Administrative Conference of the United States

in partnership with the

National Academy of Public Administration

SOCIAL SECURITY ADMINISTRATION'S REPRESENTATIVE PAYEE PROGRAM:

INFORMATION SHARING WITH STATES

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This report was prepared by the Office of the Chairman of the Administrative Conference of the United States. The views expressed in this document do not necessarily reflect those of the Administrative Conference's Council, its members, or its committees.

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Acronyms and Abbreviations

Acronym and Abbreviation	Definition
Academy	National Academy of Public Administration
ACF	Administration for Children and Families
ACUS	Administrative Conference of the United States
CMPPA	Computer Matching and Privacy Protection Act of 1988
COSCA	Conference of State Court Administrators
DEP	Data Exchange Product
DOJ	Department of Justice
EAG	Expert Advisory Group
EIEN	Environmental Information Exchange Network
FISMA	Federal Information Security Modernization Act of 2014
GAO	Government Accountability Office
GLOBAL	Global Justice Information Sharing Initiative
HHS	Department of Health and Human Services
HTTP	Hyper Text Transfer Protocol
IT	Information Technology
LIHEAP	Low Income Home Energy Assistance Program
NAS	National Academy of Sciences
NCSC	National Center for State Courts
NCSSMA	National Council of Social Security Management Associations
NCSSSA	National Conference of State Social Security Administrators
NIEM	National Information Exchange Model
NRC	National Research Council
OASDI	Old-Age, Survivors, and Disability Insurance
ODEPPIN	Office of Data Exchange, Policy Publications, and International Negotiations
ODXIA	Office of Data Exchange and International Agreements
OIG	Office of the Inspector General
OIRA	Office of Information and Regulatory Affairs
OLC	Office of Legal Counsel
OMB	Office of Management and Budget
PII	Personally Identifiable Information
PRA	Paperwork Reduction Act
PTSD	Post-traumatic Stress Disorder
SNAP	Supplemental Nutrition Assistance Program
SOLQ	State On-line Query
SORN	System of Records Notice
SPSSBA	Public Law 115-165, Strengthening Protections for Social Security Beneficiaries Act of 2018
SSA	Social Security Administration
SSAB	Social Security Advisory Board

SSI	Supplemental Security Income
SSN	Social Security Number
SVES	State Verification and Exchange System
TANF	Temporary Assistance for Needy Families
VA	Department of Veterans Affairs
WINGS	Working Interdisciplinary Network of Guardianship Stakeholders

Executive Summary

The Social Security Administration (SSA) provides benefits to vulnerable members of society, including children, the elderly, and people with disabilities. In performing its mission, SSA is authorized to make benefit payments to a representative payee, who is a designated individual or organization who manages benefits on behalf of a beneficiary, if the beneficiary is found to be incapable of managing or directing the management of his or her own benefits. In April 2018, the President signed into law the Strengthening Protections for Social Security Beneficiaries Act of 2018 (SPSSBA), to improve efforts to protect Social Security beneficiaries who rely on representative payees. The SPSSBA calls for a study by the Administrative Conference of the United States (ACUS) of the opportunities and barriers to improved information sharing between SSA's Representative Payee Program and state entities that administer guardianship/conservatorship programs. ACUS partnered with the National Academy of Public Administration (the Academy) in conducting the study. The Academy conducted the portion of the study relating to administrative and operational opportunities and barriers, and ACUS completed the portion relating to legal barriers.

The study generated the following key findings that are explained in the report that follows:

Information Sharing Opportunities:

- Potential synergies exist between SSA's Representative Payee Program and the legal guardianship activities of the state courts, as they tend to rely on the same data to execute at least three common functions: capability determinations, selection of a representative payee or guardian/conservator, and oversight of representative payees and guardians/conservators.
- The creation of information sharing mechanisms between SSA and state courts could improve outcomes for incapable individuals, while also providing greater integrity to SSA's Representative Payee Program and state courts' guardianship/conservator programs.

Administrative and Operational Barriers to Information Sharing:

- Technological barriers to information sharing exist for both SSA and state courts. These barriers, at least in part, may be overcome by developing a web-based technology, such as proposed within the Data Exchange Product (DEP), for this purpose.[1]
- Given the technology used by SSA in their current data exchanges, the budget or resource allocation constraints of SSA and state courts present a significant barrier to information sharing, particularly in the initial development phase. However, once established, a web-based exchange could offer cost savings, thus freeing resources to be reallocated.
- The complex administrative process for implementing data exchanges between SSA and

[1] The Data Exchange Product, discussed more fully in Appendix F, is an information technology infrastructure concept for data exchange modernization to provide users the ability to request, send, receive, and administer incoming and outgoing exchange of information.

state entities presents an administrative barrier to information sharing and could be addressed through streamlined and standardized processes that can be adopted by SSA and the states.

- Communication barriers that exist between SSA and state courts pose an obstacle to information sharing. SSA should consider developing an institutionalized, two-way mechanism for it and state court representatives to better work together.

Legal Barriers to Information Sharing:

- The principal legal barrier to SSA sharing information with state courts is the Privacy Act of 1974. Though SSA *may* be able to disclose limited types of representative payee and incapable beneficiary information under the Privacy Act's "routine use" exception, the study team[2] recommends that SSA seek a legal opinion from the Office of Legal Counsel (OLC) in the Department of Justice (DOJ) before invoking this exception. If SSA does not wish to invoke the routine use exception, it may consider seeking consent from representative payees and beneficiaries allowing SSA to share certain limited types of information with state courts or seeking a targeted Privacy Act exception from Congress allowing the sharing of this information. Because the Privacy Act does not apply to organizations as a general matter, SSA is likely permitted to disclose information to state courts about organizational representative payees.[3]
- Information sharing must be in accordance with appropriations law and Section 1106 of the Social Security Act. If SSA decides that the information it obtains from state courts in return for its own information sufficiently advances its statutorily authorized functions, SSA could use appropriated funds to establish and operate the contemplated information-sharing regime. Otherwise, SSA could invoke Section 1106(b) to establish the information-sharing regime with state courts and may charge them for the information. In either case, SSA would need to have regulations authorizing such disclosures to state courts.
- State courts generally face three main types of legal barriers to sharing information with SSA: (1) statewide privacy statutes that resemble the federal Privacy Act of 1974 and generally govern the disclosure of personal information by state entities; (2) statewide statutes that specifically limit disclosure of social security numbers (SSNs); and (3) state court judicial rules that govern the collection and disclosure of personal information in case records and related documents. In most states, however, the only potentially significant barrier arises due to judicial rules that govern collection or disclosure of relevant guardian/conservator information.

[2] Throughout the report, the "study team" refers collectively to ACUS and the Academy.

[3] As explained further in the legal analysis below, SSA has not previously conducted significant analysis of which categories of information it would find beneficial if it were to be obtained from state courts. As such, the study team premised its Privacy Act analysis on a hypothetical scenario in which limited pieces of information (the names, dates of birth, and SSNs of incapable beneficiaries, representative payees, and state guardians/conservators, and whether such payees or guardians/conservators had previously been removed or disqualified) are shared. *See* p. 17, *infra*.

I. Introduction

SSA provides Old-Age, Survivors, and Disability Insurance (OASDI) and Supplemental Security Income (SSI) benefits to vulnerable members of society, including children, the elderly, and people with disabilities, as well as auxiliary beneficiaries.[4] In performing its mission, if SSA finds a beneficiary incapable of managing or directing the management of his or her own benefits, the agency is permitted to appoint a suitable representative payee to manage the payments on the beneficiary's behalf.[5] SSA appoints representative payees only to manage Social Security or SSI payments, and the appointment does not confer legal authority over other matters, such as non-Social Security income or medical matters.[6]

A representative payee can be a suitable individual (such as a relative, guardian, friend, or any other interested person who is in a position to care for the beneficiary) or a suitable organization (such as a social service agency, an institution, a state or local government agency, or a financial institution).[7] After selection, a representative payee receives benefit payments from SSA on behalf of the beneficiary, uses the money to meet the beneficiary's current needs and pay for other permitted expenses,[8] maintains accurate records, communicates with SSA, and files periodic reports with SSA.[9]

Congress first authorized the Representative Payee Program in 1939. Since then, SSA has implemented new operational practices and reforms in response to legislation passed in 1990[10]

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[4] SSA also provides benefits to auxiliaries who may or may not fall into these other categories of vulnerable populations. Typically, auxiliary beneficiaries include dependent spouses and children of individuals receiving social security.

[5] 42 U.S.C. §§ 405(j), 1383(a)(2); 20 C.F.R. §§ 404.2001 *et seq*., 416.601 *et seq*. *See also Representative Payee*, SOC. SEC. ADMIN., https://www.ssa.gov/payee/index.htm (last visited June 1, 2020).

[6] SOC. SEC. ADMIN., A GUIDE FOR REPRESENTATIVE PAYEES, https://www.ssa.gov/pubs/EN-05-10076.pdf (last visited June 1, 2020); SOC. SEC. ADMIN., GUIDE FOR ORGANIZATIONAL REPRESENTATIVE PAYEES 22, https://www.ssa.gov/payee/NewGuide/toc.htm (last visited June 1, 2020) ("Limits to What a Payee May Do").

[7] 42 U.S.C. §§ 405(j)(1)(A), 1383(a)(2)(A)(i); 20 C.F.R. §§§ 404.2020, 416.620.

[8] To meet the beneficiary's needs, representative payees typically use the money to pay for the beneficiary's food, clothing, housing, medical care, personal items, and other immediate and reasonably foreseeable needs. 20 C.F.R. §§ 404.2040, 416.640.

[9] SOC. SEC. ADMIN., A GUIDE FOR REPRESENTATIVE PAYEES, *supra* note 6, at 1–13; SOC. SEC. ADMIN., GUIDE FOR ORGANIZATIONAL REPRESENTATIVE PAYEES, *supra* note 6, at 16–17 ("Duties of a Representative Payee").

[10] The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5105, 104 Stat. 1388, 1388-254, required SSA to verify the identification of representative payee applicants and determine if the applicant had been convicted of social security fraud; prohibited the appointment of representative payees who had been convicted of social security fraud; prohibited certification of a representative payee without adequate evidence that the certification is in the interest of the beneficiary; required SSA to establish and maintain a centralized, current file, accessible to SSA's local offices, identifying persons who have previously misused OASDI or SSI benefits; generally prohibited a beneficiary's creditor from serving as his or her representative payee; directed SSA to provide beneficiaries with notice of a determination that they need a representative payee, including an explanation of their right to appeal such determination; directed SSA to terminate payment of benefits to a representative payee who misuses such benefits and to certify payments to an alternative representative payee or to the individual; allowed for compensation to certain social service agencies that serve as representative payees and limited the amount of fees

and 2004.[11] Despite those improvements, many organizations and key stakeholders, including the Social Security Advisory Board (SSAB), the Government Accountability Office (GAO), the National Academy of Sciences (NAS), the National Research Council (NRC), the SSA Office of the Inspector General (OIG), and the Conference of State Court Administrators (COSCA), later conducted studies and issued reports calling for more reforms involving, among other things, the selection and oversight of representative payees.[12]

These studies also identified the need for enhanced collaboration and information sharing between SSA's Representative Payee Program and state court guardianship/conservatorship programs. Although state guardianship/conservatorship practices vary from state to state, in general, state courts appoint an individual or organization to make important decisions regarding a beneficiary's life or property upon a determination that the adult lacks the capacity to do so him or herself.[13]

For example, in 2004, GAO observed that state courts and federal agencies "collaborate little in the protection of incapacitated elderly people and the protection of federal benefit payments from misuse" and recommended increased coordination between federal agencies and state courts that appoint guardians.[14] Two years later, GAO concluded that little had changed.[15] In a subsequent 2011 report, GAO concluded that information sharing among federal fiduciary programs and state courts could improve protection of incapacitated adults, and it recommended "the Commissioner of SSA take whatever measures necessary to allow it to disclose certain

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such agencies may collect; required SSA to maintain a centralized, current file, accessible to local SSA offices, identifying all representative payees and the beneficiaries using their services; and required SSA offices to maintain a current list of the public agencies and community-based nonprofit social service agencies qualified to serve as representative payees and which are located in the area served by such an office.

[11] The Social Security Protection Act of 2004, Pub. L. No. 108-203, 118 Stat. 493, principally required that SSA perform periodic onsite reviews for all nonprofit fee-for-service payees, organizational payees (both governmental and nongovernmental) serving 50 or more beneficiaries, and individual payees serving 15 or more beneficiaries; required SSA to ensure all fee-for-service organizational representative payees are licensed *and* bonded; disqualified an individual from serving as a representative payee if he or she was convicted of an offense resulting in more than one year of imprisonment; and gave SSA the authority to impose a civil monetary penalty for offenses involving misuse of OASDI or SSI payments received by a representative payee on behalf of another individual.

[12] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-473, ADDRESSING LONG-TERM CHALLENGES REQUIRES A MORE STRATEGIC APPROACH 16 (2013).

[13] *See, e.g.*, SOC. SEC. ADVISORY BOARD, IMPROVING SOCIAL SECURITY'S REPRESENTATIVE PAYEE PROGRAM (2018), https://www.ssab.gov/research/improving-social-securitys-representative-payee-program/ (last visited June 1, 2020); GOV'T ACCOUNTABILITY OFFICE, GAO-13-473, ADDRESSING LONG-TERM CHALLENGES, *supra* note 12, at 16; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT 17 (2011); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-1086T, GUARDIANSHIPS: LITTLE PROGRESS IN ENSURING PROTECTION FOR INCAPACITATED ELDERLY PEOPLE 5 (2006); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 32–33 (2004).

[14] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE (2004).

[15] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 06-1086T, *supra* note 13.

information about SSA beneficiaries and fiduciaries to state courts."[16]

For example, SSA maintains information about the individual or organization who is serving as an incapable beneficiary's representative payee. This information could be useful to a state court when selecting an appropriate guardian/conservator under state law; if SSA has determined that a particular individual is qualified to serve as an incapable person's representative payee, a state court may consider that same individual to serve as a guardian or conservator over the same beneficiary's other assets. Likewise, both SSA's representative payee and state courts' guardian/conservator programs require aspects of oversight and monitoring. If SSA removes a representative payee for misconduct, that would be important information for state courts to consider when determining whether to appoint that individual as a guardian/conservator. Conversely, it would be relevant for SSA to know if a guardian/conservator has been removed for misconduct.[17] Despite these overlapping functions and populations served, SSA and state courts currently engage in very limited information sharing or formal collaboration. Thus, these previous studies posit that information sharing would, at a minimum, better inform both SSA and state court decisions about whether to appoint a representative payee or guardian/conservator, to determine the suitability of a potential representative payee or guardian/conservator, and to improve the oversight of existing representative payees and guardians/conservators.

State courts have undertaken several initiatives to encourage such enhanced collaboration and information sharing. First, COSCA has issued two resolutions calling for key reforms to improve the communication and exchange of information between state courts with jurisdiction over guardianships/conservatorships and SSA staff administering the Representative Payee Program.[18] Second, COSCA launched a nationwide effort to standardize data definitions between state courts to address the need for consistent data collection. Third, in collaboration with the National Center for State Courts (NCSC), COSCA launched the National Open Court Data Standards to develop business and technical court data standards to support the creation, sharing, and integration of court data in a user-friendly format.[19] Together, these initiatives help address the need for standardized definitions and data elements, potentially allowing for state courts to

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[16] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-678, INCAPACITATED ADULTS, *supra* note 13, at 17.

[17] Interviews with SSA field office staff confirmed that in the selection of a representative payee, data about guardians removed for malfeasance, misuse, or poor performance could be useful in making a suitability determination. Similarly, if the guardian is also serving as a representative payee, it would be useful to receive notification when a change in guardian/conservator occurs; notification of removal for cause raises a red flag that would suggest the need for a higher level of scrutiny on the part of SSA.

[18] *See* Conf. of State Court Administrators, *Resolution 4: Encouraging Collaboration Between State Courts and Federal and State Representative Payee Programs* (2014), https://cosca.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Encouraging-Collaboration-State-Courts-Federal-State-Representative-Payee-Programs.ashx; Conf. of State Court Administrators, *Resolution 1: Urging the Social Security Administration to Amend its Regulations and Congress to Add an Exception to the Privacy Act of 1974 for the Purpose of Protecting Assets of Social Security Recipients* (2017), https://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/08092017-1-SSA-Amending-Regulations-Privacy-Act-1974.ashx.

[19] NAT'L CTR. FOR STATE CTS., NAT'L OPEN CT. DATA STANDARDS, https://www.ncsc.org/nods (last visited June 1, 2020).

have an improved ability to match and exchange data with SSA.

In 2017, the House Ways and Means Subcommittee on Social Security held several hearings on the SSA Representative Payee Program. These hearings included testimony from SSA officials, including representatives from SSA's OIG, and key stakeholders. During the hearings, there was considerable discussion of the apparent need for improved information sharing between state courts determining guardianship/conservatorship and SSA staff determining representative payees, given the significant overlap between those who are both guardians/conservators and representative payees.[20] Shortly after these hearings, the SPSSBA was passed.

In the SPSSBA, Congress included a provision requiring a study by ACUS to evaluate the potential opportunities and barriers to information sharing between SSA and state entities regarding representative payees and guardians/conservators.[21] Specifically, Congress directed that the study provide:

> "(A) an overview of potential opportunities for information sharing between [SSA] and State courts and relevant State agencies;
>
> "(B) a detailed analysis of the barriers to such information sharing, including any Federal or State statutory barriers;
>
> "(C) a description of how such information sharing would be implemented, including any additional infrastructure needed; and
>
> "(D) a description of any risks or other factors that [SSA] and the Congress should consider before implementing such information sharing."[22]

II. Potential Benefits of Information Sharing

The study team concludes that the creation of information sharing mechanisms between SSA and state courts could improve outcomes for incapable individuals while also providing greater integrity to SSA's Representative Payee Program and state court guardianship/conservatorship programs. As noted above, SSA field office staff and state courts currently engage in very limited information sharing, even though they often serve similar populations of elderly and non-elderly incapable individuals. Based on the study team's interviews with SSA field office and state court officials, as well as findings set forth in SSAB

[20] *See, e.g.*, *Joint Hearing on Social Security's Representative Payee Program:* Hearing Before the Subcomm. on Oversight and the Subcomm. on Social Security of the H. Comm. on Ways & Means, 115th Cong. (2017), https://docs.house.gov/meetings/WM/WM06/20170322/105750/HHRG-115-WM06-20170322-SD001.pdf.

[21] Appendix A summarizes the key provisions of the SPSSBA.

[22] *Strengthening Protections for Social Security Beneficiaries Act of 2018*, Pub. L. No. 115-165, § 103(c)(1), 132 Stat. 1257, 1263.

and GAO reports,[23] this premise appears particularly true for three common functions that both SSA and state courts perform: capability determinations, representative payee or guardian/conservator selection, and representative payee and guardian/conservator oversight.[24]

First, SSA is authorized to determine whether beneficiaries are capable of managing or directing the management of their own cash benefits and, if they are deemed incapable, to appoint a responsible third party to serve as their representative payee, who serves as the beneficiary's fiduciary solely for SSA benefits.[25] The procedure carried out by SSA staff is known as a capability determination and requires field office employees to consider factors such as the physical and mental health of the beneficiary, the beneficiary's living situation, how the beneficiary's money is being handled currently, and how the beneficiary's needs are being met.[26] Similarly, state courts may conduct a capability determination and conclude that an adult is not capable of managing his or her own personal affairs or property and designate a responsible third party to serve as his or her guardian/conservator. Both SSA field office staff and state court officials[27] stated during interviews that it would be particularly helpful when making their respective capability determinations to know whether the individual had already been assigned a representative payee or guardian/conservator. This is particularly true with respect to SSA's determination because, if an individual has been deemed legally incompetent by a court, SSA will likely determine that he or she would require a representative payee.

