

February 18, 2021

Reports Clearance Director
3100 West High Rise Building
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Baltimore, Maryland 21235

Submitted via www.regulations.gov

**Re: Advance Notice Use of Electronic Payroll Data to Improve Program Administration,
86 Fed. Reg. 5303 (January 19, 2021), Docket No. SSA-2016-0039**

To whom it may concern:

These comments are submitted on behalf of Justice in Aging and the National Consumer Law Center regarding the advance notification concerning the implementation of an information exchange between the Social Security Administration (SSA) and Equifax, a payroll data provider.

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Social Security and Supplemental Security Income (SSI) benefits, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency (LEP). Justice in Aging conducts training and advocacy regarding Social Security and SSI benefits, provides technical assistance to attorneys and others from across the country on how to address problems that arise under these programs, and advocates for strong protections to ensure that beneficiaries receive the benefits to which they are entitled promptly and without arbitrary denial or disruption.

The National Consumer Law Center is a nonprofit organization specializing in consumer issues on behalf of low-income people and older Americans. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen many examples from every part of the nation of the damage wrought by abuses from data companies regulated under the Fair Credit Reporting Act, *i.e.*, consumer reporting agencies such as Equifax and its subsidiary, the Work Number. It is from this vantage point that we supply these comments on behalf of our low-income clients.

Section 824 of the Bipartisan Budget Act of 2015 added section 1184 to the Social Security Act, authorizing SSA to enter into information exchanges with payroll data providers for the purposes of efficient program administration and prevention of improper Social Security Disability Insurance (SSDI) and SSI payments. SSA has issued the advance notification that it will be using Equifax as a payroll data provider, which we presume will consist of reports from that company's Work Number subsidiary. SSA anticipates that the use of the Work Number will enable it to receive wage information in a more timely manner without the need for additional verification from other sources, and that it will use this wage information to prevent improper payment of SSI/SSDI benefits, presumably by allowing SSA to terminate, suspend, or reduce the benefits of a recipient when the Work Number reports indicate they earned income that they did not report.

In the advance notification, SSA poses the question "Are there any additional operational elements of an information exchange that we should include?" A notable element of this information exchange that is not included in the advance notification is any discussion of due process rights under the U.S. Constitution or under the Fair Credit Reporting Act. We also recommend requiring a verification process as guided by the Computer Matching and Privacy Protection Act of 1988, and to clearly disclose in Form SSA-8240 that if a recipient declines authorization for data matching, the refusal will not render the recipient ineligible for SSI/SSDI benefits.

I. Due Process Protections

The Fifth Amendment of the Constitution states, in relevant part, that the federal government may not deprive a person of "life, liberty, or property, without due process of law."¹ In *Goldberg v. Kelly*, the Supreme Court ruled in 1970 that recipients of means-tested public benefits must be afforded the "opportunity to be heard" before their benefits can be suspended.² The Court decided that a pre-termination evidentiary hearing was necessary when recipients require the benefit payments for their basic needs, and the government has an interest in ensuring that eligible recipients are not erroneously terminated. The government should not deprive the recipient of the means to survive while appealing the claim:

"... the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate."³

¹ U.S. CONST. Amend. V.

² *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

³ *Id.*

SSI benefits, as a means-tested program for extremely low-income recipients, are subject to the same due process protections as in *Goldberg*.⁴ In the context of an SSI benefit reduction or suspension due to allegations of earned income from the Equifax payroll data, presumably through the company's Work Number product, the most important of these procedural safeguards are a timely and adequate notice detailing the reasons for a proposed reduction or suspension of benefits; an evidentiary hearing to dispute the reduction or suspension of SSI benefits; and having SSI benefits continue to be paid at the Protected Payment Level (PPL)⁵ pending a decision on the appeal.⁶

For over forty years, SSA has had in place regulations concerning the SSI program that conform to the requirements of *Goldberg* and constitutional due process. These regulations establish an administrative appeal process that, on paper, protects the due process rights of SSI recipients who face a suspension of benefits.⁷ SSA must ensure that these requirements are followed in practice, when processing the data obtained through this automated information exchange with Equifax's Work Number product.

