI benefits and can challenge the grounds for this decision—such as a change in the POMS that invalidated the SNT—in a conference. Because the SSI recipient's procedural due process rights are satisfied by notice and an opportunity to be heard, the SSA's ability to change the POMS requirements does not violate due process. Therefore, the SSA's ability to freely change the POMS without notice, even if it affects the substantive rights of SSI recipients, is entirely lawful under administrative law and due process principles.

B. Whether the SSA May Change the Definition of SNT as Contemplated by Congress

A second ground on which an SSI recipient may feel unfairly treated by the SSA's changing the definition of SNT is that the SSA changed or added requirements of a self-settled SNT beyond the requirements found in the federal statute. Although a change in the SNT requirements is currently treated like all other POMS amendments, this situation is distinguishable from other POMS changes: a change in the POMS requirements for a valid SNT involves changes or additions to a concept that is already *defined* by federal statute. This practice not only gives rise to a potential procedural challenge for an adversely affected SNT beneficiary but also presents a broader policy question of whether the SSA, or any agency, should be allowed to deviate at all from a definition provided in a federal statute.

This Part will examine this issue first in the narrow context of the SSA adding and changing requirements to a self-settled SNT and the procedural propriety of this practice under administrative law. Next, this Part will address this issue on a broader scale, debating whether legislation is warranted, as a matter of public interest, to prohibit agencies from essentially redefining concepts that have been defined by federal statute.

1. The SSA Adding and Changing the Requirements of a Self-Settled SNT

An adversely affected SNT beneficiary could bring a procedural challenge to the SSA's interpretation of the Social Security Act. Although the Supreme Court has determined that the POMS sets forth interpretive rules, a rule may be a genuine interpretive rule while at the same time being an incorrect interpretation of the

108. *See* Mathews v. Eldridge, 424 U.S. 319, 332–49 (1976).

statute.[109] A plaintiff may challenge the interpretive rule's substantive validity, and if the reviewing court finds that the agency has not properly interpreted the statute or its own statutory authority,[110] the court will invalidate the rule as an agency action in excess of statutory authority.[111] To determine whether the SSA had such authority, a reviewing court would apply the *Chevron* test for scope of review, which is used for statutory issues.[112]

An adversely affected SNT beneficiary acting as a plaintiff could challenge the substantive validity of the SSA's interpretation of an SNT. As discussed in Part I, Congress has laid out the basic requirements of a self-settled SNT in § 1396p(d)(4)(A): (1) the beneficiary is under age sixty-five and has a disability; (2) the purpose of the trust is to benefit the beneficiary; (3) the settlor of the trust is a parent, grandparent, legal guardian, or court; and (4) the trust contains a Medicaid payback upon the death of the beneficiary.[113] In the POMS, however, the SSA has interpreted this rule as including additional standards for each of these requirements and further introducing an irrevocability requirement to the SNT. In this hypothetical case, the SNT beneficiary would claim that the SSA has incorrectly interpreted its authority to add additional requirements to § 1396p(d)(4)(A) and therefore the POMS provision regarding SNTs should be invalidated as SSA action in excess of statutory authority.

a. The *Chevron* Analysis Generally

Under the *Chevron* analysis, the first inquiry is whether Congress has "directly spoken to the precise question at issue."[114] If the intent of Congress is clear, then the legislative definition is applied and the agency has no authority to interpret further.[115] If the statute is silent or ambiguous on the specific issue, however, the second inquiry is whether the agency's interpretation is a permissible construction of the statute.[116]

b. *Chevron* Step One

When the first step of the *Chevron* test is applied to the SSA action of changing or adding to the requirements of an SNT, it becomes apparent that Congress has directly spoken to the precise

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109. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1113 (D.C. Cir. 1993).

110. *Id.*

111. 5 U.S.C. § 706(2)(C) (2012).

112. *See generally* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

113. *See* 42 U.S.C. § 1396p(d)(4)(A) (2012).