Second, both SSA field office staff and state court officials also explained that when an incapable individual has both a representative payee and a guardian/conservator, it is typically beneficial for the same individual to serve in both capacities.[28] This position is also supported in

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[23] *See, e.g.*, SOC. SEC. ADVISORY BOARD, IMPROVING SOCIAL SECURITY'S REPRESENTATIVE PAYEE PROGRAM (2018), https://ssab.gov/Portals/0/OUR_WORK/REPORTS/ImprovingRepPayee2018.pdf (recommending that OMB consider "creat[ing] a shared database for federal benefit-paying agencies and state and local courts that make guardianship decisions"); GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 17.

[24] The study team notes that SSA's criteria, process, and purpose for making a capability determination are different than the criteria, process, and purpose of a state court's incompetence determination.

[25] The SPSSBA required SSA to create policies for SSA beneficiaries to designate a representative payee in advance of SSA's determination that the beneficiary needs a representative payee. *Strengthening Protections for Social Security Beneficiaries Act of 2018*, *supra* note 22, § 201. SSA finalized these regulations in February 2020. Soc. Sec. Admin., *Advance Designation of Representative Payees for Social Security Beneficiaries*, 85 Fed. Reg. 7661 (Feb. 11, 2020).

[26] SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL GN 00502.060, "MAKING A CAPABILITY DETERMINATION," https://secure.ssa.gov/poms.nsf/lnx/0200502060 (last visited June 1, 2020).

[27] Throughout this report, references to comments made by SSA "field office" and "headquarters" staff or officials, as well as "state court" officials and other categories of interviewees, do not necessarily represent the views of all interviewees from such group, but rather only that some interviewees expressed the articulated opinion.

[28] However, according to SSA policies, SSA does not necessarily prioritize guardians above family in payee selection. *See* SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL GN 00502.105B, "PREFERRED REPRESENTATIVE PAYEE ORDER OF SELECTION CHARTS," https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502105 (noting a legal guardian with custody of the beneficiary or who demonstrates strong concern for the beneficiary's well-being is of equal preference to a spouse or other relative who similarly has custody of the beneficiary or demonstrates strong concern for the beneficiary's well-being).

prior studies, including in a 2007 NRC report on SSA fiduciary programs. The report recommended that SSA give preference to existing legal guardians when designating a fiduciary, citing potential "conflicts among federal law, SSA policies, and state practices" that could arise when an incapacitated adult's SSA-designated fiduciary and his or her court-appointed guardian are not the same person.[29] Thus, information regarding the individual serving in either role would benefit both SSA and state courts when they select or are required to reassign a third party to serve in either role.

Third, both SSA field office staff and state court officials stated that they believed information sharing would also provide meaningful improvements to their respective oversight of representative payees and guardians/conservators. Indeed, state court officials expressed concern that there had been several cases where an individual was removed from serving as a guardian/conservator for misconduct but nonetheless continued to serve as that incapable individual's SSA representative payee. They also expressed concern that, due to the lack of information sharing with SSA, there may be cases where the reverse was true. SSA field office staff expressed similar concerns.[30] Thus, both SSA field office staff and state court officials posit that sharing information regarding changes to the individual serving as representative payee or guardian/conservator would improve their oversight and monitoring of representative payees and guardians/conservators and thereby better protect incapable individuals from harm.

In addition to these benefits, some SSA field office staff stated they believe information sharing might also produce other ancillary benefits, such as improved customer service, faster turnaround for routine office tasks, and more efficient use of front office resources. Currently, certified paper documentation is required for proof of guardianship and other statuses. This requirement causes delays in processing, extra effort on the part of SSA field staff and beneficiaries, and unnecessary errors due to the lack of real-time information.

III. Study Design

The study team designed this study to investigate the operational and legal opportunities and barriers to information sharing between SSA and state courts. In conducting preliminary research, the study team has learned that state courts are the principal repository of guardianship/conservatorship information in all states. Because courts are the entities that would exclusively or nearly exclusively exchange guardianship/conservatorship information with SSA, the study team has determined that the prudent use of resources would be to focus on information exchanges between those entities and SSA.[31]

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[29] NATIONAL RESEARCH COUNCIL, IMPROVING THE SOCIAL SECURITY REPRESENTATIVE PAYEE PROGRAM: SERVING BENEFICIARIES AND MINIMIZING MISUSE (Nat'l Academies Press, 2007).

[30] In one SSA field office, staff explained to the study team that the courts in their area had a practice of sending a letter notifying them of changes regarding an incapacitated person's guardian/conservator, but that because those letters did not contain the incapacitated person's SSN, they had no way of identifying the incapacitated person or determining whether a new representative payee should also be assigned.

[31] Incidentally, the legal barriers for information sharing are likely lower for state courts than for state agencies as courts are often exempted from state privacy laws that might otherwise pose a barrier to information sharing.

The study team has divided the study and this report into two main parts. The first part addresses the opportunities and barriers for information sharing between SSA and state courts from an administrative and operational standpoint. It was completed by the Academy. The Academy is a congressionally chartered, non-partisan, non-profit academy that principally functions as an expert advisor to government agencies on matters of public administration.[32] Since its inception in 1967, the Academy has successfully conducted hundreds of studies related to improving the effectiveness and efficiency of federal agency programs. To benefit from the Academy's deep expertise in these areas, ACUS partnered with the Academy to complete the administrative and operational aspects of the study. The second part of the report addresses the legal barriers for information sharing. It was completed by ACUS's Office of the Chairman. Following these two parts is a series of Appendices containing more information relevant to the study.

A. Data Collection

The study was conducted from April through December 2019 and employed qualitative research methods.

Law and Literature Review

To identify the opportunities and potential barriers to information sharing, the study team reviewed federal statutory requirements; guidance on information sharing practices and information security requirements as promulgated by the Office of Management and Budget (OMB) and SSA; literature and official documentation related to SSA's Representative Payee Program, including related congressional hearings and reports conducted by GAO, SSAB, ACUS, and the SSA OIG; federal court decisions and DOJ OLC opinions regarding the scope and import of potential barriers to information sharing; and state statutory requirements regarding information sharing. The law and literature review provided a baseline for the report's findings.[33]

Interviews

Along with this review of the legal requirements and relevant literature, the study team conducted semi-structured interviews[34] with a range of stakeholders, including experts, advocates, and federal and state representatives involved with state guardianship/conservatorship programs or SSA's Representative Payee Program. Interviews were conducted in person or by phone with SSA headquarters staff from the Office of Retirement and Disability Policy; Office of Data Exchange, Policy Publications, and International Negotiations (ODEPPIN); Office of Operations; Office of Systems; Office of the General Counsel; and Office of Legislation and

[32] *See* NAT'L ACAD. OF PUBLIC ADMIN., https://www.napawash.org/about-us/who-we-are/ (last visited June 1, 2020).

[33] Appendix C summarizes prior reports and other documents.

[34] The interviews with each category of stakeholders (e.g., SSA officials, state court officials, and so forth) were conducted using a standardized set of questions related to information sharing. These questions mainly asked interviewees what types of data they would like to receive from SSA or state courts. Interviewees also were generally asked what they perceived to be the principal barriers to information sharing. Along with these two principal types of questions, interviewees were also encouraged to share any additional information they believed may be useful to the study.

Congressional Affairs (collectively, headquarters staff).[35] The study team submitted several follow-up questions to clarify interview details, which were answered by SSA headquarters staff. To better understand the needs of the various SSA field and regional offices, the study team interviewed field office staff from nine locations with diverse demographic characteristics. Those included: Austin and San Marcos, Texas; Minneapolis, St. Paul, and St. Cloud, Minnesota; Denver, Colorado; Chicago, Illinois; Rockville, Maryland; and Philadelphia, Pennsylvania.

Recognizing the large number and diversity of the state courts, the study team interviewed a non-generalizable sample of state court administrators from eight states: Texas, Minnesota, Maryland, New York, Utah, Florida, Wyoming, and Ohio. Selection criteria included diversity of geographical location, whether the state had implemented a unified case management system,[36] and the level of technological infrastructure in place. As the sample size was limited and state court administrators were not randomly selected, the results of these meetings are not necessarily generalizable to all state courts.[37]

To garner the viewpoints of subject-matter experts, the study team interviewed the following sample of expert and advocacy groups involved with guardianship/conservatorship issues:

- COSCA leadership
- Representatives of several regional offices of The Working Interdisciplinary Network of Guardianship Stakeholders (WINGS)
- Officials of the National Council of Social Security Management Associations (NCSSMA)
- Leadership at the American Bar Association's Commission on Law and Aging

The study team also interviewed congressional staff from the House Ways and Means Committee and the Senate Finance Committee to better understand the congressional intent of the language mandating this study.

[35] *See* Appendix B for the list of interviews conducted by the study team.

[36] A unified case management system refers generally to a statewide software system that virtually all courts in the state use to manage and track case information.

[37] The study relied on a non-generalizable sample of state court administrators to obtain a variety of perspectives from a limited sample. A statistically relevant and generalizable sample would involve the random selection of a much larger sample of state court administrators. The study team determined that conducting a nationally representative sample would have been prohibitively expensive and resource inefficient. GAO guidance explains that using a non-generalizable sample is appropriate to "describe aspects of an issue, understand the context of a problem, or provide anecdotes to illustrate a finding." U.S. GOV'T ACCOUNTABILITY OFFICE, SELECTING A SAMPLE OF NONGENERALIZABLE CASES FOR REVIEW IN GAO ENGAGEMENTS (2017). The study team supplemented the information received from the sampled administrators with information from national organizations representing all state court administrators. The information provided by the national organizations was consistent with the team's findings from the individual state court representatives.

Expert Advisory Group

Finally, the study team was advised by an Expert Advisory Group (EAG) consisting of four Academy Fellows with expertise and leadership experience in Social Security programs, information technology (IT), privacy matters, intergovernmental programs, and financial oversight. The Fellows met with the study team several times and provided ongoing guidance to the study team throughout the project, including providing input on the findings from the fieldwork, analysis, draft report, and recommendations. The biographical information of the Academy Fellows who served on the EAG is provided in Appendix D.

B. Data Elements

Both state court and SSA field office personnel indicated that their respective programs would better serve incapable individuals if they could access even basic information from each other. Although they each had several unique data elements, the study team has found a common core of data elements that each would like to request from the other.[38] Those staff directly making either guardianship/conservatorship or representative payee determinations suggested they would find the information listed below to be most useful. The study team concludes that narrowing the focus of information sharing to three types of data could minimize the legal and administrative barriers and would provide an important first step to improving outcomes for incapable beneficiaries:

- Name, SSN, date of birth, and contact information of incapable individuals or beneficiaries with representative payees or guardians/conservators;
- Name, SSN, date of birth, and contact information of representative payees or guardians/conservators; and
- Information regarding representative payees or guardians/conservators who have been removed or disqualified.[39]

In the two parts that follow, the study team's analysis of the opportunities and barriers to information sharing assume such sharing would, at least initially, be limited to these data elements.

[38] In reviewing feedback from state court administrators obtained in the 2014 ACUS study, the study team observed that many respondents in that report cited the same core data elements that SSA field office staff identified as valuable in connection with this study.

[39] The underlying data exchange agreement would specify that the data exchange would be limited to specific subpopulations of interest to each party. Additionally, state court and SSA field office officials indicated they would find it useful to be notified when a change in representative payee or guardian/conservator occurs. However, this would likely be a function of the technology developed to facilitate data exchange.

C. Assumptions and Premises

The study team notes several important caveats, particularly with respect to the legal discussion. First, the discussions about data elements and the Privacy Act analysis included in the sections below are premised on a hypothetical scenario. SSA has not previously conducted significant analysis of which categories of information it would find beneficial if they were to be obtained by state courts, or what information it might share with state courts. As such, the study team has limited its legal analyses to the categories of information SSA field office and state court staff identified as being useful (enumerated above) and explored the potential practical and legal barriers under these assumptions.

Additionally, the study team notes that the information-sharing scheme described and referenced throughout the report in most instances would not provide SSA with information sufficiently comprehensive to be acted upon without further investigation. In most cases, SSA headquarters staff reported that the information described—names, SSNs, and dates of birth—would flag information for follow-up investigation, rather than provide immediately actionable information upon which SSA could solely rely in its decision-making process. For example, if a state court notified SSA that a specific individual or organization had been removed as guardian or conservator for relevant misconduct, SSA headquarters staff reported that determining whether that individual or organization is currently serving as a representative payee, whether the misconduct is a relevant factor in SSA's decision-making process, and whether that misconduct is supported by relevant evidence upon which SSA could rely would likely require additional investigation.

Finally, as SSA headquarters staff reported in interviews, there is a negative correlation between the scope of the information exchanged and the strength of potential legal arguments under the Privacy Act. This correlation will be analyzed more fully below.

These premises notwithstanding, the study team acknowledges SSA's ultimate authority to assess and weigh the value of such data exchanges in light of their respective burdens and costs to the agency. The study did not examine such resource allocation issues, which are policy decisions more appropriately to be made by SSA and are beyond the scope of this report's charge.

National Academy of Public Administration

PART 1: ADMINISTRATIVE AND OPERATIONAL BARRIERS TO INFORMATION SHARING

I. Current Administrative Process

For purposes of this report, data exchange means the one- or two-way sharing of personally identifiable information (PII) with a government or private entity. The sharing of data is typically governed by legal agreements that document the exchange and the data requestor's acceptance of any restrictions on the data, including confidentiality requirements.

SSA participates in hundreds of different data exchanges with federal and state agencies ranging from SSN verifications to computer matching of databases to verify eligibility for federal programs.[40] SSA's Office of Data Exchange and International Agreements (ODXIA) is housed within ODEPPIN.[41] ODXIA is the centralized office governing data exchange.[42] It coordinates the data exchange agreements process, provides oversight, and formulates policy and procedures.[43]

All information sharing must be in accordance with the Privacy Act, 5 U.S.C. § 552a; appropriations law and Section 1106 of the Social Security Act; SSA's privacy regulations, 20 C.F.R. Part 401; and other applicable law.[44] Additional SSA criteria for data exchange include the following three factors:

- **Data System Security**: The Federal Information Security Modernization Act of 2014 (FISMA) requires external entities with access to federal data to comply with FISMA's data security requirements.[45]
- **Systems Feasibility**: SSA considers the systems options available to make an exchange and whether systems development is needed.[46]
- **Costs of Data Exchange**: SSA typically requires reimbursement of additional costs related to the data exchange.[47]

Notwithstanding the above requirements, a robust information sharing practice already exists between SSA and those state entities that administer federal benefit programs, including the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), Low Income Home Energy Assistance Program (LIHEAP), and Foster Care and Adoption Assistance. In administering these programs, state entities are required to use SSA's Income and Eligibility Verification system to verify the SSN and eligibility of all recipients of federally funded aid in those programs. In addition, state entities are required to follow mandatory guidelines and procedures that are outlined in information sharing agreements.

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[40] *See, e.g.*, SOC. SEC. ADMIN., DATA EXCHANGE, https://www.ssa.gov/dataexchange/ (last visited June 1, 2020).

[41] SOC. SEC. ADMIN., ORGANIZATIONAL CHART, https://www.ssa.gov/org/ssachart.pdf (last visited June 1, 2020).

[42] SOC. SEC. ADMIN., DATA EXCHANGE, *supra* note 40.

[43] *Id.*

[44] A discussion of the legal barriers to information sharing is contained in Part 2 below.

[45] SOC. SEC. ADMIN., DATA EXCHANGE, *supra* note 40.

[46] *Id.*

[47] *Id.*

SSA currently uses several different platforms for its information-sharing activities. SSA's State Verification and Exchange System (SVES) provides participating state entities with a standardized method to confirm an applicant's SSN, earnings information, and other data required to determine eligibility. SVES was developed to provide an electronic, computer-to-computer method by which a state can submit multiple data requests daily. The requests are then batched together and SSA returns the data overnight. More recently, SSA developed the State On-line Query (SOLQ)—a real-time online application of the verification and exchange system. Using SOLQ, data requests from a state entity are processed and answered immediately.[48]

II. Current State of Data Exchanges Between SSA and State Courts

In contrast to the robust information-sharing practice that exists between SSA and state entities administering federal benefit programs, information sharing among state courts and SSA is virtually non-existent and is severely limited by the Privacy Act.[49] SSA field office staff indicated, that due to the lack of real-time information, they may be making determinations or providing oversight of representative payees with incomplete or erroneous information. Similarly, state court officials may be recommending and making decisions that are contrary to the interests of those with guardians or conservators. Very often, these decisions impact the most vulnerable beneficiaries—individuals with limited capacity to manage their own finances and other matters.

III. Administrative Barriers to Information Sharing

While data sharing among federal and state agencies may provide numerous benefits, it also presents potential challenges at each phase of the process comprising data collection, data transmission, and data analysis. This section examines the administrative barriers from the perspective of SSA and state courts, including technology barriers, budget constraints, cumbersome data exchange processes, and communication barriers between SSA and state court representatives. It recognizes that although certain barriers are unique to either, many are common to both state and federal entities.

A. Challenge: Technology Barriers

As explained above, SSA has developed various data exchange platforms to accommodate the transfer of data between SSA and entities with different IT systems and levels of technology. However, much of the data SSA provides are gathered through older legacy systems that rely on outdated applications and technologies. Legacy systems require constant monitoring for data integrity and compatibility and are expensive to maintain. In general, data from one legacy system source is formatted to be compatible with the legacy system receiving the data, followed by a series of uploads and downloads of the data. Those systems are resource-intensive from both a human capital and a technology perspective, requiring significant

[48] *Id.*

[49] A full discussion of the Privacy Act's implications on information sharing is included in Part 2.

programming resources and server capacity.[50]

Therefore, the technology generally used by SSA in their data exchanges (uploading and downloading data from SSA's legacy system to the other entity's system) is costly and complex. Creating a data exchange with each of the thousands of court systems presents significant limitations from both SSA and the state courts' perspective. However, the ability to implement data exchanges using web-based technology and the development of cloud computing are rapidly evolving and offer more cost-efficient solutions.

Web-based technology allows users to access a program via a network connection using Hyper Text Transfer Protocol (HTTP).[51] Users typically interact with a remote server through a web browser interface and run the program inside a web browser, rather than utilizing a device's stored memory. Provided there is internet access, a user can access a web-based application from any location at any time. Cloud computing, or the use of cloud-based applications, represents a more advanced form of web-based applications.[52] Cloud computing provides on-demand access to a broad range of shared computing resources, including networks, servers, storage, applications, and services. The cloud environment may be on-site or external.[53]

As part of a broader effort to transform IT within the federal government, OMB in 2010 mandated that federal agencies begin to shift their IT services to a cloud environment when feasible.[54] Consistent with the OMB directive, SSA is migrating internal IT systems to a cloud environment. As of September 2019, SSA deployed its on-site-private cloud environment and 30 systems in external cloud environments. Of the 30, 17 collect, process, maintain, transfer, or store sensitive information, such as program data and PII.[55]

In its 2019 report on cloud computing, GAO highlighted several key benefits of using web and/or cloud-based applications, including cost savings, improved communication, efficiency, and employee productivity as well as enhanced data security.[56]

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[50] SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2018 INSPECTOR GENERAL'S STATEMENT ON THE SOCIAL SECURITY ADMINISTRATION'S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES (2018), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-18-50307.pdf (last visited June 1, 2020).

[51] HTTP is the protocol and foundation to transfer data over the World Wide Web.

[52] The principal difference is that cloud applications utilize multiple data centers while web-based utilize a single location.

[53] *See* FINANCES ONLINE, CLOUD-BASED VS WEB-BASED APPLICATIONS: A COMPARISON OF FEATURES KEY ASPECTS, https://financesonline.com/cloud-based-web-based-applications-a-comparison-of-features-key-aspects/#whatarecloud (last visited June 1, 2020).

[54] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 25 POINT IMPLEMENTATION PLAN TO REFORM FEDERAL INFORMATION TECHNOLOGY MANAGEMENT (2010), https://www.dhs.gov/sites/default/files/publications/digital-strategy/25-point-implementation-plan-to-reform-federal-it.pdf (last visited June 1, 2020).

[55] *See* SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, STATEMENT ON SSA'S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES (2019), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-18-50705.pdf (last visited June 1, 2020).

[56] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-58, CLOUD COMPUTING: AGENCIES HAVE INCREASED USAGE AND REALIZED BENEFITS, BUT COST AND SAVINGS DATA NEED TO BE BETTER TRACKED (2019).