The fact that the Work Number and its reports are regulated under the Fair Credit Reporting Act (FCRA), as discussed in Section IV. below, raises another important reason why SSA must provide due process, particularly the right to a hearing, and also may affect the timing of the hearing. Under the FCRA, 15 U.S.C. § 1681i(a), consumers have a right to dispute errors in a consumer report. The company or "consumer reporting agency" (CRA) must conduct a reasonable investigation of the dispute, with the participation of the entity that supplied or "furnished" the information, *i.e.*, in this case the employer. The CRA has 30 days to conduct this investigation. If an SSI/SSDI recipient is disputing Work Number information as erroneous, as a matter of due process, SSA must conduct a hearing. However, in the circumstance of an FCRA dispute, SSA cannot make a determination on the matter until the FCRA dispute investigation process has been concluded after the statutory 30-day period. Otherwise, it would deny due process for SSA to make a determination before the recipient has obtained the results of the CRA's investigation as to the disputed information.

II. Verification of Data

Section 1184 of the Social Security Act permits SSA to engage in an information exchange with a payroll data provider in order to prevent improper payments "without the need for verification

⁴ *Cardinale v. Mathews*, 399 F.Supp. 1163 (D.D.C., 1975).

⁵ The Protected Payment Level is the amount of monthly SSI benefits received prior to a proposed adverse action. It is the unreduced benefit amount that a recipient may continue to receive until there is a decision at the first level of appeal. SSA Program Operations Manual (POMS), SI 02301.300 Due Process Protections – General, paragraph C.12. (Oct. 14, 2004) <https://secure.ssa.gov/apps10/poms.nsf/lnx/0502301300>

⁶ *Goldberg* at 267-68.

⁷ 20 C.F.R. § 416.1400 et seq.

by independent or collateral sources.”⁸ Although this information exchange is not covered by the Computer Matching and Privacy Protection Act of 1988 (“Matching Act”), codified as part of the Privacy Act, because it involves a commercial database, SSA should still follow certain best practices to ensure that SSI and SSDI beneficiaries are not harmed by inaccurate information.

The Office of Management and Budget (OMB) has advised agencies to consider applying the principles of the Matching Act when a commercial database is involved. OMB Memoranda 01-05 -- Guidance on Inter-Agency Sharing of Personal Data - Protecting Personal Privacy from December 2000 states “Although this guidance applies directly only to programs covered by the Matching Act, agencies should consider applying these principles in other data sharing contexts.”⁹ It further provides:

Accuracy.

Because information shared among agencies may be used to deny, reduce, or otherwise adversely affect benefits to individuals, it is critical that agencies have reasonable procedures to ensure the accuracy of the data shared. At a minimum, this should include providing individuals the right to access and to request amendment of their records, as required by the Privacy Act.

To ensure accuracy, agencies must also adhere to the due process requirements found in the Matching Act. Pursuant to 5 U.S.C. 552a(p), before an agency takes adverse action against an individual based on the results of information produced by a matching program, it must independently verify the information unless there is a determination by the relevant Data Integrity Board, for a limited class of information, that there is a high degree of confidence that the information is accurate. Agencies must also, at least 30 days before taking adverse action (unless statute or regulation states otherwise), provide notice to the individual of the agency's findings and provide an opportunity to contest those findings.

In June 2018, OMB reiterated this point when OMB re-issued Appendix C to OMB Circular A-123, Requirements for Payment Integrity Improvement.¹⁰

Verification is crucial to protecting the rights of SSI and SSDI beneficiaries because databases such as the Work Number can be prone to errors. While we could not find statistics on the error rate for the Work Number, we do know that for credit reporting agencies, including Equifax, the definitive study conducted by the Federal Trade Commission found that 21% of

⁸ 42 USC 1320e-3(a)(2).