114. *See Chevron*, 467 U.S. at 842.

115. *See id.* at 842–43.

116. *See id.* at 843.

question of defining a self-settled SNT. The first step instructs courts to use traditional tools of statutory construction to ascertain congressional intent.[117] Although there is some disagreement concerning what "traditional tools" should be considered in this step, Justice Stevens advocates for the majority approach that considers not only the plain meaning of the statute but also additional evidence of congressional intent, such as the purpose and intent of the statute and the statute's legislative history.[118]

In the SSA situation, the plain meaning of the Social Security Act reveals that Congress has spoken to the precise definition of a self-settled SNT. One canon of statutory construction, *expressio unius est exclusio alterius*, states that where a specific list is set forth, it is presumed that any items not included in the list are intended to be excluded.[119] In *Lewis v. Alexander*,[120] the Third Circuit applied this canon of construction to the self-settled SNT in § 1396p(d)(4)(A).[121] In that case, the Third Circuit held that Congress's stated requirements for the self-settled SNT are exclusive; therefore, states are preempted from placing additional requirements on an SNT.[122] The court reasoned that the *expressio unius* principle leads to the conclusion that states are not free to expand the list absent an express statement otherwise.[123] Therefore, the Third Circuit found that Congress intended self-settled SNTs to be defined by a specific list of criteria that it set forth and no others.[124]

Although *Lewis* involved a preemption analysis in relation to states' authority, the discussion is applicable to the *Chevron* analysis regarding the SSA's authority as an agency. By providing a list of SNT requirements within the plain language of § 1396p(d)(4)(A), Congress leaves no gaps within the definition, indicating that states and agencies are not free to step in and regulate, but rather both must abide by the same requirements.[125] Furthermore, it should be noted that in the FCIA, Congress did not provide a new list of requirements for an SNT, but rather it referred

117. *See id.*

118. *See* Melina Forte, *May Legislative History Be Considered at* Chevron *Step One? The Third Circuit Dances the* Chevron *Two-Step in* United States v. Geiser, 54 VILL. L. REV. 727, 737 (2009).

119. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 793 n.9 (1995) (finding that this canon of construction leads to the conclusion that qualifications for office expressed in the Constitution are the sole requirements and other requirements cannot be imposed).

120. 685 F.3d 325 (3d Cir. 2012).

121. *Id.* at 347.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

to the trust defined in OBRA.[126] This reinforces the idea that Congress intended the list it set forth to remain the only defining requirements of an SNT throughout legislation.

Congress's intent to provide the exclusive requirements for an SNT is further supported by the purpose and legislative history behind the 1999 amendment to the Social Security Act, which was contained in the FCIA. The main purposes of the amendment were to reduce fraud in the SSI benefits program and to create uniformity with the Medicaid antifraud rules that had been passed in OBRA.[127] In the aim to reduce fraud, Congress provided a comprehensive scheme for the relationship between trusts and SSI eligibility, just as it had done with trusts and Medicaid eligibility in OBRA.[128] In both FCIA and OBRA, Congress expanded the types of trusts to be included as countable resources in eligibility determinations, yet Congress explicitly excluded self-settled SNTs from these sections.[129] Therefore, while the primary purpose in these statutes was to reduce fraud, a secondary purpose was to protect SNTs from these sections and from having any effect on SSI and Medicaid eligibility.[130]

Congressional intent to protect self-settled SNTs is evident not only in the purpose of the FCIA but also in the legislative history behind the FCIA. The subcommittee report addresses the exclusion of SNTs from all other trusts as countable resources, explaining that Congress aimed to balance reducing fraud while protecting those in need.[131] The Supreme Court emphasizes giving full effect to a specific balance struck among Congress's statutory objectives.[132] Congress recognized that an individual with a disability who is a beneficiary of a self-settled trust may still need the protection of SSI benefits. Thus, Congress carefully carved SNTs out of the trusts that are countable resources. Congress did not intend to allow "additional burdens targeted specifically at special needs trusts."[133] Congress could not have intended to allow the SSA to more narrowly define SNTs and restrict these individuals' access to SSI benefits. The SSA's changes or additions to SNT requirements hinder, rather than advance, the purpose of Congress.