- **Cost savings**: Unlike traditional desktop applications, which require the purchase and download of software, web and/or cloud-based applications allow users to avoid the costs of all the required computing services. The cost is incurred as the service is used, preserving funds for more critical needs such as IT modernization. Further savings arise from the fact that developers are not required to write multiple versions of the same application for different operating systems, and also because maintenance costs are borne by the provider.
- **Greater flexibility and mobility**: The use of a web- or cloud-based application provides users greater flexibility and mobility. Web-based applications are device agnostic—they do not require the use of a particular device or operating system. Any device that can access a browser, including laptops, tablets, and cell phones can access the application. This provides users the opportunity to work in any location at any time. Finally, as the application is run on the web it does not require hard drive storage capacity.
- **Greater efficiency**: The use of a web- or cloud-based application allows agencies to introduce new versions of a software application and modifications to an existing work product immediately and make them available for all users, improving efficiency and mitigating version control issues. Web- or cloud-based applications are also more efficient. They are more intuitive, more user friendly, and require fewer training resources.
- **Data security**: The use of a web- or cloud-based application can also improve data security as confidential data is stored on a secure server whose security is constantly monitored by sophisticated protective mechanisms and protocols.

Cybersecurity may also present a significant challenge to data exchange. Issues can occur at several levels, including the sharing of raw data and of statistical analysis that identifies individuals and organizations. SSA and state courts are responsible for the safekeeping of sensitive and important personal information of individuals and are constantly working to ensure personal data is secure and available only to authorized entities. Recent data breaches of SSNs and other PII illustrate how difficult this task is in the current cyber environment. FISMA requires SSA to enforce security requirements when exchanging data. SSA meets those requirements by ensuring that data exchange partners comply with its Information System Security Guidelines. Those guidelines provide a detailed description of the management, operational, and technical controls SSA requires of electronic data exchange partners to safeguard its information.[57] Further, prior to sharing data, SSA must certify that new data exchange partners are in full compliance with its safeguard requirements. Finally, SSA conducts triennial security reviews of all electronic data exchange partners to ensure their ongoing compliance with those requirements.

[57] SOC. SEC. ADMIN., DATA EXCHANGE SECURITY INFORMATION, https://www.ssa.gov/dataexchange/security.html (last visited June 1, 2020); *see also* Federal Information Security Management Act, 44 U.S.C. § 3541, Privacy Act of 1974, 5 U.S.C. § 552a.

There are a number of success stories related to the use of web-based technology, both within the federal government and throughout the public sector. Appendix E provides several recent examples of data exchanges using web-based technology. Similarly, SSA had been developing an IT infrastructure concept to modernize data exchanges, known as the Enterprise Data Exchange Network, that demonstrated functionality that would allow sharing of real time data using a single data-exchange platform. Interviews with SSA headquarters staff conducted in June 2019 discussed imminent deployment progress and field visits in July 2019 garnered indications of initial deployment as well. Subsequently, the study team was informed that this program was renamed to the Data Exchange Project (DEP) concept and funding was no longer provided.[58]

In interviews with SSA representatives from ODEPPIN, staff explained that DEP would include a web-based functionality that would allow sharing of real-time data using a single data exchange platform. Additionally, SSA staff explained that DEP would create a menu of standard data elements to which SSA could grant entities access to the particular data elements that have been agreed to through data exchange agreements. Any particular entity would only be able to access those data elements authorized by a data exchange agreement. SSA staff indicated that the intention was to reach "full functionality" of the DEP concept by 2021, though they expected to continue to build on DEP after that date. However, in subsequent interviews with SSA headquarter staff, the Academy team was informed that no funding for this type of data exchange modernization was available at this time.

As described in the overview of the DEP in Appendix F, this effort could provide numerous advantages, including a single point of entry for internal and external users and the ability for customers to create user accounts and to authorize and manage those accounts, to submit online requests, to initiate and monitor a workflow process, and to create real time management information reports. Finally, the DEP could integrate SSA's existing Identity and Access Management system and comply with applicable federal and commercial security standards, including FISMA. When fully developed, this product may reduce the need for computer systems (SSA's and/or the other entity's) to be reprogrammed or reformatted in order to exchange data and may reduce costs and time in development, implementation, and training.

Additional State Court Technological Barriers

State courts and related agencies face additional technological barriers. The difficulty arises in part from the fact that, in the United States, each state independently defines the structure and administrative rules for its court system.[59] Consequently, data management systems, data governance policies, definitions of data points (or "data definitions"), and the complexity and sophistication of data collection can vary significantly from state to state.

[58] The study team requested additional information about the apparent change in direction and did not receive any clarifying information.

[59] *See* CONF. OF STATE COURT ADMINISTRATORS, https://cosca.ncsc.org/ (last visited June 1, 2020); *see also* NAT'L CTR. FOR STATE CTS., NATIONAL PROBATE COURT STANDARDS (2013), https://ncsc.contentdm.oclc.org/digital/collection/spcts/id/240 (last visited June 1, 2020).

The challenge is even more complex in that not all states have court systems that are governed by rules and procedures determined by a state court administrator. Some do not have a common case management database. There are a number of large states where each county may determine its own procedures, its own data collection methodologies, its own definitions, and its own data governance policies. As a result, the timeliness of data submission, the level of granularity/detail of data, and the level of data error can vary greatly.

There is also great variation among the courts both across and within states as to the sophistication of their data management systems. For example, the Minnesota courts have made significant progress in unifying and upgrading their data management systems to the point that all county courts use the same data management system, including a probate information system that is partially accessible to the public via the web. Maryland's State Court Administrator indicated that Maryland courts are also upgrading and requiring a consistent approach to data collection across all counties.

In contrast, other state court administrators believed that their internal data collection capabilities were not sufficiently developed to allow them to share data with other state and federal entities. For example, several administrators commented that many court files are not accessible online, particularly with respect to ongoing guardianship/conservatorship cases that the records for which are stored only as paper files. Others stated that some guardian reports are not centrally filed and may not be included in the aggregate database due to a lack of resources. Although they acknowledged the benefits of having access to SSA data on representative payees, they felt that the costs to develop a state-wide unified database on guardianship/conservatorship activities might exceed those benefits. (However, with the development of the DEP, such a unified database, while ideal, would not be necessary for accessing data from SSA. It could be accessed by single users through the approved web portal). Finally, certain state court representatives expressed concern about sharing PII data with federal entities and losing oversight of the data.

Variations in data definitions and data quality among state court entities also present a challenge. Those issues exist throughout the state court systems, which may not have terminology consistent with SSA (e.g., legal guardian, conservator, guardian of the estate). Further, existing state and federal data systems have been designed to collect and analyze data sets for specific purposes.[60] Aggregating data from different data management systems may create possible data integrity issues resulting in greater data collection error rates.

[60] COMM'N ON EVID.-BASED POL'Y MAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING: REPORT OF THE COMMISSION ON EVIDENCE-BASED POLICYMAKING (2017), https://www.cep.gov/report/cep-final-report.pdf (last visited June 1, 2020).

Potential Solutions:

- Prioritization and continued development of web-based data exchanges: A web-based, bi-directional data exchange provides data sharing participants the flexibility to enter or upload real-time data directly to the web-based data management system without first modifying/revising their own data management systems.[61] This facilitates the exchange of data among entities with different IT systems and levels of technical sophistication. As noted in the above-referenced GAO report,[62] such a system would also enhance cybersecurity as data exchange partners are only provided access to specific data sets and the confidential data is stored on a secure server with sophisticated protective mechanisms. Web-based technology is rapidly evolving, and a growing number of state and federal entities are partnering to develop these exchanges. Examples include the CDX exchange used by the Environmental Protection Agency, the SSA exchange with state departments of motor vehicles, and the Department of Health and Human Services (HHS) data exchange with state agencies that monitor the well-being of foster children. See Appendix E for a review of current federal and state government data exchanges.
- Standardized data definitions and data integration standards: There is a national effort by COSCA to standardize data definitions throughout the court system. COSCA and NCSC have launched a joint initiative, the National Open Court Data Standards, to develop business and technical court data standards to support the creation, sharing, and integration of court data in a user-friendly format.[63] Both of these efforts would address the issue of standardized definitions and data elements, allowing for improved ability to match and exchange SSA data with the state courts.
- Pilot with state courts with robust data collection and IT capabilities: In order to assess the benefits and barriers to data sharing among SSA and the state courts more accurately, a trial launch could be implemented among SSA and those states with more robust data reporting and IT capabilities.[64] As one state court administrator commented, "the best states for sharing data are the ones that adjudicate guardianship/conservatorship cases statewide, and not in local courts. It is more difficult to locate information from individual counties than a single statewide source." Based on the information received by the study team regarding their existing data systems, Minnesota and Maryland appear to be two states well positioned to be pilots for this effort. Each of those states would offer a useful test for a data exchange with SSA and would offer important insights into the costs and benefits of improved

[61] The term bi-directional data exchange refers to an exchange where participants are both providing and drawing data from the exchange.

[62] GOV'T ACCOUNTABILITY OFFICE, GAO-19-58, CLOUD COMPUTING, *supra* note 56.

[63] NAT'L CTR. FOR STATE CTS., NATIONAL OPEN COURT DATA STANDARDS, https://www.ncsc.org/nods (last visited June 1, 2020).

[64] The study team acknowledges that a pilot data exchange would be conditional on the legal authority to disclose and consideration of other limitations discussed herein, and on there being sufficient state courts that collect the necessary data in a technologically-sufficient manner to participate in such a pilot.

information sharing. If SSA and state courts determine that the trial effort is successful, other court systems could also accrue these benefits through web-based direct data exchanges.

B. Challenge: Budgetary Constraints

Budget or resource allocation constraints both within SSA and among the states may present a significant barrier to implementing additional data sharing arrangements. As noted above, if data exchanges continue through the use of expensive and cumbersome legacy system-based data exchanges, the cost of developing compatible databases with the thousands of different court systems throughout the U.S. would be both technologically infeasible and cost prohibitive. Further, as the SSA OIG recently observed, SSA's use of outdated IT systems is not sustainable as the agency is forced to use much of its IT budget to operate and maintain these systems.[65] Accordingly, SSA is actively working to migrate away from the use of legacy systems, consistent with the OMB directive to move to cloud computing for applications whenever feasible.

The study team queried SSA regarding the costs of developing a web-based platform for data exchanges, understanding that the initial development of a web-based data exchange system is often where the largest investment is required, and that the addition of other databases and users is less resource intensive. The team also requested information on what the costs of adding each incremental data exchange would be once the basic framework for such exchanges was established. SSA officials explained it was very difficult to provide these figures and stated they were unable to provide the study team with the cost information requested.

In a June 2019 interview, staff from ODEPPIN explained that their ultimate goal was to migrate all data exchanges to the DEP concept. There would be a standard set of data variables that would be accessed as needed by each entity engaged in a data exchange with SSA. Once this initial data set is structured, there would likely be some changes as different entities request different data elements that may not be part of the initial standard data set. However, SSA ODEPPIN staff indicated that the basic information articulated by both state court staff and SSA field office staff as their priority would be part of the initial standard data set provided through the DEP concept. Once the DEP concept is fully developed, the cost to SSA of beginning a new exchange with states may be minimal.

SSA ODEPPIN staff indicated they anticipate significant resource savings on their part by migrating data exchanges to the DEP concept. Staff also stated that SSA currently must manually process any new data exchanges and has 23 different administrative applications to manage their thousands of data exchanges. The resource requirements to develop and maintain web-based data exchanges would be significantly less.

Additionally, the DEP would eliminate the need for each exchange partner to build its own data management system to communicate with SSA. This means that the burden on states would be dramatically reduced. As noted by SSA headquarters staff, one of the goals of the DEP

[65] *See* SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, STATEMENT ON SSA'S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES (2018), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-18-50307.pdf (last visited June 1, 2020).

is to ensure that resource constraints are not a barrier to information sharing.

As stated above, SSA headquarters officials stated that there is no funding for the DEP at this time. Nonetheless, the DEP concept appears promising if is fully developed by SSA in the future.

Additional State Court Budgetary Constraints

Although funding for data-sharing activities may be included as part of a federal program, it typically does not cover the costs associated with building the state court information systems side of the exchange. A case in point is the data sharing activities among child welfare agencies and state courts. The HHS Administration for Children and Families (ACF) and NCSC partnered to improve the timely sharing of data between child welfare agencies and state courts. HHS oversees the data exchange and participants include federal, state, local and tribal entities. Although ACF provides technical guidance to courts and state welfare agencies to create the bi-directional data exchange and funds a portion of the costs, federal funding does not cover the building or enhancing of data management systems at the tribal, state, or local level.[66] Absent sufficient additional funding, state courts would need to divert funds earmarked for other IT related services and may not be able to participate in a timely manner. For example, the absence of funding is one factor for the slow pace at which states have begun sharing data with SSA regarding minor beneficiaries who enter or exit foster care, as required by Section 103 of the SPSSBA.

Constrained state budgets and the complexity of sharing data through the uploading/downloading methodology have slowed implementation. Interviews with SSA officials and state court associations confirmed that to date only a few states have actually complied with SPSSBA's mandate, and ten others were in the queue to do so. At the time of this report, it is not clear how or when the rest of the states will comply.

A web-based platform for this data exchange would likely allow more states to comply with the congressional mandate for foster care data exchanges. However, SSA is currently relying on its existing legacy-based systems for the data exchange.

The resources afforded state court systems vary widely from state to state, and their priorities for their funding may also differ significantly. Without the use of web-based data exchanges, it is likely that very few states or courts would have the resources necessary to engage in a data exchange with SSA centered on representative payees or guardians. Use of the web-based technology would largely address the budgetary issue, since states would no longer have to invest in the expensive construction and maintenance of legacy databases. Even smaller court systems, in states with non-unified databases, would be able to access and input data via the web-based exchange.

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[66] *See* DEP'T OF HEALTH & HUMAN SERV., DATA SHARING: COURTS AND CHILD WELFARE, https://www.acf.hhs.gov/sites/default/files/cb/data_sharing_toolkit.pdf (last visited June 1, 2020); *see also* NAT'L INFO. EXCH. MODEL, HELPING CHILDREN AT RISK, https://www.niem.gov/sites/default/files/NIEM_helping_children.pdf (last visited June 1, 2020).

Potential Solutions:

The solutions identified below assume the use of a robust, web-based data exchange platform that is developed by SSA with access to agreed-upon data elements provided to state courts. However, as explained above, the study team was unable to ascertain a projected budget for the development of such a platform by SSA and was informed there is no funding for the DEP at this time.

- Continue development of the DEP concept and migrate SSA data exchanges to the DEP concept. As noted by SSA staff in interviews, once the DEP concept is built, the costs to either SSA, or partner entities, of providing access to the minimum data requested by state court representatives may be minimal.

  At the time of the study team's June 2019 interview, SSA staff noted that moving away from legacy-based data exchanges would free up significant staff and operating resources, while providing greater accuracy and timeliness in data exchanges. SSA staff also indicated that the intention was to reach "full functionality" of the DEP concept by 2021, though they expected to continue to build on DAP after that date.

  While not fully developed, the DEP concept could lessen costs for both SSA and a state court entity with which it is exchanging information as they would not have to construct new data platforms for loading and downloading data. Training and transition costs would also be lower for both parties as the technology is simpler and more intuitive. For example, SSA field office staff reported there had been no significant training for other web-based exchanges such as the financial information data exchange, but they still found it easy to operate and useful.

- Given the possible funding constraints for both SSA and state courts, Congress should consider appropriating funds for the completion and implementation of SSA's DEP concept. At the same time, a grant program to assist states in developing the ability to access and utilize the web-based data exchange would help to address budgetary barriers for state court systems.

- To better focus the data exchange efforts, and reduce the costs and risks, those data elements identified by both SSA and state court interviewees should be exchanged during the initial phases of implementation. As noted above, the following data elements were identified as the most relevant to the work of both SSA field offices and state courts: beneficiary/ward personal information such as SSN and date of birth; SSN, date of birth, and contact information for representative payee; and notification regarding an individual's termination as a representative payee or guardian/conservator.

C. Challenge: Mandatory Data Exchange Administrative Process

The current process for SSA approval of a data exchange requires that each state or court system enter into a data exchange agreement with SSA. This is necessary in order to ensure that those entities with which SSA shares data will protect the security and privacy of that data, and conversely that SSA protects the security and privacy of the data it receives. Individual states may have disparate privacy and data sharing guidelines, including different definitions of

confidentiality, statutory protections, and levels of authorization to access databases. Additionally, as described above, each state court or entity may have different terminology for data points used by SSA. Interviews with SSA staff confirmed that the approval process can take 12-18 months, and state court entities would have to have sophisticated and well-defined IT functions.

Potential Solutions:

- Pilot with state courts that possess a unified court data system and are best able to navigate the SSA process for data exchanges. Although a separate data exchange agreement may be necessary for each system, the process and complexity of the process could be streamlined with standardized data exchange agreements. In interviews with SSA staff, they indicated that templates for the data exchange agreements are available and that one could be developed for the use of data exchanges with state courts.
- Follow up with OMB to pursue the improvements recommended by the Data Exchange Community of Practice, a multi-agency data exchange group. These recommended improvements were referenced in an interview with SSA staff.

D. Challenge: Communication Barriers Between SSA and State Court Representatives

In addition to the more specific data challenges above, the study team notes a critical challenge related to communication practices between SSA and state court representatives. Despite the potential synergy in data sharing, interviewees confirmed there is no institutionalized form of communication between SSA offices and the state courts. To the extent there is any communication between those entities, it is episodic, based on personal contacts, and severely constrained by SSA's interpretation of the Privacy Act's applicability to such data sharing. The lack of institutionalized communication for policy development between the two levels of government at the regional level means that policies and practices that are intended to serve similar vulnerable populations—those in need of guardians/conservators and/or payees—may be disjointed and even contradictory.

For example, when SSA changed its priority order for assigning payees, the change was not generally communicated to state courts that may be assigning that same person a conservator and/or guardian. And as many state courts move to a "supported decision-making" model[67] for those with disabilities, rather than simply assigning them a guardian/conservator, it would be beneficial if such a policy were coordinated with SSA as it determines a payee. While the individual may still be assigned a guardian/conservator, the role of that guardian may be diminished as the independence of the beneficiary improves.

[67] A supported decision-making model works to create greater independence for those who may have been determined to be unable to manage their own financial or other affairs. It provides the individual with support in learning the life skills necessary to function more independently, make decisions, and reduce his or her dependence on his or her guardian/conservator.

SSA lacks an institutionalized form of communication between its regional offices and the state courts

In some locations, field office staff developed contacts with individuals within the state courts and developed approaches to supplement the evidence already received through verbal verification. However, the majority of information sharing between SSA and the courts remains heavily dependent on documentation provided by the representative payee/guardian/conservator. The use of some paper documentation, such as guardianship/conservatorship certifications, marriage certificates, and travel documentation, can be difficult and costly for beneficiaries or their guardian to access. Further, as SSA field office staff stated, relationships based on individual contacts are difficult to maintain due to changes in personnel in either SSA offices or the state courts.

There is no formal mechanism for regular two-way communication between state courts and SSA regarding policy or other issues—at both the field office and regional office levels. Although there are some states that have an active WINGS chapter, whose mission it is to enhance communication for the benefit of those with Social Security representative payees or guardians, participation by SSA is episodic and limited. Furthermore, since the participation in WINGS is an added responsibility for often over-burdened staff in both SSA and the state courts, offices may simply not have the resources to activate and maintain a WINGS chapter.

State courts face organizational communication barriers

Other factors that contribute to the lack of communication include state officials who may not see the benefit to, or may be unable to commit the resources to, ensure institutionalized communication with SSA. There are also states with particularly fragmented court systems that may be less able to ensure standardization within their states.

Despite these challenges, a recommendation from state court judges and staff from a 2014 NCSC survey "suggested that SSA local or regional offices designate staff to act as a liaison to state courts,"[68] indicating the interest of state courts to share data with SSA. It was also noted that WINGS has helped improve collaboration between state courts and SSA. WINGS chapters exist in 17 states, and SSA participates through a regional SSA WINGS representative for each of the participating states.