⁹ Jacob J. Lew, Director, Office of Management and Budget, Memoranda 01-05 -- Guidance on Inter-Agency Sharing of Personal Data - Protecting Personal Privacy (Dec. 20, 2000) https://obamawhitehouse.archives.gov/omb/memoranda_m01-05/

¹⁰ Mick Mulvaney, Director, Office of Management and Budget, Transmittal of Appendix C to OMB Circular A-123, Requirements for Payment Integrity Improvement (June 26, 2018) p. 68 <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-20.pdf>

consumers had verified errors in their credit reports, 13% had errors that affected their credit scores, and 5% had serious errors that would significantly impact their eligibility for credit.¹¹

If the Work Number has similar error levels, there must be verification by a human being before SSA takes action to terminate, suspend, or reduce a recipient's benefits. It is not acceptable for SSA to suspend or reduce the benefits of 5% or even 1% of SSI beneficiaries over erroneous information when review by a human could readily catch them. This is especially true with automated matching, where errors often manifest in the form of illogical information that can be detected by human review, such as when a report states that the individual is employed at a business located in a state that is far from the recipient's home state.

And while we may not have statistics, we certainly have examples of errors. One dramatic example, which resulted in the client being charged with fraud, was supplied to us by a legal services advocate in California:

A client in [California] was given two Notices of Action stating she had CalWORKs (cash aid) and CalFresh (Food Stamp or SNAP) overpayments for the period of nine months from 2011 to 2012 on the false basis that she failed to report all of her earned income. The evidence that she failed to report all income is a report from Equifax to a named person (presumably a County worker), dated October 2013.

* * * * *

The statements on the report are false. The employee went to the restaurant in question (to the best of her knowledge based on the report), and spoke with the manager. He stated he did not recognize the recipient and gave a statement to that effect. It is believed that the report came as a result of identity theft - someone working under this person's social security number.¹²

Here are two examples of errors from complaints filed with the Consumer Financial Protection Bureau (CFPB):

Complaint #1: Mixed file

A "mixed file" is when the information of two different consumers is mixed up by a credit or consumer reporting agency, and is one of the most serious types of errors. The following complaint, reproduced verbatim, indicates that the consumer believes they have a mixed file consisting of an employer that they did not work for:
"THE WORK NUMBER WILL NOT PUT A SECURITY FREEZE ON MY FILE, OR REMOVE EMPLOYERS OR EMPLOYEE ADDRESSES AND EMPLOYEE NAME. THE WORK NUMBER MUST HAVE A MIX FILE. I HAVE TRIED CALLING THEM"

¹¹ Federal Trade Comm'n Report to Congress Under Section 319 of the Fair and Accurate Credit Transactions Act of 2003 (Dec. 2012), <http://www.ftc.gov/sites/default/files/documents/reports/section-319-fair-and-accurate-credit-transactions-act-2003-fifth-interim-federal-trade-commission/130211factareport.pdf>.

¹² Email from Stephanie Haffner, Western Center for Law & Poverty, Nov. 10, 2014.

CFPB Complaint No. 3837876, filed September 9, 2020, www.consumerfinance.gov

Complaint #2: Fraudulent One-Month Jobs and Address Complaint

The following complaint indicates that the consumer has had multiple incorrect one-month employment positions listed in their Work Number report:

“The Work Number, from EQUIFAX, has FOR YEARS, supplied fraudulent employment information to potential employers. ... Moreover, this fraudulent information is not on my credit report. It is being secretly reported to potential employers via The Work Number from Equifax. I have never authorized this information to be provided by The Work Number. I didn’t know The Work Number from Equifax was providing employment information. I have never worked for these employers. Review the dates of employment also. The majority of these companies are reporting 1 (ONE) month of employment. This is ridiculous. Remove these employers from my employment history. It is fraudulent. I have never worked for these employers. There is also a fraudulent address listed on the last page of the report: XXXX XXXX XXXX XXXX XXXX GA XXXX. [This consumer lives in Mississippi] Today I’ve spoken with XXXX a customer service rep with The Work Number, from Equifax. She states that I must contact Equifax Office of Consumer Affairs to have the address removed. This office has removed this fraudulent address several times. I have recorded calls each time. Why is this address being rotated by Equifax?”