Therefore, the plain language, purpose, and legislative history behind the FCIA amendment to the Social Security Act suggest that

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126. *See* 42 U.S.C. § 1382b(e) (2012).

127. *See* H.R. REP. NO. 106-182, pt. 1 at 18, pt. 2 at 34 (1999).

128. *See* Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822.

129. *See id.*

130. *See* Lewis v. Alexander, 685 F.3d 325, 343 (3d Cir. 2012) (discussing the use of the word "shall" as a command that states not count special needs trusts in Medicaid determinations).

131. *See* H.R. REP. NO. 106-182, pt. 1 at 18, pt. 2 at 34.

132. *See* Rodriguez v. United States, 480 U.S. 522, 525–26 (1987).

133. *Lewis*, 685 F.3d at 347.

Congress intended to provide an exclusive list of requirements for a self-settled SNT and to protect these trusts from having any effect on SSI eligibility. Congress spoke directly to the precise issue of the definition of SNT. Under the *Chevron* analysis, the legislative definition contained in § 1396p(d)(4)(A) must be applied, and there is no further inquiry into the reasonableness of the SSA interpretation. Therefore, a judicial review of the SSA practice of changing and adding to the requirements of an SNT in the POMS would conclude that the SSA is acting outside the scope of its authority.

2. *The Need for Legislation in the Public Interest*

Even if a challenge to the SSA's changing the definition of SNT result in a judicial finding that the SSA is acting beyond the scope of its authority, ad hoc decisions against a few challenged agencies will not resolve the broader problem of agencies redefining concepts already defined by Congress. When this issue is considered in the broader context, every agency could potentially engage in this practice of deviating from definitions explicitly provided by Congress, resulting in many challenges to agency interpretations as seen in the hypothetical SSA challenge above. Instead of relying on judicial review, it is in the public interest to implement legislation as a preventative measure directing agencies serving the public interest not to redefine terms already defined by Congress.

If agencies are required to abide by the single uniform definition Congress has provided, the public will not be subject to the potentially absurd situations that would result from inconsistent definitions. For example, an individual could end up in a position where compliance with one agency's definition prevents compliance with another's definition. As a result, that individual would have to decide which agency's benefits he or she values more and choose to abide by the respective definition that agency requires.

Rather than subject the public to such predicaments, legislation calling for agencies to refrain from changing congressional definitions will better serve the public's expectations and confidence. An individual would be able to expect that if a federal statutory definition exists for a given concept, agency regulations may interpret and explain the definition, but there will be no changes to the definition. An individual who abides by the federal statutory definition should be able to maintain confidence that he or she is abiding by agency definitions as well.

CONCLUSION

Although Congress has defined a self-settled SNT as exempt from countable resources in SSI eligibility determinations, the SSA changes and adds to the requirements of a self-settled SNT through interpretive rules without notice. Thus, an SSI recipient who is a

beneficiary of a valid self-settled SNT under federal law and SSA requirements could discover that the SSA has changed the requirements. The recipient's SNT will be counted as a resource and his or her SSI benefits will be suspended, unless the recipient pays the expense of having the SNT redrafted. If the SNT is not redrafted, then the recipient's benefits will be terminated. This result could not have been intended by Congress. When Congress defined an SNT, it intended that trusts fitting the list of requirements would be valid to receive SSI benefits. Although the SSA is not violating administrative law or due process through this practice, a judicial review would conclude that the SSA is acting outside the scope of its authority. If agencies, however, are able to essentially redefine concepts already defined by Congress, the broader practical implications suggest that it would be in the public interest to legislate as to this practice, rather than rely on ad hoc decisions upon judicial review.

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