During the March 22, 2017, congressional hearing related to the SSA representative payee program, there was considerable discussion regarding the anticipated increase in the senior citizen demographic and the marked projected increase in the number of SSA beneficiaries who will require representative payees. Members of Congress probed SSA administrators regarding the resources needed to more appropriately monitor and provide oversight to payees. SSA made clear they do not have the resources to keep up with the increasing number of representative

[68] *Joint Hearing on Social Security's Representative Payee Program:* Hearing Before the Subcomm. on Oversight and the Subcomm. on Social Security of the H. Comm. on Ways & Means, 115th Cong. 42 (2017) (statement of Brenda K. Uekert, Principal Court Research Consultant, NCSC).

payees.[69]

Potential Solutions:

- Develop an institutionalized, two-way mechanism for SSA and representatives of state courts to work together. The most meaningful collaboration would likely be between SSA regional offices and state court administrators. Although WINGS chapters provide a communication vehicle, not all areas have active WINGS chapters and SSA participation is not institutionalized where WINGS chapters do exist. Participation from SSA appears to be dependent on the interest and available time of the staff. Similarly, state court representatives should be incentivized to develop relationships with SSA staff and enhance communication.
- Reinstitute regular meetings between SSA policy staff and state court officials with sufficient federal and state resources to ensure meaningful communication and collaboration. In interviews with SSA staff, the study team learned that SSA previously convened a regular, institutionalized meeting between SSA policy staff and state court officials. However, that practice was discontinued by SSA in 2017. SSA staff indicated they were in internal discussions as to whether to resurrect this group.

[69] *Id.* at 12–17 (statement of Marianna LaCanfora, Acting Deputy Commissioner for Retirement and Disability Policy, SSA).

Administrative Conference of the United States

PART 2: LEGAL BARRIERS TO INFORMATION SHARING

The legal barriers to information sharing for SSA and state courts are distinct from each other. As a result, this part of the report is divided into two main sections. The first section addresses those barriers faced by SSA in sharing information with state courts. The second section addresses those barriers faced by state courts in sharing information with SSA. Included within each of these sections is a comprehensive analysis of the existing legal barriers, as well as steps SSA and state courts may consider taking to mitigate them.

I. Legal Barriers to Information Sharing by SSA

To identify the legal barriers facing SSA, the study team (1) requested and received a list of federal laws from SSA that it believed may pose a barrier to information sharing, (2) surveyed the applicability of other privacy-related federal statutes and regulations, and (3) compared SSA's existing information sharing regimes with those of other federal agencies. From that process, the study team has concluded that information sharing must be in accordance with the Privacy Act of 1974, as amended by the Computer Matching and Privacy Protection Act of 1988 (CMPPA),[70] and appropriations law and Section 1106 of the Social Security Act.[71] Although each of those laws potentially makes it harder for SSA to share representative payee and beneficiary information with state courts, the study team does not believe any of them necessarily poses an insuperable obstacle to SSA's doing so.

The Privacy Act substantially restricts the collection, maintenance, use, and dissemination of personal information by executive branch agencies. Notwithstanding the Act's restrictions, its "routine use exception" *may* permit SSA to disclose certain types of representative payee and incapable beneficiary information to state courts for limited purposes. Though the precise contours of the exception are murky, such that disclosing information could create a litigation risk, the study team concludes that case law, relevant guidance, and DOJ OLC opinions show there is at least a reasonable argument that the exception covers information sharing by SSA, at least under carefully tailored circumstances. The study team recommends that, before engaging in any information sharing with state courts, SSA solicit an opinion from DOJ's OLC to confirm the study team's reading of the routine use exception.

Even if SSA ultimately determines that it cannot or simply does not want to rely on the routine use exception as authority for sharing representative payee and beneficiary information with state courts, other options are available to it if SSA believes such data sharing would be beneficial to the agency. For instance, SSA could share the information by establishing procedures to obtain advance written consent from beneficiaries and representative payees. Or SSA could ask Congress to amend the Social Security Act to expressly authorize SSA to share information with state courts without the consent of SSA beneficiaries and representative payees. Moreover, the study team concludes that SSA is likely already permitted to share information about organizational representative payees with state courts under certain circumstances because the Privacy Act only protects individuals.

Assuming SSA could share information with state courts without violating the Privacy Act, the study team also concludes that Section 1106 of the Social Security Act, which limits the

[70] 5 U.S.C. § 552a.

[71] 42 U.S.C. § 1306.

circumstances under which SSA may disclose information in its possession, does not foreclose information sharing with state courts. If SSA decides that the information it obtains from state courts in return for its own information sufficiently advances its statutorily authorized functions, SSA could use appropriated funds to establish and operate the contemplated information-sharing regime. Otherwise, SSA could invoke Section 1106(b) to establish the information-sharing regime with state courts and may charge them for the information. Either way, so long as SSA has regulations authorizing the disclosure, Section 1106 should not stand as a barrier to information sharing.

Finally, whether disclosing representative payee and beneficiary information implicates the CMPPA is largely a function of how any information exchange is structured. As with the Privacy Act and Section 1106 of the Social Security Act, SSA and state courts can work together to carefully tailor any information exchange so that it complies with the law's requirements—which, in the case of the CMPPA, are largely administrative.

A survey of other information sharing regimes suggests that it is at least feasible for SSA to share information with state courts. The remainder of this section explains why federal law does not conclusively forbid such an arrangement.

A. The Privacy Act of 1974

SSA has indicated that it views the Privacy Act as the principal legal barrier to information sharing with state courts.[72] The Privacy Act is an "omnibus 'code of fair information practices'" that "regulate[s] the collection, maintenance, use, and dissemination of personal information by federal executive branch agencies."[73] The Privacy Act generally prohibits non-consensual disclosures[74] by federal executive branch agencies[75] of PII unless, as explained below, one of the Privacy Act's specific exceptions applies.[76] Agencies that disclose information in violation of the Privacy Act are subject to civil damages (as well as attorney's fees) in private rights of action brought in federal district court, and their officials may be subject to criminal penalties.[77] In a private civil suit, the plaintiff is entitled to compensation for actual damages suffered (or at least $1,000) and attorney's fees upon proving that the agency disclosed the information "intentional[ly] or willful[ly]"[78]—terms of art requiring a plaintiff to prove the

[72] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 25.

[73] U.S. DEP'T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974 1 (2015 ed.).

[74] 5 U.S.C. § 552a(b) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with prior written consent of, the individual to whom the record pertains ….). "'[S]ystem of records' means any group of records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to that individual." *Id.* § 552a(a)(5).

[75] 5 U.S.C. § 552a(a)(1) (defining "agency" as only executive branch agencies).

[76] *Id.* § 552a(a)(5).

[77] *See id.* § 552a(g).

[78] *Id.* § 552a(g)(4).

agency acted "reckless[ly]"[79] or "without grounds for believing [its actions are] lawful."[80] For criminal liability, the agency official making the disclosure must have known the disclosure violated the Privacy Act.[81]

The study team agrees with SSA that the Privacy Act prohibits SSA from disclosing representative payee and incapable beneficiary information unless such disclosures fall within one of the 12 statutory exceptions that each authorize the release of certain records.[82] Based on the study team's review of these exceptions, only one—the "routine use" exception—might apply in the context of information sharing with state courts.[83]

In response to previous calls for it to begin sharing information with state courts,[84] SSA has stated that the Privacy Act prohibits it from disclosing representative payee or incapable beneficiary information and that it does not believe the routine use exception applies.[85] For example, in a July 2011 report, GAO called on SSA to "determine how, under applicable laws and consistent with SSA's existing legal authority, the agency might be permitted to disclose information about incapable beneficiaries and their fiduciaries to state courts." In response, SSA explained that the Privacy Act barred it from doing so:

> We previously evaluated applicable laws to determine if we may disclose this information to States. We assert, as we did in response to your 2004 report, "Guardianships—Collaborations Needed to Protect Incapacitated Elderly

[79] Andrews v. Veterans Admin. of United States, 838 F.2d 418, 425 (10th Cir. 1988).

[80] Laningham v. United States Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987). *See also* Covert v. Harrington, 876 F.2d 751, 757 (9th Cir. 1989) (holding that an "agency acts in violation of the [Privacy] Act in a willful or intentional manner, either by committing the act without grounds for believing it to be lawful, or flagrantly disregarding others' rights under the [Privacy] Act"); Moskiewicz v. United States Dep't of Agric., 791 F.2d 561, 564 (7th Cir. 1986) (holding that "intentional or willful" requires "evidence of conduct which would meet a greater than gross negligence standard, focusing on evidence of reckless behavior and/or knowing violations of the [Privacy] Act on the part of the accused");Chapman v. NASA, 736 F.2d 238, 243 (5th Cir. 1984) (requiring a showing of "unlawful intent or ulterior motive" to establish an intentional or willful violation); Wisdom v. Dept. of Hous. & Urban Dev., 713 F.2d 422, 425 (8th Cir. 1983) (interpreting "willful" to mean "so patently egregious and unlawful that anyone" should have known that he or she was violating the Privacy Act).

[81] 5 U.S.C. § 552a(i)(1).

[82] The twelve exceptions are: (1) the intragency "need to know" exception, 5 U.S.C. § 552a(b)(1); (2) required FOIA disclosures, 5 U.S.C § 552a(b)(2); (3) the routine use exception, *id.* § 552a(b)(3); (4) Bureau of Census disclosures, *id.* § 552a(b)(4); (5) the statistical research exception, *id.* § 552(b)(5); (6) the National Archives exception, *id.* § 552a(b)(6); (7) law enforcement request disclosures, *id.* § 552a(b)(7); (8) disclosures for the health or safety of an individual, *id.* § 552a(b)(8); (9) disclosures to the U.S. Congress, *id.* § 552a(b)(9); (10) disclosures to the Comptroller General of the U.S. GAO, *id.* § 552a(b)(10); (11) court ordered disclosures, *id.* § 552a(b)(11); (12) Debt Collection Act disclosures, *id.* § 552a(b)(12).

[83] *Id.* § 552a(b)(3).

[84] GOV'T ACCOUNTABILITY OFFICE, GAO-13-473, ADDRESSING LONG-TERM CHALLENGES, *supra* note 12, at 16; GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 17; GOV'T ACCOUNTABILITY OFFICE, GAO-06-1086T, GUARDIANSHIPS, *supra* note 13, at 5; GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS, *supra* note 13, at 32–33.

[85] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 17.

People" (GAO-04-655), that privacy implications prevent us from doing so.

> We may only disclose information to State courts or other Federal agencies in accordance with the Privacy Act, section 1106 of the Social Security Act, and regulations at 20 C.F.R. Part 401. The Privacy Act governs how Federal agencies collect, use, maintain, and disclose personal information, and it forbids disclosure of personal information about a living person without the written consent of the individual or someone who can consent on the individual's behalf. Without consent, the only relevant Privacy Act exception is the routine use exception 5 U.S.C. § 552a(b)(3).
>
> To create a routine use, we must determine if the requested disclosure is compatible with the purpose for which we collect the information. In this case, it does not appear the proposed disclosure is compatible. We collect information about representative payees solely to evaluate whether they are fit to manage Social Security benefits. State-appointed legal guardians, on the other hand, may have broader legal authority to care for personal property and other interests. There is no clear indication of how any SSA disclosure of beneficiary information or representative payee information to a State court is compatible with SSA's collection of the information to assist beneficiaries in managing their benefits or payments.[86]

SSA has reiterated its position recently, consistently maintaining that it may not disclose personal identifying information to state courts without violating the Privacy Act. For example, at a March 2017 hearing before the House Ways and Means Committee's Subcommittees on Social Security and Oversight, SSA officials reaffirmed the agency's position and again explained they believe SSA is prohibited by the Privacy Act from sharing any representative payee or incapable beneficiary information with state entities.[87] In November 2019, SSA headquarters officials confirmed with the study team that the agency's position regarding the Privacy Act and its routine use exception had not changed. SSA headquarters staff explained that the agency does not believe disclosure of its records to state courts for the purposes of better administering the Representative Payee Program and facilitating States' guardian-conservator programs meets the compatibility requirements in the Privacy Act.

[86] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 17.

[87] *Hearing on Social Security Representative Payee Program Before the Subcomms. on Social Security and Oversight of the H. Comm. on Ways and Means*, 115th Cong. 108 (Mar. 22, 2017) (testimony of Marianna LaCanfora, Acting Deputy Comm'r, Office of Ret. and Disability Policy, Soc. Sec. Admin.).

1. The Routine Use Exception

The routine use exception permits an agency to disclose a record "for a routine use." The Privacy Act defines a "routine use" as "the use of [a] record for a purpose which is compatible with the purpose for which it was collected."[88] In addition to compatibility of the underlying purposes, the Privacy Act requires that, before disclosure, agencies first publish a notice in the *Federal Register* identifying "each routine use of the records contained in the [corresponding] system, including the categories of users and the purpose of such use."[89] In sum, "[t]o fit within the confines of the routine use exception to the Privacy Act, an agency's disclosure of a record must be both (i) 'for a purpose which is compatible with the purpose for which it was collected' and (ii) within the scope of a routine use notice published by the agency."[90]

There does not appear to be a barrier to SSA's satisfying the routine use exception's notice requirement. SSA has previously issued Systems of Records Notices (SORNs) detailing when it will release certain information under the Privacy Act,[91] including many routine uses for disclosure of representative payee information.[92] It may modify its SORNs or provide for additional SORNs in the *Federal Register* at any time.

The main question, therefore, is whether SSA's disclosure of representative payee and incapable beneficiary information to state courts would be "for a purpose which is compatible with the purpose for which it was collected."[93] To answer that question, the study team first consulted the Privacy Act's text and legislative history. But the Privacy Act does not define "compatible" or provide examples of disclosures that might qualify as "compatible." The legislative history likewise sheds little light on the issue.[94]

Because the text and history of the Privacy Act are of scant help in determining the meaning of "compatible," the study team focused on three other sources: court decisions, OMB

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[88] 5 U.S.C. § 552a(b)(3).

[89] *Id.* § 552a(e)(4).

[90] Ames v. United States Dep't of Homeland Sec., 861 F.3d 238, 240 (D.C. Cir. 2017); *see also* 5 U.S.C. § 552a(a)(7) (defining "routine use as "the use of [a] record for a purpose which is compatible with the purpose for which it was collected.").

[91] A system of records is a "group of any records under the control of any agency from which information is retrieved by name of the individual or by some identifying number, symbol, or other identifier assigned to the individual, such as a finger or voice print or a photograph." 5 U.S.C. § 552a(a)(5). The Privacy Act requires each agency to publish notice for each of its systems of records in the *Federal Register*. *Id.* § 552a(e)(4). These notices are called "System of Records Notices" or "SORNs." Included in these SORNs are the routine use notices required by the Privacy Act before an agency's disclosure of information under the routine use exception. *See id.* § 552a(e)(4)(D).

[92] *See, e.g.*, 83 Fed. Reg. 31,250, 31,251 (July 3, 2018); 83 Fed. Reg. 55,228 (Nov. 2, 2018).

[93] 5 U.S.C. § 552a(a)(7).

[94] *See* Disclosure of Parolees' Names to Local Police, 6 Op. O.L.C. 227, 229 (1982) ("The legislative history of the Privacy Act ... do[es] not provide much guidance as to the outer limits of the 'routine use' exception.").

guidance, and opinions issued by DOJ's OLC.[95] The three are not of equal significance. Court decisions set out binding legal standards to which SSA's actions are subject.[96] Decisions by federal courts of appeals constitute the law in the circuits in which they are issued and are often treated as highly persuasive authority in other circuits throughout the country. OMB guidance and OLC opinions, by contrast, are only persuasive authority.[97] They do not constitute the law, and a court would not be required to abide by them. At the same time, they may help flesh out the meaning of the Privacy Act in ways courts will ultimately find persuasive.

Although court decisions, OMB guidance, and DOJ OLC opinions concerning the Privacy Act are all due different weight, they all tend to show more or less the same things: that "compatible" does not mean "identical"; that compatibility is often, though not always, framed at a comparatively high level of generality; and that compatibility requires not just that information sharing be helpful, but that there be some level of congruence between the purpose for which the

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[95] SSA has issued a regulation implementing the routine use exception. *See* 20 C.F.R. § 401.150. It expressly contemplates that SSA "may disclose information for the administration of other governmental programs." *Id.* § 401.150(c)(2). Such disclosures, the regulation continues, generally meet three conditions: (1) "The program is clearly identifiable as a Federal, State, or local government program"; (2) "The information requested concerns eligibility, benefit amounts, or other matters of benefit status in a Social Security program and is relevant to determining the same matters in the other program"; and (3) "The information will be used for appropriate epidemiological or similar research purposes." *Id.* The regulation itself identifies a broad range of permissible disclosures, including "to the Railroad Retirement Board for pension and unemployment compensation programs, to the Department of Veterans Affairs for its benefit programs, to worker's compensation programs, to State general assistance programs and to other income maintenance programs at all levels of government." *Id.* § 401.150(c)(2)(ii).

That SSA has, in its own regulations, interpreted the routine use exception to permit such an array of disclosures might be taken to show that the exception has a broad scope. And sharing representative payee and incapable beneficiary information with state courts would seem to fit within the regulation's plain language, both because the information would be shared with a "State … government program," and because the information being shared concerns "other matters of benefit status in a Social Security program and is relevant to determining the same matters in the [state] program." *Id.* § 401.150(c)(1)–(2). Ultimately, however, the principal authority for determining whether SSA can disclose information under the Privacy Act is the act itself, not an SSA regulation. Indeed, because Congress has not vested SSA with authority to issue binding rules interpreting the Privacy Act, it is unlikely courts would defer to SSA's regulation. Presumably for those reasons, SSA has repeatedly asserted that it is the Privacy Act, not SSA's regulations, that bars disclosure of information to state courts. Furthermore, to the extent SSA's regulations are understood as a barrier to disclosing information to state courts, SSA can solve the problem by amending its regulations.

[96] The extent to which a court decision is binding depends on the court that decided it. Congress has divided the United States into 94 federal judicial districts. Each district is home to a federal district court. Federal district courts are responsible for resolving disputes, determining the facts, and applying legal principles to decide which party to a legal action should prevail. Congress has placed each of the 94 districts in one of 12 regional circuits. Each circuit is home to a court of appeals. The courts of appeals, also known as circuit courts, are tasked with reviewing contested district court decisions to determine whether the law was correctly applied. The rules and decisions announced by a court of appeals are binding on all federal judges and litigants within that court's circuit, whereas district court decisions bind only the parties to the case being decided.

[97] *See* Casa de Md. v. U.S. Dep't of Homeland Sec., 924 F.3d 684, 692 n.1 (4th Cir. 2019) ("Although not binding on courts, OLC opinions reflect the legal position of the executive branch and are generally viewed as providing binding interpretive guidance for executive agencies.") (internal quotation marks and brackets omitted); Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (clarifying that guidance may set forth an agency's "policy on … or interpretation of a statutory or regulatory issue," but may not "impose a legally binding requirement").

information was collected and the purpose for which it is shared.

a. Court Decisions

Litigants routinely ask federal courts to decide whether certain uses of information are "compatible with the purpose for which [the information] was collected." Although the Supreme Court of the United States has never decided such a case or otherwise weighed in on the meaning of "compatible" in the Privacy Act, scores of federal appellate and district courts have. Their decisions establish that applying the routine use exception requires comparing the use for which the information was originally collected and the use for which the information is to be shared. Their decisions also establish that, though uses need not be identical to be "compatible," there must be some concrete relationship between them. Apart from those vague and amorphous standards, however, the case law offers almost no general rules for applying the routine use exception and its compatibility requirement.[98] Instead, to the extent courts have fleshed out the routine use exception's contours, they have done so through narrow, fact-specific opinions deciding whether the exception applies in particular cases.