CFPB Complaint No. 3376292, filed September 16, 2019, www.consumerfinance.gov.

It appears that these consumers who complained to the CFPB were repeatedly thwarted as they tried to remove inaccurate information from their Work Number files. Imagine if they were cut off from their sole source of income -- SSI or SSDI benefits -- based on these same files. In such cases, verification by an SSA employee could be the only thing standing between them and destitution. SSA must put in place a verification process that will require a confirmation of the specific information that would be used as the basis for an adverse action against a beneficiary before that adverse action is taken.

III. Disclosure that Authorization to Obtain Payroll Data is Not Necessary for Eligibility

SSA states that it will request authorization from SSI and SSDI claimants and recipients in order to obtain their employment verification reports from payroll data providers such as the Work Number.¹³ SSA further acknowledges that failure to sign the authorization will not lead to ineligibility for benefits.¹⁴

However, the current form, Form SSA-8240, does not disclose to claimants and recipients that declining to provide authorization will not render them ineligible. Instead, the Privacy Act Statement at the end of the form states while “[f]urnishing us this information is voluntary”

¹³ 86 Fed. Reg. at 5304.

¹⁴ *Id.*

that “failing to provide all or part of the information may prevent us from making an accurate and timely decision regarding your Social Security benefit.” These statements imply that claimants/recipients will *not* be eligible for benefits or that benefits will be delayed if they do not provide the authorization.

Form SSA-8240 should instead state, in the body of the form itself at Question 5.b and 5.c, and not in the Privacy Act Statement, that “You are not required to provide authorization. Checking ‘No’ will not lead to us rejecting you for benefits.”

IV. Fair Credit Reporting Act Requirements

Both Equifax and its Work Number subsidiary¹⁵ have identified themselves as “consumer reporting agencies” under the Fair Credit Reporting Act. They are also both listed in the CFPB’s List of Consumer Reporting Agencies.¹⁶ Information from the Work Number is considered a “consumer report,” which imposes certain duties on SSA when using it to terminate, reduce, or suspend a recipient’s benefits.

The most important of these duties is the requirement to provide an adverse action notice under the FCRA, 15 U.S.C. 1681m(a). Any person, including a governmental agency such as SSA,¹⁷ who uses a consumer report to take an adverse action must provide this notice. An adverse action includes “a denial or cancellation of...or any other adverse or unfavorable change in the terms of, any license or benefit described in [section 1681b(a)(3)(D)] of this title”¹⁸ The “benefits” described in Section 1681b(a)(3)(D)] would include eligibility for SSI or SSDI benefits.¹⁹

Thus, SSA must provide an adverse action notice whenever it terminates, suspends, or reduces a recipient’s SSI or SSDI benefits based on a Work Number report. This notice is in addition to, and in advance of, the Notice of Planned Action that SSA must provide to SSI beneficiaries before their benefits are to be reduced or suspended. The FCRA adverse action notice must include:

- The name, address and telephone number of the consumer reporting agency that furnished the report to the user

¹⁵ The Work Number, FCRA, The Work Number, and Your Privacy, <https://test.ct2.theworknumber.com/employees/fcra/> (viewed Feb 13, 2021).

¹⁶ CFPB, List of Consumer Reporting Agencies, 2021, https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list_2021.pdf, at 8, 15.

¹⁷ “Person” includes a “government or governmental subdivision or agency,” which includes SSA. *Id.* at 1681a(b).
¹⁸ *Id.* at 1681a(1)(B)(iii).