The most frequently cited court decision concerning the meaning of "compatibility'" is *Britt v. Naval Investigative Service*.[99] There, the United States Court of Appeals for the Third Circuit held that the Naval Investigative Service's collecting information for purposes of a criminal investigation into a Marine Corps reservist was not compatible with the Services' disclosing that information to the reservist's civilian employer for use in evaluating the reservist's integrity.[100] In so holding, the Third Circuit emphasized that nothing in the record suggested "that the [civilian employer] was conducting its own criminal investigation of the same activity or any other activity" by the reservist.[101] Instead, the Service had argued that its reason for compiling the records was "compatible" with the civilian employer's use of them because the civilian employer "might find it relevant to have information suggesting" the reservist lacked integrity.[102] But "relevance," the Third Circuit explained, "is not the standard Congress placed in" the routine use exception.[103] Rather, there must be "a concrete relationship or similarity, some meaningful degree of convergence, between the disclosing agency's purpose in gathering the information and in its disclosure."[104] Deciding whether such a relationship exists, according to the *Britt* court, "requires … a dual inquiry into the purpose for the collection

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[98] *See, e.g.*, Chichakli v. Tillerson, 882 F.3d 229 (D.C. Cir. 2018); *Ames*, 861 F.3d at 238; U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, 9 F.3d 138 (D.C. Cir. 1993); Britt v. Naval Investigative Serv., 886 F.2d 544 (3d Cir. 1989).

[99] *Britt*, 886 F.2d at 544; *see, e.g.*, *Ames*, 861 F.3d at 240 (citing *Britt*); *U.S. Postal Serv.*, 9 F.3d at 145 (same); Swenson v. U.S. Postal Serv., 890 F.2d 1075, 1078 (9th Cir. 1989) (same); Fattahi v. Bur. of Alcohol, Tobacco & Firearms, 186 F. Supp. 2d 656, 660 (E.D. Va. 2002) (same).

[100] *Id.* at 549–50.

[101] *Id.* at 549.

[102] *Id.*

[103] *Id.* at 549.

[104] *Id.*

of the record in the specific case and the purpose of the disclosure."[105]

Britt is not the only case in which a federal court held that two uses were too dissimilar to each other to be "compatible." In *Swenson v. U.S. Postal Service*, a mail carrier sent a letter to members of Congress regarding the Postal Service's alleged undercounting of rural route mailboxes.[106] The members requested information regarding the mail carrier's allegations, to which the Postal Service responded by disclosing "private facts about [the mail carrier's] employment status," including that she "filed charges of sex discrimination with the Equal Employment Opportunity Commission."[107] The Ninth Circuit Court of Appeals agreed with the mail carrier that the Postal Service had violated the Privacy Act when it shared the records, originally collected "to perform routine personnel functions," with members of Congress to "addres[s] the congressmen's concerns with the alleged undercounting of rural mail routes."[108] As in *Britt*, then, the court's decision hinged on what it viewed as the fundamentally different purposes of the two uses at issue.

A number of other circuit and district court cases have applied the framework articulated in the *Britt* decision but have concluded that a challenged use was "compatible" within the meaning of the routine use exception.[109] For instance, in *Ames v. United States Department of Homeland Security*, the United States Court of Appeals for the D.C. Circuit applied the approach from *Britt* but held that the routine use exception permitted a federal agency to share information about a former employee's misconduct with the federal agency that had subsequently hired the former employee.[110] In reaching this result, the court analyzed the "compatibility" of purposes and found that the information collected by the federal agency was collected to determine the individual's "suitability" for federal employment and that the purpose of the disclosure was so that it could be used for the same "suitability" purpose at the individual's new agency.[111] The panel acknowledged that the D.C. Circuit had "not definitively determined the precise meaning" of "compatibility" and again declined to make such a determination, finding that, under any "reasonable formulation of the compatibility test," including the test put forth by the Third Circuit in *Britt*, the purposes were compatible.[112]

Other decisions confirm that the approach from *Britt* does not foreclose sharing information for seemingly divergent uses. In *Melvin v. SSA*, for example, the plaintiff alleged that SSA violated the Privacy Act when it provided a written doctor's evaluation to the Department of Veterans Affairs (VA).[113] SSA had obtained the evaluation to assess plaintiff's

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[105] *Id.* at 548–49.

[106] *See* 890 F.2d at 1076.

[107] *Id.*

[108] *Id.* at 1078.

[109] *See, e.g.,* Melvin v. Soc. Sec. Admin., 126 F. Supp. 3d 584, 605–06 (E.D.N.C. 2015); Radack v. U.S. Dep't of Justice, 402 F. Supp. 2d 99, 106 (D.D.C. 2005); Fattahi, 186 F. Supp. 2d at 660.

[110] *Ames*, 861 F.3d at 241.

[111] *Id.* at 240.

[112] *Id.* at 240 n.1.

[113] 126 F. Supp. 3d 584 (E.D.N.C. 2015), *aff'd,* 686 Fed. Appx. 230 (4th Cir. 2017).

claim for disability benefits, and VA used the record to assess plaintiff's claim for service-connected Post-traumatic Stress Disorder (PTSD). In analyzing the compatibility of the two agencies' uses of the record, the court wrote:

> it cannot be seriously disputed that there is compatibility between the SSA's procurement of a consultative examination to assess Plaintiff's claim for disability benefits on the basis of, *inter alia*, 'service-connected [PTSD],' and its disclosure to the VA for the purposes of determining Plaintiff's entitlement to a service-connected claim for PTSD.[114]

The district court in *Doe v. United States DOJ* employed a similarly flexible approach in construing "compatible," albeit without directly citing *Britt*.[115] In *Doe*, the plaintiff alleged that his employer, DOJ, "violated the Privacy Act by improperly disclosing plaintiff's private medical information [demonstrating his disability] to various persons inside and outside of the agency," including his state's unemployment commission when his employment was terminated.[116] The court identified that the purpose for DOJ's collection of the record was to allow DOJ to determine how to provide disability accommodations (*i.e.*, to "'clearly explain the nature of the disability or the need for the reasonable accommodation'").[117] It identified a distinct purpose for disclosing the record, which was to show that the plaintiff "had been fired for 'just cause.'"[118] Notwithstanding the differing purposes, the court held that the two uses were compatible under the Privacy Act because the "plaintiff's records were both collected and disclosed in order to determine the rights and benefits to which he was entitled under 'pertinent' laws."[119]

Cases like *Britt*, *Swenson*, *Ames*, *Melvin*, and *Doe* reveal that no general definition or test exists to determine whether two uses are "compatible" under the routine use exception.[120] About the most that can be said is that two uses can be compatible even if they are not identical, so long as there is some concrete relationship between them, and that, the more conceptually similar the uses, the more likely courts are to deem them compatible.[121] Thus, for example, the court in *Britt* found no compatibility because the two uses at issue there—one for law enforcement, the other for employment—were conceptually very different, whereas the court in *Ames* found compatibility where the two uses at issue both pertained to employment.

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[114] *Id.* at 605–06.

[115] Doe v. United States DOJ, 660 F. Supp. 2d 31 (D.D.C. 2009).

[116] *Id*. at 45.

[117] *Id.* at 48.

[118] *Id.*

[119] *Id.*

[120] U. S. DEP'T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, *supra* note 73, at 87 (explaining that the "precise meaning of the term 'compatible'" remains "quite uncertain and must be assessed on a case-by-case basis").

[121] *Cf.* Disclosure of Parolees' Names to Local Police, 6 Op. O.L.C. 227, 229 (1982) (denying that "compatible" is synonymous with "identical").

Unfortunately, those vague and general standards are of limited predictive value. Neither provides a clear rule for ascertaining whether the nexus between two uses is close enough for the uses to be compatible. And neither provides guidance about the level of generality at which a given "use" should be defined for purposes of the routine use exception. Because of the uncertainty inherent in the courts' seemingly ad hoc and fact-intensive approaches to cases concerning the routine use exception, there is almost inevitably some litigation risk when agencies share information under the routine use exception.

b. OMB Guidance

Guidance issued by OMB is another source of information about the routine use exception's contours. The Privacy Act tasks OMB with developing "guidelines and regulations for the use of agencies in implementing the [Privacy Act's] provisions."[122] OMB complied with that mandate in 1975 when it issued its Privacy Act Guidelines and Circular A-108.[123] In the course of clarifying agencies' obligations under the Privacy Act, the Guidelines and Circular A-108 further illuminate the meaning of "compatibility" and the proper application of the routine use exception.

The Guidelines state that "the term 'routine use' was introduced to recognize the practical limitations of restricting use of information to explicit and expressed purposes for which it was collected" and to acknowledge "that there are corollary purposes 'compatible with the purpose for which the information was collected' that are appropriate and necessary for the efficient conduct of government and in the best interest of both the individual and the public."[124] Circular A-108 makes a similar point, explaining that a "routine use [disclosure] may be appropriate when the use of the record is necessary for the efficient conduct of government, and when the use is both *related to* and *compatible with* the original purpose for which the information was collected."[125] Circular A-108 further explains that "[c]ompatibility comprises both functionally equivalent uses of the information as well as other uses of the information that are necessary and proper."[126] It also instructs agencies to "narrowly tailor" routine uses to address a "specific and appropriate use of the records."[127]

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[122] 5 U.S.C. § 552a(v).

[123] Privacy Act Implementation: Guidelines and Responsibilities, 40 Fed. Reg. 28,953 (July 9, 1975), *revised by* 40 Fed. Reg. 56,741 (Nov. 21, 1975). OMB rescinded Circular A-108 in 1985, incorporating its substance into an appendix in the newly issued Circular A-130. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-130, MANAGEMENT OF FEDERAL INFORMATION RESOURCES (1985). Then, in 2016, after public notice and comment, OMB reissued Circular A-108 to provide further guidance on agencies' responsibilities under the Privacy Act. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016).

[124] 40 Fed. Reg. 28,953 (July 9, 1975).

[125] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016) (emphasis in original).

[126] *Id.*

[127] *Id.*

Echoing the relevant court decisions, Circular A-108 confirms that whether information may be disclosed under the routine use exception is a fact-intensive inquiry. Agencies must consider whether the purposes for collection and disclosure of the information are "functionally equivalent" or have a "concrete relationship or similarity."[128] If so, the agency can disclose the information so long as the routine use is narrowly tailored and sufficient prior notice has been published in the *Federal Register*.[129]

OMB's pronouncements on these points are due special weight because Congress expressly delegated to OMB authority to establish rules and guidelines for implementing and administering the Privacy Act.[130] Because OMB promulgated the Guidelines under that authority, courts have consistently applied *Chevron* deference to the interpretations the Guidelines set out.[131] And because OMB also promulgated Circular A-108 under its authority to establish rules and guidelines for implementing and administering the Privacy Act, it is likely courts would similarly give *Chevron* deference to the interpretations in Circular A-108,[132] although it appears no court has directly addressed that question.

Notwithstanding that courts would likely defer to the interpretations announced in OMB's Guidelines and Circular A-108, there are a few reasons those sources are of limited utility in precisely defining "compatibility" and the boundaries of the routine use exception. First, the standards they set out—typified by phrases like "appropriate and necessary,"[133] "related to and compatible with,"[134] and "necessary and proper"[135]—are too abstract to yield a particularized meaning. Second, and relatedly, because the Guidelines and Circular A-108 are framed at such a high level of abstraction and do not flesh how the routine use exception would apply to specific types of information sharing, whatever deference courts afford the Guidelines and Circular A-108 would be limited to the overarching tests they establish and would not apply to specific applications of those tests. Third, because OMB's test mirrors the one predominantly

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[128] *Britt*, 886 F.2d at 550; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016).

[129] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016).

[130] 5 U.S.C. § 552a(v).

[131] *See, e.g.*, Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1120 (D.C. Cir. 2007) (stating that OMB's Privacy Act Guidelines "are owed the deference usually accorded interpretation of a statute by the agency charged with its administration"); Whitaker v. CIA, 31 F. Supp. 3d 23, 47 (D.D.C. 2014) ("[T]he Court notes that the D.C. Circuit has previously accorded *Chevron* deference to the OMB Guidelines interpreting the Privacy Act.").

[132] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (holding that an agency may claim *Chevron* deference "when it appears [1] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [2] that the agency interpretation claiming deference was promulgated in the exercise of that authority").

[133] *See* 40 Fed. Reg. 28,953 (July 9, 1975).

[134] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016) (emphasis omitted).

[135] *Id.*

applied by the courts, it is unlikely much would change based on whether courts applied the test announced by OMB or their own test.

c. OLC Opinions

OLC opinions interpreting and applying the routine use exception are another significant source of guidance about the exception's contours and the meaning of "compatibility."[136] Although the opinions are not legally binding or dispositive of the questions they address,[137] they merit serious consideration because OLC is the arm of the executive branch responsible for providing legal advice to the President and all executive branch agencies.[138]

OLC's opinions regarding the routine use exception suggest that, although Congress "apparently did want 'to prohibit gratuitous, ad hoc, disseminations for private or otherwise irregular purposes,'"[139] it left agencies with "broad discretion" and "considerable latitude" in classifying routine uses.[140] Consistent with that view, OLC has stated that uses of information

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[136] The study team identified 15 opinions issued by DOJ's OLC since 1977 referencing the Privacy Act's routine use exception: Whether the United States Department of Labor Has the Authority to Control the Disclosure of Federal Employee Compensation Act Records Held by the United States Postal Service, __ Op. O.L.C. __, 2012 OLC LEXIS 8 (2012); Application of Record Destruction Requirements to Information Received From the National Instant Criminal Background Check System, __ Op. O.L.C. __, 2005 OLC LEXIS 7 (2005); Checking Names of Prohibited Persons Against Records in the NICS Audit Log Concerning Allowed Transfers, 25 Op. O.L.C. 215 (2001); Access to Criminal History Records by Non-Governmental Entities Performing Authorized Criminal Justice Functions, 22 Op. O.L.C. 119 (1998); Contractor Access to Information from Interstate Identification Index, 20 Op. O.L.C. 299 (1996); Brady Act Implementation Issues, 20 Op. O.L.C. 57 (1996); Immigration and Naturalization Service Participation in Computer Matching Program with Department of Education, 16 Op. O.L.C. 159 (1992); Procedures for Investigating Allegations Concerning Senior Administration Officials, 6 Op. O.L.C. 626 (1982); United States Secret Service Use of the National Crime Information Center, 6 Op. O.L.C. 313 (1982); Disclosure of Parolees' Names to Local Police, 6 Op. O.L.C. 227 (1982); United States Participation in Interpol Computerized Search File Project, 5 Op. O.L.C. 373 (1981); Disclosure of Information Collected Under the Export Administration Act, 5 Op. O.L.C. 255 (1981); Questions Concerning the Right to Financial Privacy Act, 3 Op. O.L.C. 217 (1979); FBI Disclosure to Local or State Law Enforcement Agency of Personal Information Obtained From Another Law Enforcement Agency, 3 Op. O.L.C. 12 (1979); Legality of Proposed Executive Order Requiring Public Disclosure of Employee Financial Statements, 2 Op. O.L.C. 329 (1977).

[137] Because OLC's opinions are relatively old and span several decades, it is possible that the prevailing legal standard may have changed since many of them were written. For example, the sometimes-cursory application of *Chevron* deference and the heavy reliance on legislative history in some of OLC's older opinions would presumably look different today. Yet the opinions have been relatively consistent in their approach over time, suggesting that the standard they articulate has achieved widespread acceptance.

[138] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, https://www.justice.gov/olc (last visited June 1, 2020).

[139] Disclosure of Parolees' Names to Local Police, 6 Op. O.L.C. 227, 229 (1982) (quoting 120 Cong. Rec. 36,967 (1974) (remarks of Cong. Moorehead)); *see also* Presidential Authority — Legality of Proposed Executive Order Requiring Public Disclosure of Employee Financial Statements, 2 Op. O.L.C. 329, 339 (1977) (characterizing the routine use exception as having a "rather limited scope," and explaining that the exception "was never intended by Congress to be an independent vehicle for disclosing information to the public at large").

[140] 6 Op. O.L.C. at 227; *see also* United States Participation in Interpol Computerized Search File Project, 5 Op. O.L.C. 373, 383 (1981) (routine use exception's legislative history "does not provide much guidance as to the outer limits of the 'routine use' exception").

need not be identical to be "compatible"[141] and that "the purpose for which [information] was collected" can be defined in relatively broad terms.[142]

Although the OLC opinions concern factual contexts different from the one that is the subject of this report, they still help explain the degree of relatedness that is required for two uses to be "compatible." For example, OLC has advised that data collected by the Attorney General for conducting background checks on prospective firearms purchasers may be shared with law enforcement agencies to advance their ongoing criminal investigations—even if those investigations do not relate to the sale of firearms—because both uses advance a general "law enforcement purpose."[143] Likewise, OLC has advised that transmission of information from the United States Secret Service to the National Crime Information Center, and from there to state and local law enforcement agencies, may qualify as a routine use because the information is being shared "for the same purpose for which it was originally collected—protection of protectees," even though the nature of the protection and identity of the protectees differs.[144] Opinions like these suggest that, at least as interpreted by OLC, "compatibility" should be assessed at a relatively high level of abstraction.[145]

2. Disclosure of Representative Payee and Incapable Beneficiary Information May Be Permissible Under the Routine Use Exception

SSA has taken the position that the Privacy Act generally prohibits SSA from disclosing representative payee or incapable beneficiary information to state courts. The study team finds this to be a reasonable interpretation of the Privacy Act, particularly given that the Privacy Act, its legislative history, the case law interpreting it, the applicable OMB guidance, and the potentially pertinent OLC opinions do not squarely address such an information exchange.

SSA's position is not, however, the only reasonable one possible. Indeed, there are reasonable arguments—drawing on case law, OMB guidance, and OLC opinions—that the routine use exception authorizes disclosure of representative payee and incapable beneficiary

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[141] *See* 5 Op. O.L.C. at 383 (agencies may share information about people's criminal histories "for a wide variety of law enforcement and humanitarian purposes"); *see also* United States Secret Service Use of National Crime Information Center, 6 Op. O.L.C. 313, 323 (1982) ("It is clear, for example, that the exemption may cover the dissemination of information even though it is used for a purpose different from the one for which it was collected.").

[142] *See* Brady Act Implementation Issues, 20 Op. O.L.C. 57, 60 (1996); 6 Op. O.L.C. at 324.

[143] *See* 20 Op. O.L.C. at 60.

[144] *See* 6 Op. O.L.C. at 324. Although these OLC opinions at first appear to be distinct or cabined to the specific law-enforcement context, they do not apply the Privacy Act's specific exception for law enforcement under 5 U.S.C. § 552a(b)(7). As a result, these OLC opinions addressing issues in the law-enforcement context are not as easily dismissed as distinct on that ground alone.

[145] Although an exhaustive review of each opinion is beyond the scope of this report, the following list of the purposes discussed or noted in these opinions helps to illustrate the level of generality at which OLC characterizes the relevant purpose under the routine use exception: law enforcement, law enforcement audits, background investigations, criminal justice, auditing systems, verifying eligibility for benefits, employment purposes, licensing purposes, and discovering and avoiding conflicts of interest. These categorizations suggest that, even though the inquiry depends heavily on the specific facts and uses at issue, OLC and agencies have defined such purposes in broad terms.

information, at least in some circumstances. At bottom, whether the routine use exception permits SSA to disclose representative payee or incapable beneficiary information with state courts depends on the details of that information-sharing arrangement. As noted above, SSA has not extensively studied what the details of such an arrangement might look like.[146] For purposes of analyzing the issue, therefore, the study team has responded to a hypothetical scenario involving the sharing of only a limited set of facts—specifically representative payees', guardians'/conservators', and beneficiaries' names, SSNs or EINs, dates of birth, and contact information; as well as information about representative payees and guardians who have been removed or disqualified.

Within that hypothetical scenario, the study team sees a reasonable argument for invoking the routine use exception to permit information sharing with state courts. But acting on that argument would expose SSA to litigation risk, particularly given that the case law prescribes a case- and fact-intensive inquiry and that no court has ever addressed the information-sharing arrangement contemplated here. That litigation risk is amplified by the fact that SSA could face litigation anywhere in the country, including in federal courts in circuits that have little or no case law regarding the routine use exception. And it is amplified still further by the fact that the Privacy Act establishes four separate civil causes of action, including two for money damages.[147] Thus, even if SSA were to conclude that the best reading of the routine use exception permits it to share certain information about representative payees with state courts, SSA might nevertheless justifiably decline to engage in such an exchange.

Under the circumstances, the study team recommends that SSA seek an OLC opinion before deciding whether to engage in information sharing. By delegation from the Attorney General, OLC provides "legal advice to the President and all executive branch agencies."[148] That includes providing written opinions to agencies for "concrete" legal problems when there is a "practical need" for the advice.[149] Over the last several decades, OLC has issued over a dozen opinions referencing the Privacy Act's routine use exception in some way, several of which included a compatibility analysis similar to what the study team recommends that SSA obtain.[150] Given how useful it could be for SSA and state courts to share information regarding representative payees, guardians, and conservators, as well as the indefiniteness of the underlying law, SSA could make a strong case to OLC of a "practical need" for advice.

Of course, even a favorable OLC opinion would not eliminate SSA's litigation risk when it comes to sharing information about representative payees. Agencies do not become immune to

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[146] In particular, and as noted in the Study Design's "Assumptions and Premises" § II(C), SSA headquarters staff has not extensively studied (i) specific categories of information that would be helpful to receive from state courts to administer its programs, or (ii) specific categories of information SSA would be willing to share with state courts assuming the Privacy Act is not a barrier.

[147] *See* 5 U.S.C. § 552a(g)(1).

[148] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, https://www.justice.gov/olc (last visited June 1, 2020).

[149] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR ATTORNEYS OF THE OFFICE, https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf (last visited June 1, 2020).

[150] *See supra* note 136 (listing the 15 opinions issued since 1977).

lawsuits by virtue of acting in accord with OLC opinions.[151] Still, obtaining an OLC opinion would be a prudent next step. OLC has significant experience evaluating questions regarding the Privacy Act, in general, and the routine use exception, in particular.[152] SSA could benefit from availing itself of that expertise. Moreover, although courts are not bound to defer to OLC's interpretations of the Privacy Act, a court might look more favorably on SSA's position if it knew that SSA had come to that position only after consulting with OLC.

Although OLC has primary responsibility for providing legal advice to executive branch agencies, and also has considerable Privacy Act expertise, the Administrative Conference has ultimately been tasked by statute with analyzing the legal viability of an information-sharing arrangement between SSA and state courts. In carrying out that task, the study team has focused on three specific and limited data points that SSA and state courts might exchange:[153]

- Representative Payee and Guardian/Conservator Information: Name, SSN (or employer identification number for organizations), Date of Birth, Contact Information;
- Incapable Beneficiary Information: Name, SSN, Date of Birth, Contact Information; and
- Information about representative payees or guardians/conservators who had been removed or disqualified.

If information sharing is limited to these three types of information, the study team concludes that SSA could make a reasonable argument that the routine use exception applies. SSA collects information about current and prospective representative payees to determine whether the subjects are fit to manage Social Security benefits—in other words, fit to serve as fiduciaries for incapable people with respect to some part of those people's finances.[154] Under an information-sharing agreement, state courts would use the same information from SSA to determine whether the same individuals are fit to serve as guardians or conservators, which would require them to manage or serve as fiduciaries regarding other aspects of the incapable persons' finances. Because SSA and state courts would use the same information for the same

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[151] Although courts might treat OLC's interpretation of the Privacy Act as persuasive authority, they are not bound to defer to it. *See* Crandon v. United States, 494 U.S. 152, 177 (1990) (explaining that an "advisory opinion ... of the ... OLC ... is not an administrative interpretation that is entitled to deference under *Chevron*"); Cherichel v. Holder, 591 F.2d 1002, 1016 (8th Cir. 2010) ("We note ... that while OLC opinions are generally binding on the Executive branch, the courts are not bound by them." (internal citation omitted)). Because an individual alleging that his or her information has been disclosed in violation of the Privacy Act has a private right of action, as explained above, it ultimately falls to the courts to determine whether any invocation of the routine use exception is permissible. In this light, even were it equipped with an OLC opinion blessing disclosure of certain representative payee and beneficiary information to state courts, SSA would still run a litigation risk.

[152] *See* ns. 136–145 and accompanying text.

[153] As noted earlier, the Privacy Act protects "any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to that individual." 5 U.S.C § 552a(a)(5). Because SSA would be retrieving all of the identified data points by SSN or name, the Privacy Act applies to all of this information.

[154] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 25.

general purpose—establishing certain people's fitness to oversee finances for vulnerable people—the two uses of the designated information may fairly be characterized as "functionally equivalent," and thus "compatible" under the routine use exception.[155]

The same logic applies with respect to the sharing of information about incapable beneficiaries. SSA's stated purpose for collecting information about an incapable person is to determine whether that individual needs a representative payee and, if so, to properly administer and oversee payments of his or her benefits to the representative payee. Based on the study team's interviews with state court officials, state courts would use the disclosed information for a similar purpose: evaluating whether an incapable person needs a guardian or conservator and, if so, what qualifications the guardian or conservator should possess to properly oversee the management of the incapable individual's assets and income.[156] The substantial overlap between those two purposes means SSA could make a reasonable argument that its purposes in compiling designated information about incapable beneficiaries is "compatible" with state courts' purposes in using that information.

Whether federal courts will ultimately hold that SSA's purposes in collecting the designated information about representative payees and incapable beneficiaries are "compatible" with state courts' uses of that information depends, in the first place, on the level of generality with which federal courts define the relevant purposes. As explained above,[157] court decisions in cases like *Ames*[158] and *Doe*,[159] along with several of OLC's opinions,[160] support defining the relevant purposes at a high level of abstraction. Thus, it is at least plausible that federal courts will define both relevant purposes as being to determine whether a person is suitable to manage an incapable person's government-allocated finances. Defined that way, the study team

[155] *See Britt*, 886 F.2d at 550; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-108, FEDERAL AGENCY RESPONSIBILITIES FOR REVIEW, REPORTING, AND PUBLICATION UNDER THE PRIVACY ACT 11–12 (2016).

[156] As noted above in the Study Design's "Assumptions and Premises" § II(C), this information would flag information for follow-up investigation, rather than provide immediately actionable information upon which SSA could solely rely in its decision-making process. A narrower information exchange along these lines would be less likely to disclose irrelevant information and thus would be more likely to satisfy the Privacy Act's compatibility analysis and reduce SSA's litigation risk.

[157] *See supra* pp. 40–41 and nn. 110–119.

[158] *Ames*, 861 F.3d at 241.

[159] *Doe*, 660 F. Supp. 2d at 31.

[160] *See, e.g.*, 20 Op. O.L.C. at 60 (advising that the routine use exception permits the Attorney General to take data collected to conduct background checks on prospective firearms purchasers and share it with law enforcement agencies for use in their ongoing criminal investigations because both uses of the data advance a general "law enforcement purpose").

concludes that there is a sufficiently "concrete relationship"[161] between SSA's use of the relevant information and the state courts' uses of it that the uses are "compatible" for purposes of the routine use exception.

The strength of any argument about compatibility also depends on the expansiveness of the disclosure at issue. It matters, for instance, how much information SSA discloses to state courts. The more information SSA shares, the more likely it is that state courts' uses of that information will not be compatible with the purposes for which SSA collected it. Likewise, information sharing is more likely to comply with the routine use exception if state courts agree to narrow and carefully tailored limitations on how they will use the information SSA shares with them. The more constrained state courts are in their use of representative payee information, the less likely they are to use it for purposes that are incompatible with SSA's reasons for collecting it. Consistent with those two considerations, SSA's argument for compatibility will be strongest if it limits disclosure of information about beneficiaries and their representative payees to those instances in which state courts are assessing whether or not the same pairings of beneficiaries and representative payees are appropriate for guardian-conservator pairings. The obvious congruity of uses in such cases would increase the likelihood that they would fit within the routine use exception. By contrast, were SSA to simply share with state courts the names, SSNs, and dates of birth of every single representative payee and beneficiary, the case for compatibility would be considerably weaker, because the data set would include a significant amount of information of no use to state courts.

In the past, SSA has stated that it does not appear that its purpose for collecting representative payee information is compatible with the purpose for disclosure because, unlike representative payees, "[s]tate-appointed legal guardians … may have broader legal authority to care for personal property and other interests."[162] This is a valid concern, as the additional uses to which the state courts put the information could detract from the argument that it is being used for the same "purpose." But SSA can address the concern in a way that still allows it to share representative payee information with state courts. Specifically, SSA can refuse to share representative payee information unless the state courts that receive it agree to use it only to ascertain whether a person would be a suitable fit for a particular guardianship or conservatorship relationship. By limiting the use of representative payee information in that way, the study team concludes that SSA can ensure that state courts use the information only for

[161] As discussed earlier, *Britt* is the "leading" case on compatibility. U.S. DEP'T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, *supra* note 73, at 88. For that reason, the study team used its framework in analyzing compatibility in this section. The study team acknowledges that the D.C. Circuit may potentially take a less stringent approach to determining compatibility, *see, e.g.*, *Ames*, 861 F.3d at 240 n.1 (explaining that the D.C. Circuit has not yet determined the precise meaning of compatibility); *U.S. Postal Serv.*, 9 F.3d at 144, but did not consider application of a less stringent approach given that SSA's Representative Payee Program is national in scope and therefore the agency is likely bound, as a practical matter, to the more stringent interpretation set out by the Third Circuit in *Britt*.

[162] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 17.

purposes that are "compatible" with SSA's purposes in obtaining it.[163]

In sum, the study team has concluded that SSA could make a reasonable argument in favor of invoking the routine use exception to disclose these limited types of information to state courts for the limited purposes discussed above.[164] Still, given the considerable uncertainty concerning the outer bounds of the routine use exception, the study team recommends that SSA seek an opinion from OLC before invoking the exception. And even if SSA obtained such an opinion, it would still run a risk of litigation from a representative payee or beneficiary alleging that his or her information was improperly shared in violation of the Privacy Act.[165] In this light, the study team has identified two other options SSA may consider taking rather than invoke the routine use exception if it wishes to pursue information sharing with state courts.

3. Additional Options for Information Sharing SSA Might Consider In Lieu of Invoking the Routine Use Exception

Set forth below are two other options that SSA may consider taking if it wishes to pursue information sharing with state courts but does not wish to invoke the routine use exception under the Privacy Act.

(1) Written Consent

The Privacy Act only applies to disclosures made without prior written consent.[166] Thus, if SSA wishes to pursue information sharing with state courts, it should consider whether there are mechanisms it can implement to prospectively obtain written consent from representative payees and incapable beneficiaries to share their information with state courts. For example, SSA could request that representative payees voluntarily consent to their information being shared when they apply to serve as a payee or, for existing payees, when they are assigned to serve an additional or new beneficiary. Similarly, under Section 201 of the SPSSBA, SSA beneficiaries can designate in advance individuals to serve as their representative payees.[167] SSA should

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[163] A similar principle disposes of certain concerns that might arise were SSA to receive information from state courts as part of a reciprocal information-sharing arrangement. In phone calls with the study team, SSA's headquarters staff raised the possibility of state courts providing SSA with information about people who are not being assessed for representative payee status. In that case, headquarters staff hypothesized, SSA might find itself in violation of the Privacy Act's requirement that an agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished" by law. 5 U.S.C. § 552a(e)(1). Here again, the underlying concern is valid but within SSA's power to address. SSA might, for instance, condition any information-sharing arrangement on state courts' agreeing not to provide SSA with information unless the information pertains to someone being assessed for representative payee status. SSA thus has it within its power to structure information-sharing arrangements in ways that minimize Privacy Act concerns.

[164] As noted earlier, SSA has promulgated a regulation implementing the Privacy Act's compatibility standard. *See* 20 C.F.R. § 401.150. Accordingly, SSA must also ensure that any information it shares under the routine use exception conforms to the terms of this standard.

[165] As noted above in the Study Design's "Assumptions and Premises" § II(C), the study team acknowledges and accepts SSA's ultimate authority to assess and weigh the value of such data exchanges in light of their respective burdens and costs to the agency. Further, resource-allocation and other policy decisions are beyond the scope of this report.

[166] 5 U.S.C. § 552a(b).

[167] *Strengthening Protections for Social Security Beneficiaries Act of 2018*, *supra* note 22, § 201.

consider whether beneficiaries could at the same time also consent in advance to have their information shared if they are assigned a representative payee.[168] Both mechanisms could provide a meaningful way for SSA to prospectively share information with state courts without resorting to the routine use exception.

At the same time, obtaining consent from representative payees and incapable beneficiaries may pose other additional legal or administrative hurdles. For example, SSA headquarters staff identified the Paperwork Reduction Act (PRA)[169] as a major legal obstacle that SSA would be required to overcome when establishing a consent-based approach to information sharing. The PRA is "the basic statute controlling paperwork requirements imposed on the public by the federal government" and sets out a process with which federal agencies must comply to gain approval (known as "clearance") from OMB's Office of Information and Regulatory Affairs (OIRA) for an information collection.[170] This clearance process would apply to a hypothetical form SSA would presumably use to collect information and obtain written consent from representative payees and incapable beneficiaries. Nothing in the PRA appears to prohibit such a hypothetical consent form outright, and SSA has not identified any such provision. Notably, SSA has created consent forms in other contexts in the past and complied with the PRA in so doing, including obtaining clearance from OIRA.[171] Although the clearance process may be burdensome, such concerns are more appropriately considered administrative hurdles consistent with other similar concerns identified by SSA headquarters staff.

With respect to administrative hurdles, SSA headquarters staff pointed to various legitimate challenges to overcome, such as tracking the status of written consent and any attendant time limitations, implementing an opt-out process, avoiding imposing unnecessary burdens on vulnerable populations, and the apparent absence of incentives for individuals to provide consent. Notably, SSA has created consent forms in other contexts in the past.[172] Even so, whether to implement such a consent-based approach is ultimately a policy decision for SSA in assessing whether the value derived justifies the costs given the unique and specific considerations at issue in this information-sharing regime.

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[168] SSA's Program Manual lays out the agency's internal requirements and procedures for obtaining consent. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL GN 00305, "DISCLOSURE WITH CONSENT," https://secure.ssa.gov/apps10/poms.nsf/subchapterlist!openview&restricttocategory=02033 (last visited June 1, 2020).

[169] 44 U.S.C. §§ 3501 *et seq.*

[170] *See Paperwork Reduction Act*, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (June 1, 2020), https://sourcebook.acus.gov/wiki/Paperwork_Reduction_Act/view (describing the details of the PRA's clearance process).

[171] *See, e.g.*, Form SSA-3288, Consent for Release of Information, https://www.ssa.gov/forms/ssa-3288.pdf (including a PRA Statement noting compliance with the PRA's clearance provisions).

[172] *See, e.g., id.* (including a PRA Statement noting compliance with the PRA's clearance provisions).

(2) Request that Congress Amend the Social Security Act

Finally, if SSA wishes to pursue information sharing with state courts, it should also consider requesting that Congress amend the Social Security Act to provide explicit authorization for it to disclose representative payee and incapable beneficiary information to state courts. As an initial matter, SSA would need to clear such a legislative request with OMB.[173] To craft the appropriate legislative language, SSA would need to work closely with Congress to identify the specific types of information that should be disclosed and the purpose for the disclosure.

Congress has previously provided express authorization for an agency to disclose information in collaboration with state entities in other contexts, such as tax administration and law enforcement, and Congress might consider doing so here as well. For example, Congress has explicitly provided the IRS with statutory authority to share certain tax information with states for the purpose of state tax administration.[174] In providing this authorization, Congress restricted the sharing to specific types of taxes and imposed additional administrative obligations for states seeking the information. Similarly, Congress has also expressly authorized information sharing with states in the law enforcement context. In the Homeland Security Act of 2002, Congress chartered a "Directorate for Information Analysis and Infrastructure Protection" within the Department of Homeland Security.[175] This directorate was given explicit authorization to exchange, among other things, information with states related to threats of terrorism. Given the existing precedent for Congressional action regarding information sharing, it seems possible Congress might be willing to authorize SSA to begin sharing information with state courts regarding representative payees and incapable beneficiaries.

Thus, if SSA wishes to pursue information sharing with state courts, it could also consider asking Congress to pass legislation expressly permitting it to do so (after clearing such a request with OMB). Whether OMB or Congress would or should approve such a request is beyond the scope of this report.

4. Consider Sharing Organizational Representative Payee Information

SSA should also consider whether the Privacy Act applies to its approximately 32,000 organizational representative payees. An organizational representative payee "is a business, company or the like . . . that manages benefits on behalf of an incapable beneficiary" or, more often, on behalf of multiple beneficiaries.[176] Because the Privacy Act's protections extend only to "individual[s]," which the Privacy Act defines as either a "citizen of the United States" or an

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[173] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-19, LEGISLATIVE COORDINATION AND CLEARANCE (rev. Sept. 20, 1979) (setting forth requirements in sections 7 and 8 for the submission of agency proposed legislation and the clearance of agency proposed legislation).

[174] 26 U.S.C. § 6103(d)(1).

[175] 6 U.S.C. § 121.

[176] SOC. SEC. ADMIN., TRAINING ORGANIZATIONAL REPRESENTATIVE PAYEES, https://www.ssa.gov/payee/LessonPlan-2005-2.htm (last visited June 1, 2020). *See also* SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, EXAMINING SSA'S REPRESENTATIVE PAYEE PROGRAM: WHO PROVIDES HELP, https://oig.ssa.gov/newsroom/congressional-testimony/march22-representative-payee (last visited June 1, 2020).

"alien lawfully admitted for permanent residence," it appears the Privacy Act does not protect the information of organizational representative payees, and SSA is therefore permitted to share that information.[177]

Sharing organizational representative payee information would be a significant step forward. Although the 32,538 organizational representative payees made up less than 1% of all payees in fiscal year 2019, they collectively served as payees for 918,000 of the 8 million beneficiaries who had been assigned one in 2019.[178] Moreover, these 918,000 beneficiaries are among the most vulnerable of all beneficiaries "because, in addition to being deemed incapable of managing [or directing the management of] their own benefits, they [may] lack family or another responsible party to assume this responsibility."[179]

SSA headquarters staff noted specific concerns about disclosing information about organizational representative payees[180] that could result in improperly disclosing information about specific incapable beneficiaries, which would likely trigger the Privacy Act. Notably, SSA already discloses certain information annually about organizational representative payees, including details about certain allegations and findings of misuse, without disclosing information about specific beneficiaries.[181] These summaries identify the name and location of the organizational representative payees and briefly describe select details about the allegations, investigation, or findings.[182] Therefore, SSA could realize many benefits associated with information sharing by exchanging information about organizational representative payees without disclosing information about specific beneficiaries.[183]

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[177] 5 U.S.C. § 552a(a)(2). *See also* U.S. DEP'T OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, *supra* note 73, at 16 (explaining that "[c]orporations and organizations also do not have any Privacy Act rights."); 20 C.F.R. § 401.25 (defining "individual" as a "living natural person" that does "not include corporations partnerships, and unincorporated business or professional groups of two or more persons").

[178] SOC. SEC. ADMIN., ANNUAL REPORT ON THE RESULTS OF PERIODIC REPRESENTATIVE PAYEE SITE REVIEWS AND OTHER REVIEWS 2 (2019).

[179] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-688, SOCIAL SECURITY BENEFITS: SSA NEEDS TO IMPROVE OVERSIGHT OF ORGANIZATIONS THAT MANAGE MONEY FOR VULNERABLE BENEFICIARIES 1 (2011).

[180] Other concerns involved the accuracy and detail of information identifying the organizational representative payees because the organization may use multiple names and multiple employer identification numbers.

[181] *See*, *e.g.*, SOC. SEC. ADMIN., ANNUAL REPORT ON THE RESULTS OF PERIODIC REPRESENTATIVE PAYEE SITE REVIEWS AND OTHER REVIEWS (2018), https://www.ssa.gov/legislation/2018RepPayeeReport.pdf (disclosing information about organizational representative payees).

[182] *Id.* at 13–35.

[183] As noted previously, the study team acknowledges SSA's ultimate authority to assess and weigh the value of such hypothetical data exchanges in light of their respective burdens and costs to the agency, and this report does not examine resource allocation issues.