¹⁹ Section 1681b(a)(3)(D) specifically refers to “a determination of the consumer’s eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant’s financial responsibility or status,” which would include SSI and SSDI.

- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken
- The right to obtain a free copy of a consumer report from the agency within 60 days pursuant to 15 U.S.C. §1681j
- The right to dispute the accuracy or completeness of any information in a consumer report pursuant to 15 U.S.C. §1681i

Because the Work Number is a specialized type of consumer report that is different from the credit reports with which consumers are more familiar, we suggest a notice similar to the following to explain what type of report was used.

<p>[Name of Entity Providing Notice] [Denial/Action Based On] Your Employment Verification Report</p>	
<p>What is an employment verification report?</p>	<p>An employment verification report is a record of your employment and salary as reported by employers. An employment verification report is a type of “consumer report” regulated by the Fair Credit Reporting Act.</p>
<p>How did we use your employment verification report[s]?</p>	<p>We used information from your employment verification report to determine that your income is XXXX. This determination is the reason why we [terminated/denied/reduced] your [type of] benefits.</p> <p>We obtained your employment verification report from [insert name of CRA], but [insert name of CRA] did not make the decision to [terminate/deny/reduce] your [type of] benefits. [insert name of CRA] is unable to provide you with the specific reasons why your [type of] benefits were [terminated/denied/reduced]</p>
<p>What if there are mistakes in your employment verification report[s]?</p>	<p>You have a right to dispute any inaccurate information in your employment verification report[s].</p> <p>If you find mistakes in your employment</p>

	<p>verification report[s], contact [insert name of CRA], which [is/are] the consumer reporting [agency/agencies] from which we obtained your employment verification report[s].</p> <p>It is a good idea to check your employment verification report[s] to make sure the information [it contains is/they contain are] accurate.</p>
<p>How can you obtain a copy of your employment verification report[s]?</p>	<p>Under Federal law, you have the right to obtain a copy of your employment verification report[s] without charge for 60 days after you receive this notice. To obtain your free report[s], contact [insert name of CRA]:</p> <p>By telephone: Call toll-free: 1-877-xxx-xxxx</p> <p>By mail: Mail your written request to: [insert address]</p> <p>On the web: Visit [insert website address]</p>
<p>How can you get more information about your employment verification report?</p>	<p>For more information about consumer reports including employment verification reports, visit the Consumer Financial Protection Bureau’s website at www.consumerfinance.gov/learnmore</p>

Whether or not SSA chooses to use our suggested notice, we recommend that SSA consult with the CFPB about the adequacy of the adverse action notice that it develops.

Furthermore, in addition to the adverse action notice, we suggest that SSA provide a copy to the recipient of the Work Number report that it relied upon to terminate, suspend, or reduce the recipient’s benefits. Under the FCRA, Equifax cannot prohibit SSA from sharing the report with the recipient, 15 U.S.C. § 1681e(c).

SSA should also provide translations of adverse action notices into languages frequently used by Limited English Proficient (LEP) recipients. Furthermore, because Equifax is receiving federal funds as a federal contractor, Title VI of the Civil Rights Act of 1964 and Executive Order

13166²⁰ require it to provide language accommodations, *i.e.*, it must provide meaningful access for LEP recipients to Work Number reports.

Thank you for the opportunity to comment on this advance notification. If there are questions concerning this submission, please contact Tracey Gronniger at tgronniger@justiceinaging.org and Chi Chi Wu at cwu@nclc.org.

Respectfully submitted,

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²⁰ Title VI of the Civil Rights Act of 1964 -- National Origin Discrimination Against Persons With Limited English Proficiency, 65 F.R. 50123, August 16, 2000. This is the Federal Register cite for Department of Justice guidance for Executive Order 13166, Improving Access To Services For Persons With Limited English Proficiency, signed on August 11, 2000.