B. Authorization to Share Information and Section 1106 of the Social Security Act

Even assuming SSA could share information with state courts without violating the Privacy Act, SSA has taken the position that it is not authorized to disclose information with state courts and that it would therefore have to charge state courts for any information it provides.[184] As an initial matter, SSA cannot use appropriated funds in a manner that is not authorized by Congress.[185] To determine whether SSA could use appropriated funds to create the contemplated information-sharing regime with states, SSA would be required to decide whether any information it obtains from state courts in return for its own information sufficiently advances its statutorily authorized functions. The study team takes no position on that question.

If SSA determines that a reciprocal information-sharing regime insufficiently advances its statutorily authorized functions, the study team agrees with SSA's conclusion that it is permitted to charge the states for any information it provides. Section 1106 of the Social Security Act[186] governs that analysis. Section 1106(a) generally prohibits the unauthorized disclosure of information in SSA's possession and would likely apply to its disclosures in an information-sharing exchange with state courts.[187] Section 1106(a) applies broadly, and SSA may not disclose information in its possession unless SSA regulations authorize the disclosure.[188] Subsection (b) provides SSA the authority to disclose information for non-program purposes, subject to regulations prescribed "to avoid undue interference with [SSA's] functions" so long as "the agency, person, or organization making the request agrees to pay for the information … requested in such amount, if any (not exceeding the cost of furnishing the information or services)[.]"[189] In other words, subsection (b) permits SSA to charge recipients for any information SSA discloses pursuant to its regulations.[190]

Read together, these statutory provisions provide that SSA may charge state courts for establishing and operating the information-sharing regime as long as SSA regulations authorize such disclosure. SSA would need have regulations to facilitate the program because its current information-disclosure regulations do not authorize or contemplate such a disclosure regime with state courts.[191]

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[184] *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13, at 25 (responding to GAO's report proposing that SSA disclose certain information about incapacitated beneficiaries and their fiduciaries to state courts by stating that information sharing is not viable because if it were to disclose information to state courts it "would have to charge [states] for [its] services."). During the study team's interview process, SSA headquarters staff reiterated this assessment.

[185] 31 U.S.C. § 1301.

[186] 42 U.S.C. § 1306.

[187] *Id.* § 1306(a)(1). Subsection (a)(1) also sets out penalties for unauthorized disclosures, including felony conviction, a fine up to $10,000 per occurrence, and up to 5 years in prison.

[188] *Id.*

[189] *Id.* § 1306(b).

[190] *Id.*

[191] *See* 20 C.F.R. pts. 401–402.

C. The CMPPA and Other Federal Laws

The final potential barrier to information sharing is the CMPPA, which sets out requirements for federal agencies to follow when engaging in computer-matching activities.[192] The hypothetical data exchanges discussed in this report may implicate the CMPPA's requirements, depending on their design, the type of exchange, the purpose of the exchange, and the data to be disclosed.

The CMPPA amended the Privacy Act to add special requirements and privacy protections when agencies engage in computer-matching programs with other federal or state agencies.[193] A computer-matching program is any computerized comparison of two or more automated systems of records controlled by federal agencies, or a computerized comparison of a federal agency's system of records with other non-federal records, to establish or verify eligibility or compliance under federal benefit programs.[194] The CMPPA requires that federal agencies who match information with other entities provide prior public notice about the establishment or revision of such programs, as well as enter into written matching agreements that specify, among other things, the scope, purpose, and legal authority of the program.[195] Similarly, the CMPPA also lays out guidelines for computer matching that ensure federal agencies conduct computer matches uniformly and provide the protections required by the Privacy Act.[196]

These burdens are largely administrative and dependent on the design of the hypothetical data exchanges. SSA headquarters staff acknowledged that the CMPPA may not be a significant legal barrier. This accords with current agency practices, given that SSA has routinely complied with the CMPPA's requirements in the context of other matching programs. For example, SSA has matching programs with state agencies that administer and determine eligibility for certain entitlement programs, such as SNAP[197] and the Special Supplemental Nutrition Program for Women, Infants, and Children.[198]

Even so, SSA headquarters staff explained that the CMPPA could pose a significant administrative barrier given the time, effort, and volume of data at issue, which SSA would need to weigh with countervailing concerns, including agency interest. Notably, SSA headquarters officials emphasized during the study team's interviews that it is common for it to take 12 to 16 months to create a new matching agreement and that it can be difficult to get every state to agree

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[192] Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, 102 Stat. 2507 (amending various provisions of the Privacy Act at 5 U.S.C. § 552a). SSA has not pointed publicly to the requirements of the CMPPA as posing a barrier to information sharing in the context of this study.

[193] *Id.*

[194] 5 U.S.C. § 552a(a)(8).

[195] *Id.* § 552a(o). *See also* SOC. SEC. ADMIN., MODEL COMPUTER MATCHING AND PRIVACY PROTECTION ACT AGREEMENT, https://www.ssa.gov/dataexchange/documents/CMPPA%20State%20Agency%20Model.pdf (last visited June 1, 2020).

[196] 5 U.S.C. § 552a(o).

[197] *See generally* 7 U.S.C. §§ 2011 *et seq*.

[198] *See generally* 42 U.S.C. §§ 1771 *et seq*.

to the same set of terms set forth in the agreements. As previously explained, SSA would need to assess and weigh the value of these matching programs in light of their respective burdens and costs to the agency.[199]

Beyond the Privacy Act, Social Security Act, and CMPPA, the study team has conducted a general survey of other federal laws to determine whether there may be other significant federal legal barriers to information sharing. The study team has not identified any such laws. Likewise, SSA did not identify any other federal laws that it believed may pose a significant legal barrier to information sharing in response to an ACUS inquiry.

D. Other Information Sharing Regimes

The final aspect of the study team's analysis of the legal barriers consisted of reviewing other information sharing practices within SSA and at other federal agencies to identify any useful similarities or differences that might provide context to the legal barriers that exist for information sharing here. This review led to two key findings.

First, as noted in Part 1 above, a robust information sharing regime already exists between SSA and those state agencies that administer federal benefit programs, including SNAP, TANF, LIHEAP, and Foster Care and Adoption Assistance. In addition, information-sharing regimes appear to be commonplace across the federal government, with many large agencies engaging in information sharing with state entities. For example, the Federal Emergency Management Agency shares PII of individual disaster-assistance applicants under the routine use exception with a range of government and private entities, including state courts, in carrying out its disaster-assistance programs.[200] Similarly, the HHS shares PII under the routine use exception with a wide variety of state entities.[201] Although these existing information sharing regimes do not change the fact that SSA must carefully consider whether it may, consistent with its legal obligations, share representative payee or incapable beneficiary information with state courts, it does show that the legal barriers associated with disclosing information to state courts under the routine use exception are not necessarily insurmountable.

Second, aside from the pervasiveness of these existing information sharing regimes, it appears SSA has also already published in its SORNs many routine uses for disclosure of representative payee information. For example, SSA has published 24 routine uses in the SORN for its "Master Representative Payee File."[202]

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[199] As noted above in the Study Design's "Assumptions and Premises," § II(C), the study team acknowledges and accepts SSA's ultimate authority to assess and weigh the value of such data exchanges in light of their respective burdens and costs to the agency. Further, resource-allocation and other policy decisions are beyond the scope of this report.

[200] Dep't of Homeland Security, *Privacy Act of 1974; Department of Homeland Security Federal Emergency Management Agency-008 Disaster Recovery Assistance Files System of Records*, 78 Fed. Reg. 25,282 (Apr. 30, 2013).

[201] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERV., CENTERS FOR MEDICARE & MEDICAID SERVICES, SORNS, https://www.hhs.gov/foia/privacy/sorns/cms-sorns.html (last visited June 1, 2020).

[202] Soc. Sec. Admin., *Privacy Act of 1974; System of Records*, 83 Fed. Reg. 55,230–31 (Nov. 2, 2018).

II. Legal Barriers to Information Sharing for State Courts

To identify the most common and significant types of legal barriers for state courts, the study team surveyed the statutory codes and judicial rules of all 50 states.[203] From this survey, the study team has identified three main categories of potential legal barriers: (1) statewide privacy statutes that resemble the federal Privacy Act of 1974 and generally govern the disclosure of personal information by state entities; (2) statewide statutes that specifically limit disclosure of SSNs; and (3) state court judicial rules that govern the collection and disclosure of personal information in case records and related documents.

The application and complexity of the laws and rules within each of these categories varied, often significantly, from state to state. Moreover, the laws or rules governing disclosure within any given state often interacted or overlapped with one another. For example, some statewide privacy statutes incorporate by reference the prohibitions against disclosure potentially contained in other state or federal statutes or judicial rules (e.g., the statewide privacy statute in California provides that "[n]othing in this [statute] should be construed to authorize the disclosure of any record containing personal information, other than to the subject of such records, in violation of any other law.").[204] Thus, even if disclosure were permitted under the statewide privacy statute, it may still be barred by some other state statute, such as a statute specifically governing disclosure of SSNs.

Another layer of complexity is that in many states some of the laws governing the disclosure of personal information exempt the state judiciary, whereas other state privacy-related statutes in that same state may not. For example, it is possible that the statewide privacy statute does not apply to the judiciary, but the statewide law governing disclosure of SSNs does. Given this complexity, the analysis below of state court legal barriers is necessarily limited to a discussion of each type of barrier generally, along with citations to examples of the laws or rules from various states that may pose a barrier to information sharing.

A. General Statewide Privacy Laws

The study team has found that all 50 states have adopted laws that generally govern the disclosure of personal information by state entities. A survey of these laws revealed that they fall into two main categories. First, in 11 states, the general state privacy laws resemble the federal Privacy Act in that they are standalone statutes that apply generally to disclosing personal information by all state governmental entities *except* the courts.[205] Thus, in these 11 states, the statewide privacy laws do not pose a barrier to information sharing.

In the remaining 39 states, the general privacy laws are not standalone or independent in operation. Rather, they are embedded as exceptions to disclosure within each state's public

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[203] As noted above, the study team limited its study of the barriers to information sharing to specific data points. Because state courts are the main repositories of this information in all states, the study team limited its study of the opportunities and barriers to information sharing to state courts.

[204] *See* Cal. Civ. Code § 1798.3 (provision of statewide privacy statute explicitly excluding the state courts from coverage); *id.* § 1798.85 (statute governing disclosure of SSNs and appears to apply to state courts).

[205] The study team identified Alaska, Arkansas, California, Connecticut, Illinois, Massachusetts, Minnesota, New York, North Carolina, Ohio, and Virginia as falling within this category.

records law. However, similar to standalone privacy statutes, in some states these public records laws explicitly exempt the judiciary,[206] whereas in others they do not.[207] In addition, within those states where the public records law applies to the judiciary, the disclosure exceptions differ in operation. In some states, the exceptions are mandatory (i.e., affirmatively prohibit disclosure of personal information),[208] whereas in other states they are merely discretionary (i.e., leave disclosure to the discretion of the state entity responding to the records request).[209] And, in at least one state, the privacy exceptions can be discretionary or mandatory depending on the personal information at issue.[210]

Finally, along with the operational differences, the types of personal information covered by the exceptions vary widely. In some states, the privacy exceptions are very broad and bar disclosure of SSNs and contact information both of incapable beneficiaries and guardians.[211] In other states, the statutes define protected personal information narrowly and permit disclosure of incapable beneficiary and guardians or conservator information.[212]

Given the disparities in the operation and breadth of these exceptions, it is difficult to estimate the significance of these laws on information sharing. Even so, based on the study team's survey, the barrier posed by these laws does not appear to be significant. Only 12 of the 39 states without standalone or independent general privacy laws have a public records law that both applies to the judiciary and contains mandatory exceptions that would affirmatively prohibit state courts from disclosing personal information. Thus, in 38 of the 50 states, statewide privacy statutes would not serve as a barrier to information sharing. A chart displaying the study team's findings about statewide privacy laws is in Appendix G.

B. State Statutes Limiting Disclosure of SSNs

The second category of potential barriers involves state statutory provisions governing or prohibiting the disclosure of SSNs by state entities. These provisions are of particular importance because SSNs may serve as the unique identifier that enables information sharing with SSA under certain circumstances in the hypothetical regime set out in this report. The study team has identified 37 of 50 states as having some statutory provision specifically governing the disclosure of SSNs. Like general statewide privacy laws, these statutory provisions vary widely

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[206] Based on the study team's survey, 6 of the 33 states with public records' laws explicitly exempt state courts. *See, e.g.,* Haw. Rev. Stat. Ann § 92F-3 (stating that Hawaii's public records law "does not include the non-administrative functions of the courts").

[207] *See, e.g.,* Idaho Code § 74-101 (defining state agency for purpose of the public records law as "including . . . [the] judicial branch").

[208] *See, e.g.,* Miss. Code Ann. § 25-62-3(2) (stating that "[personal information shall be exempt from disclosure under the Mississippi Public Records Act").

[209] *See, e.g.,* Okla. Stat. tit. 51, § 24A.5(2) (stating that "[a]ll [SSNs] included in a record may be confidential . . . and *may* be redacted or deleted prior to release of the record by the public body").

[210] *See, e.g.,* Maryland GP §§ 4-301, 4-343.

[211] *See, e.g.,* Pennsylvania Right-to-Know Law, 65 P.S. § 67.708; Neb. Rev. Stat. § 84-712.05(19).

[212] *See, e.g.,* Miss. Code Ann. § 25-62-1 (defining personal information narrowly to only include names/information of people who have donated to nonprofits).

in application and operation, and in some states are embedded within the state public records law as mandatory exceptions.

Collectively, these provisions likely would not pose a significant barrier to information sharing in the majority of states. In the 37 states that the study team has identified as having such a provision, 20 have SSN provisions that are not applicable to state courts.[213] In the other 17 states, the relevant statutory language was ambiguous regarding whether or not the relevant provision applied to state courts. Thus, collectively these provisions do not pose a barrier to information sharing in at least 33 of the 50 states. A chart displaying the study team's findings about these provisions is in Appendix G.

C. State Court Judicial Rules

The final potential category of legal barriers to information sharing for state courts is court-created judicial rules. Like both types of state statutes discussed above, state court rules governing the disclosure of records also vary widely in operation and breadth. Generally, court records in all states are presumed to be open to the public. That said, some state courts have adopted disclosure rules that protect certain types of personal information in court records. The study team's survey of state court rules identified 39 states as having adopted a statewide judicial rule or rules governing information disclosure. A chart displaying the study team's findings about judicial rules is in Appendix G.

The study team has reviewed these disclosure rules, as well as state judicial rules more broadly, and identified three common types of rules that may pose a barrier to information sharing:

- **Rules governing when judges may seal case records.** Judges in all states may seal case records under certain circumstances. In specifying whether it is appropriate to seal a record, most state rules instruct the judge to balance the public's interest in disclosure or accessibility against the individual privacy interests at stake.[214] During the study team's interviews with state court officials, some indicated that judges sometimes seal records in guardianship/conservatorship cases.
- **Rules governing the disclosure of SSNs.** Most states with a judicial rule specifically governing SSNs prohibit the disclosure of SSNs or, in some cases, all but the last four digits of an SSN.[215] Some courts have also implemented filing rules that discourage or prohibit including SSNs in court filings, which poses a similar legal obstacle. As discussed above, disclosure of SSNs may be necessary to facilitate more effective information sharing with SSA.

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[213] *See, e.g.,* Alaska Stat. § 45.48.090(3) (defining "governmental agency" as "a state or local governmental agency, except for an agency of the judicial branch").

[214] *See, e.g.,* Alaska Rules of Administration 37.5; California Trial Court Rules, Article 4, 2.550.

[215] *See, e.g.,* Arizona Rules of the Supreme Court 123(c); 123(g)(1)(A); Colorado Directive Concerning Access to Court Records, § 4.60(e).

- **Rules governing the disclosure of information in court records to other governmental entities.** In some states, the disclosure rules provide special procedures or exceptions when disclosure of court records is to another governmental entity.[216] These rules generally enhance the ability of state courts to share information with SSA. Even so, in some cases these rules also place additional administrative or procedural requirements on state courts making such disclosures.

In sum, although many state courts have implemented rules that may serve as a barrier to information sharing, none of these rules makes information sharing a legal impossibility. This is largely because state courts can amend their rules as necessary to facilitate information sharing.[217] The process and complexity for amending judicial rules also varies between states, but most states have standing rules committees or working groups specifically assigned to recommend amendments to existing rules to improve the fairness, effectiveness, or efficiency of court proceedings and programs. For example, California's standing Rules Committee meets almost monthly to discuss needed changes or amendments to state judicial rules.[218]

Finally, during the study team's interviews with state court officials, they consistently expressed their view that the principal barrier to information sharing from their perspective was technological, not legal. None of the state court officials interviewed expressed strong concerns about the legal barriers to sharing information with SSA. As a result, the study team concludes that the principal legal barriers to information sharing relate to SSA's ability to share information, not state courts' ability.

[216] *See, e.g.,* California Trial Court Rules, Article 4, 2.540.

[217] Whether a specific state court would change their rules to accommodate a hypothetical information-sharing regime is beyond the scope of this report.

[218] California Rule of Court 10.13 (establishing and defining the California court system's Rules Committee).

Appendix A: Key Provisions of Public Law 115-165

On February 5, 2018, the Committee on Ways and Means Chairman Kevin Brady (R-TX8) and Ranking Member Richard E. Neal (D-MA1) submitted a Legislative History and Technical Explanation of H.R. 4547 (became Public Law 115-165), the SPSSBA, to then Acting Commissioner of SSA Nancy Berryhill. Outlining the need for the legislation, the document provided seven key provisions:

- SECTION 101: STRONGER MONITORING OF REPRESENTATIVE PAYEES

  Representative payees will be subject to increased on-site reviews to be carried out by each state's Protection and Advocacy (P&A) system. SSA will provide annual grants to state P&A systems to accommodate the increased reviews.

- SECTION 102: REDUCING THE BURDEN ON FAMILIES

  While still requiring benefits to be used on behalf of the beneficiary, SSA will no longer require annual filings of accounting forms for "representative payees who are a parent or legal guardian living with the child receiving Social Security or SSI benefits, a parent living with an adult who is receiving benefits, and spouses."

- SECTION 103: PROTECTING BENEFICIARIES THROUGH INFORMATION SHARING

  SSA is required to complete data exchanges with state foster care agencies on a monthly basis to monitor children receiving Social Security benefits to determine if they have been moved in or out of the foster care system and if SSA needs to determine a new representative payee.

- SECTION 201: ADVANCE DESIGNATION OF PAYEE

  SSA will allow beneficiaries to designate in advance a potential representative payee prior to the necessitation of representative payee services. Organizational representative payees will not be eligible for advanced designation.

- SECTION 202: PROHIBITION ON INDIVIDUALS CONVICTED OF CERTAIN CRIMES SERVING AS REPRESENTATIVE PAYEES

  Individuals convicted of at least one of the twelve felonies listed in this section are not eligible to serve as representative payees. Individuals currently acting as representative payees who have previously been convicted of at least one of the twelve felonies will be removed as representative payee within five years.

- SECTION 203: PROHIBITION ON INDIVIDUALS WITH REPRESENTATIVE PAYEES SERVING AS REPRESENTATIVE PAYEES

  Individuals with representative payees may not serve as representative payees for other beneficiaries.

- SECTION 204: REASSESMENT OF PAYEE SELECTION AND REPLACEMENT POLICIES

  SSA must review, and make available for public comment, a reassessment of the order by which it designates representative payees.

Appendix B: Interview List

The study team interviewed a range of stakeholders, including experts, advocates, and federal and state representatives involved with state guardianship/conservatorship programs and SSA's Representative Payee Program. Notably, the study team interviewed a number of officials in SSA field offices, but the specific names of those interviewees are not provided in this report. This section lists the non-SSA interviewees alphabetically.

COSCA

- Pam Harris, Maryland State Court Administrator
- Robin Sweet, Nevada State Court Administrator

General Services Administration

- Bill Zielinski, Assistant Commissioner, Office of IT Category

House Ways and Means Committee

- Amy Shuart, Staff Director, Social Security Subcommittee
- TJ Sutcliffe, Professional Staff Member, Social Security Subcommittee

National Association of State Chief Information Officers

- Eric Sweden, Program Director, Enterprise Architecture & Governance

NCSC

- Paul Embley, Chief Information Officer
- Kathryn Holt, Senior Court Research Analyst

National Conference of State Social Security Administrators (NCSSSA)

- Kathleen Baxter, NCSSSA Vice President & State Comptroller (Alabama)
- Daniel Huffine, NCSSSA Vice President & Compliance Officer (Iowa)
- Maryann Motza, NCSSSA Legislative Committee Chair
- Thomas J. Rearden, NCSSSA President & State Social Security Administrator, MD
- Veronica Silva-Gil, State Social Security Administrator, CA

NCSSMA

- Joe Deaton, NCSSMA Executive Officer & District Manager, Hot Springs, AR
- Rachel Emmons, NCSSMA Washington Representative
- David Lescarini, NCSSMA Vice President & SSA District Manager, TN
- Peggy Murphy, President of NCSSMA & SSA District Manager, Great Falls, MT

New York State Courts

- Michelle Gartner, Special Counsel, Fiduciary Appointments
- Lawrence Marks, Chief Administrative Court Judge
- Paul McDonald, Deputy Counsel for Criminal Justice Matters

Ohio State Courts

- David Edelblute, Manager, Children and Families Section at The Supreme Court of Ohio
- Dixie Park, Judge, Stark County Court of Common Pleas, Probate Division

Senate Finance Committee

- David Timmons, Policy Advisor
- Jeff Wrase, Deputy Staff Director and Chief Economics

SSAB

- Diane Brandt, Research Director
- Claire Green, Staff Director
- Kim Hildred, Board Chair
- Conway Reinders, Lead Policy Analyst

Virginia Tech/SSAB Project

- Pam Teaster, Director of the Center for Gerontology and SSAB Project Lead

WINGS

- Jamie Majerus, Minnesota WINGS Co-Chair
- Anita Raymond, Minnesota WINGS Co-Chair
- David Slayton, Texas WINGS Chapter
- Erica Wood, Assistant Director at the American Bar Association and WINGS Representative

Appendix C: Summary of Prior Reports and Documents

The following is a brief summary of prior literature on the SSA Representative Payee Program from GAO, SSAB, NAS, the SSA OIG, COSCA, ACUS, and WINGS.

GAO

Over the past two decades, GAO has conducted several studies highlighting the need to enhance data exchange between SSA and the state courts. In 2004, GAO observed that state courts and federal agencies "collaborate little in the protection of incapacitated elderly people and the protection of federal benefit payments from misuse" and recommended increased coordination among federal agencies, and between federal agencies and state courts that appoint guardians.[219] In its follow up review two years later, GAO concluded that little had changed.[220]

Several subsequent GAO reports reiterated the need for information sharing among federal fiduciary programs and state courts, suggesting that better information sharing could improve the protection of older adults with guardians. For example, in 2011, a GAO report revealed how gaps in information sharing adversely affected incapacitated adults who are vulnerable to financial exploitation by fiduciaries and guardians.[221] More recently, in its 2013 report, GAO concluded that SSA needed to improve oversight of the representative payees.[222]

SSAB

The SSAB serves as an independent federal government agency that advises on the administration of SSA's OASDI and SSI programs. Over the years, SSAB has issued many reports and recommendations related to SSA's Representative Payee Program. In its 2016 report, *Representative Payees: A Call to Action*, SSAB calls on SSA, Congress, and stakeholders to reexamine SSA's procedures for appointing, selecting, training, and monitoring payees. The report describes key "issues facing the representative payee program" and warranting "more interagency research and collaboration to generate media interest, congressional commitment, and public awareness."[223]

Upon holding a public forum in 2017, SSAB released a comprehensive review in January 2018, recommending that SSA "research and evaluate the order of preference for payee selection." Shortly after, Congress enacted the SPSSBA. Section 204 of the SPSSBA requires the Commissioner to review how representative payees are selected and replaced.

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[219] GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS, *supra* note 13, at 30.

[220] GOV'T ACCOUNTABILITY OFFICE, GAO-06-1086T, GUARDIANSHIPS, *supra* note 13.

[221] GOV'T ACCOUNTABILITY OFFICE, GAO-11-678, INCAPACITATED ADULTS, *supra* note 13.

[222] GOV'T ACCOUNTABILITY OFFICE, GAO-13-473, ADDRESSING LONG-TERM CHALLENGES, *supra* note 12.

[223] SOC. SEC. ADVISORY BOARD, REPRESENTATIVE PAYEES: A CALL TO ACTION 1 (2016), https://www.ssab.gov/announcements/representative-payees-a-call-to-action/ (last visited June 1, 2020).

In June 2019, SSAB released its latest brief, *Recent Developments in the Social Security Administration's Representative Payee Program*. The brief discusses salient issues addressed at SSAB's September 2018 policy forum, the use of evidence-based policymaking, and the implementation of the new payee monitoring process.[224] More recently, SSAB appointed an independent, expert panel to review SSA's progress in implementing key initiatives of its IT Modernization Plan, including how systems processes are developed, modified, and used by the agency.[225]

NAS

Following a congressional request, SSA engaged NAS to review the SSA payee program in 2007. Specifically, NAS was asked to examine the extent to which representative payees were not performing their responsibilities in accordance with SSA standards, to determine whether the representative payment program policies were practical and appropriate, to identify the types of payees that exhibit the highest risk of misuse, and to identify ways to mitigate the risk of misuse.

Among the major recommendations listed in its report was that SSA "redesign the annual accounting form to obtain meaningful accounting data and payee characteristics that would facilitate evaluation of risk factors and payee performance." Second, NAS recommended that SSA standardize the process for selecting representative payees, which at the time of the study varied across field offices.[226]

NAS also suggested that SSA shift from auditing a random sample of representative payees to more targeted audits of those most likely to misuse funds. To that end, NAS identified key risk factors that would suggest the need for enhanced monitoring of a representative payee, including whether the payee's zip code differs from the beneficiary's; the payee also receives government benefits; the payee has had multiple address changes during the past two years; an individual payee was serving 15 or more beneficiaries; an organizational payee was serving 50 or more beneficiaries, and if the payee was a fee-for-service payee.

As for sharing data with state entities, NAS observed that state court guardianship/conservatorship programs operated independently from the SSA payee program even though SSA required any beneficiary with a guardian/conservator to also have a payee selected by SSA. NAS also observed that certain beneficiaries had SSA-appointed representative payees who were different from the people who served as their guardian/conservator. This in turn caused "potential conflicts, violations of [SSA] rules, inefficiencies and inaccuracy in reporting, delays in payee selection, and duplication of effort."[227]

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[224] SOC. SEC. ADVISORY BOARD, RECENT DEVELOPMENTS IN THE SOCIAL SECURITY ADMINISTRATION'S REPRESENTATIVE PAYEE PROGRAM, https://www.ssab.gov/research/recent-developments-in-the-social-security-administrations-representative-payee-program/ (last visited June 1, 2020).

[225] SOC. SEC. ADVISORY BOARD, https://www.ssab.gov/announcements/expert-panel-to-review-information-technology-modernization-efforts/ (last visited June 1, 2020).

[226] NAT'L RESEARCH COUNCIL, DIVISION OF BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION; COMMITTEE ON SOCIAL SECURITY REPRESENTATIVE PAYEES, IMPROVING THE SOCIAL SECURITY REPRESENTATIVE PAYEE PROGRAM: SERVING BENEFICIARIES AND MINIMIZING MISUSE, https://doi.org/10.17226/11992 (last visited June 1, 2020).

[227] *Id.*

SSA OIG

The SSA OIG has conducted several audits and reviews of SSA's operations. In its 2018 statement on SSA's Major Management and Performance Challenges,[228] the OIG cited these seven management and performance goals:

- Improve Administration of the Disability Programs
- Reduce Improper Payments and Increase Overpayment Recoveries
- Improve Customer Service
- Modernize IT Infrastructure
- Secure Information Systems and Protect Sensitive Data
- Strengthen the Integrity and Protection of the SSNs
- Strengthen Planning, Transparency, and Accountability

In its 2017 testimony, the OIG expressed concerns with several aspects of the Representative Payee Program, including whether SSA is adequately screening representative payees and providing sufficient payee oversight. The OIG also found that SSA did not properly document capability determinations for almost half of their beneficiaries, and that further statistical analysis identified a population of disabled beneficiaries with mental impartments who did not have payees. As for the latter, the OIG suggested that SSA could identify beneficiaries potentially in need of payees by further analyzing agency data and trends.[229]

ACUS

SSA tasked ACUS with researching and cataloguing the guardianship laws and practices of the 50 states; gathering information on state guardianship processes; and conducting interviews with guardianship and foster care agencies to evaluate their practices. ACUS conducted this research to help enhance information-sharing and coordination on overlapping guardianship/conservatorship-representative payee matters between SSA and state courts.

Completed in 2014, the ACUS report confirmed the difficulties guardians face in obtaining information from local SSA field offices and the barriers to information sharing among various stakeholders because of the decentralized recordkeeping practices of courts and state agencies.[230] Reflecting those difficulties, approximately 82 percent of the state courts surveyed stated that they had infrequent or no interaction with SSA related to data exchange or to consult on overlapping guardianship-representative payee matters.[231] Finally, the report emphasized the

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[228] SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, FISCAL YEAR 2018 INSPECTOR GENERAL'S STATEMENT ON THE SOCIAL SECURITY ADMINISTRATION'S MAJOR MANAGEMENT AND PERFORMANCE CHALLENGES (2018), https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-02-18-50307.pdf (last visited June 1, 2020).

[229] SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, EXAMINING THE SOCIAL SECURITY ADMINISTRATION'S REPRESENTATIVE PAYEE PROGRAM (testimony of Gale Stallworth Stone), https://oig.ssa.gov/newsroom/congressional-testimony/march22-representative-payee (last visited June 1, 2020).

[230] Admin. Conf. of the U.S., Office of the Chairman, SSA Representative Payee: Survey of State Guardianship Laws and Court Practices (Dec. 24, 2014), https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf.

[231] *Id.* at 40–41.

need for information sharing between SSA and the state courts in order to perform their respective functions more efficiently as well as the need for congressional action.[232]

COSCA

Established in 1955, COSCA serves as a national forum for the state court administrators across the United States. COSCA is a leading advocate for adult guardianship/conservatorship issues. In 2017 and 2014, COSCA issued Resolutions 1 and 4 respectively to promote several key reforms: (i) to improve communication and exchange of information between state courts with jurisdiction over guardianships/conservatorships and SSA staff administering the Representative Payee Program; (ii) to allow SSA to recognize state court orders related to the appointment, resignation, and removal of court-appointed guardians/conservators; and (iii) to encourage SSA participation in stakeholder collaboration groups such as WINGS.[233]

In its 2010 publication, *The Demographic Imperative: Guardianships and Conservatorships*, COSCA calls for a coordinated federal and state partnership to foster a "national guardianship court improvement program" to focus resources on the needs of individuals with intellectual or cognitive impairments and to compile accurate data on adult guardianships. COSCA posits that accurate and timely data is necessary to "(1) shape guardianship policy, practice, training and education—and obtain the resources for system improvements; (2) determine effective case processing and monitoring of guardians by the courts; (3) gauge the extent of abuse by guardians and the extent to which guardians protect individuals from abuse; and (4) determine current and future resource needs."[234]

[232] *Id.* at 6, 65-66.

[233] CONF. OF STATE COURT ADMINISTRATORS, Resolution 1, https://cosca.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/08092017-1-SSA-Amending-Regulations-Privacy-Act-1974.ashx (last visited June 1, 2020); CONFERENCE OF STATE COURT ADMINISTRATORS, Resolution 4, https://cosca.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Encouraging-Collaboration-State-Courts-Federal-State-Representative-Payee-Programs.ashx (last visited June 1, 2020).

[234] CONF. OF STATE COURT ADMINISTRATORS, THE DEMOGRAPHIC IMPERATIVE: GUARDIANSHIPS AND CONSERVATORSHIPS, https://ncsc.contentdm.oclc.org/digital/collection/famct/id/308/ (last visited June 1, 2020).

Appendix D: Biographical Information on EAG Members

The following individuals, all of whom are Academy Fellows, made up the EAG:

Gary Glickman, Former Managing Director, Health & Public Service Innovation, Accenture. Senior Policy Advisor, U.S. Department of the Treasury; Coordinator, Partnership Fund for Program Integrity Innovation, OMB, Executive Office of the President; President and CEO, Imogen LLC; President and CEO, Giesecke and Devrient Cardtech; President and Chief Marketing Officer, Maximus; President, Phoenix Planning & Evaluation, Ltd.; Principal/National Director, Federal Consulting, Laventhol & Horwath; Practice leader, Financial Institutions Division, Orkand Corporation; Senior Consultant, Deloitte Consulting, LLP.; Team Member, Office of the Secretary, U.S. Department of the Treasury; Chief, Financial Management Division, Office of the Comptroller of the City of New York.

Franklin Reeder, Former Director, Office of Administration, the White House. Former chair, Federal Information Security and Privacy Advisory Board. Former positions with OMB: Deputy Associate Director for Veterans Affairs and Personnel; Assistant Director for General Management and Deputy Assistant Director; Chief, Deputy Chief, Information Policy Branch; Policy Analyst; Chief, Systems Development Branch. Former Deputy Director, House Information Systems, Committee Staff, Committee on House Administration, U.S. House of Representatives. Former positions with U.S. Department of the Treasury and U.S. Department of Defense focusing on IT and systems.

Kurt Schmoke, President, the University of Baltimore. Former positions with Howard University: Dean, School of Law; Senior Vice President of Academic Matters. Positions with City of Baltimore: Mayor; State Attorney. Former Assistant Director, White House Domestic Policy Staff; Assistant U.S. Attorney.

Barry Van Lare, Independent Consultant, Management and Public Policy; Former Director, Office of Management Consulting and Training, National Governors Association; Senior Vice President for Strategic Marketing, MAXIMUS Inc.; Executive Director, The Finance Project; Senior Manager, Deloitte Consulting; Deputy Executive Director, Director of State Services, Director of Human Resources, National Governors Association; Special Administrator for Gasoline Rationing, U.S. Department of Energy; Deputy Assistant Secretary for Welfare Legislation, HHS; Associate Commissioner for Family Services, SSA; Commissioner, Erie County Department of Social Services; Director, Division of Community Services, Washington State Department of Social and Health Services. Earlier positions with State of New York: Executive Secretary, Health Planning Commission; Director, State Senate Task Force on Critical Problems; Executive Deputy and Acting Commissioner, Department of Social Services; Assistant Secretary to the Governor for Human Resources, Deputy Commissioner, Division of Human Rights.

Appendix E: Web-based, Public Sector Data Exchanges

These are examples of information sharing platforms that occur across state, federal, and tribal entities within the United States.

HHS and State Courts

HHS's ACF and NCSC partnered to improve the timely sharing of data between child welfare agencies and state courts. HHS oversees the data exchange. The domain uses the National Information Exchange Model (NIEM) that provides participating state entities a template that can be easily tailored to its individual needs. Participants in the data exchange include federal, state, local, and tribal entities. More information about the data exchange is provided at https://www.niem.gov/sites/default/files/NIEM_helping_children.pdf.

U.S. Environmental Protection Agency

The Environmental Information Exchange Network (EIEN) is a web-based system used by state, tribal, and territorial partners to share environmental and health information with one another and the EPA securely. EIEN uses a standards-based approach that allows partners to exchange data regardless of the specific IT used and eliminates the need to share data on paper, discs, or by other media (including email). According to the EPA, EIEN provides information-sharing partners the ability to improve operational efficiency while reducing costs by:

- Improving the timeliness and accuracy of environmental data,
- Reducing the burden and costs associated with reporting data,
- Using robust security measures to control data access,
- Enhancing data access for environmental professionals, and
- Supporting better decisions on environmental and health issues.

More information about the benefits of EIEN can be found at https://www.epa.gov/exchangenetwork/learn-about-environmental-information-exchange-network.

Global Justice Information Sharing Initiative (GLOBAL)

Under the auspices of DOJ, GLOBAL is a web-based information-sharing platform among more than thirty independent entities to enhance information sharing between law enforcement, courts, and correctional facilities. More information about the benefits of GLOBAL can be found at https://it.ojp.gov/global.

Pennsylvania Department of Human Services Enterprise Web Services Security and Governance framework

In recent years, Pennsylvania's Department of Human Services took several initiatives to enhance both operational and cybersecurity aspects of data exchange. As for the latter, it created a centralized gateway to secure the exchange of sensitive PII data exchanged with federal, state, and county agencies. The framework improved operational efficiency, leading to significant cost savings to the agency. Separately, the agency automated many of its data exchange processes to optimize the exchange of data between the department and over 100 entities within the state and federal government. For more information, see https://d117h1jjiq768j.cloudfront.net/docs/default-source/default-document-library/pa-case-study-redesign_final05970506bd9442d49ab7d7f1bf49981a.pdf?sfvrsn=ec882838_0.

Appendix F: Overview of SSA's DEP

As described in Appendix E, federal and state entities are increasingly partnering to develop bi-directional, web-based data exchanges to share data and to improve the outcome of their respective programs. The development of web-based data exchanges allows for a nimbler and more cost-effective way to access large and complex databases. In addition, the exchange may provide data-sharing participants several additional benefits:

- Facilitate the exchange of data among entities with different IT systems and levels of technical sophistication as participants can upload real time data directly to the web-based system without first modifying their own data collection systems;
- Enhance cybersecurity as data exchange partners are only provided access to predetermined data sets; and
- Potentially eliminate the need for computer systems (SSA's and/or the other entity's) to be reprogrammed or reformatted in order to exchange data, significantly reducing costs and time in both development, implementation, and training.

In conducting interviews with SSA head-office staff in March 2019, the study team has learned that SSA has been developing an IT infrastructure concept for data exchange modernization—the DEP. The DEP concept would allow sharing of real time data "through a single data exchange gateway" with web-based technology. The DEP concept provides, "a centralized, interactive, and dynamic user-friendly experience for requesting, sending, receiving, and administering incoming and/or outgoing data exchanges." An overview of the DEP concept provided by SSA appears below.

More recently, SSA informed the study team that they had put development of the DEP concept on hold and that the project did not receive funding for FY 2020. At the time of this report, it is unclear when and if SSA will resume the DEP.

SSA provided the following description of the DEP to the study team:

Product Vision

> The [DEP] will reduce and centralize the many different systems and applications that process and manage the agency's data exchanges. [The DEP] will be the foundation for data exchange that will support future customer requests, commissioner priorities, and legislative mandates[.]
>
> The [DEP] will provide data exchange customers, both internal and external to SSA, with a centralized, interactive, and dynamic user-friendly experience for requesting, sending, receiving, and administering incoming and/or outgoing data exchanges. The [DEP] investment addresses the problems that both internal and external data exchange customers experience with the existing data exchange processes, applications, and workload. [The DEP] will provide a holistic solution that will generate greater value for our customers and maximize the Return on Investment for the agency.

Data exchange processes and customer communication will be transparent, cost-effective, and streamlined. Data will be offered from a menu of data exchange services utilizing an authoritative source of data and shared through a single data exchange gateway. SSA will use historical and management information about our customers to drive resource decisions, identify possible fraud indications, evaluate the effectiveness of exchanges, and anticipate future needs.

We believe [the DEP] may help other organizations receive data more quickly, and help to reduce improper payments, SSA field office traffic, and administrative expenses.

Future To-Be Steps

Below is a technical diagram of [the DEP]. This is a high-level depiction of the communication between the customer, the applications, and the processing.

The [DEP] will include three pieces of functionality for streamlining the complete end to end data exchange process:

1. Customer Connection
2. Workflow Processor
3. Data Exchange Gateway

Customer Connection

The Customer Connection is a foundational piece of [the DEP] that will be provided to data exchange customers. This includes internal SSA employees, as well as external customers from various Federal, state, private, and foreign entities. Customer connection will be a role-based communication tool for the individuals interested in data exchange. Customer Connection will provide functionality to:

- Obtain general information about the data exchange process
- Obtain data-exchange specific information
- Submit an online, automated, and complete data exchange request
- Create and manage account information
- Obtain historical and management information
- Submit and receive data exchange-specific communication

Workflow Processor -- Creating Agreements, Generating Bills, and Receiving Payments

The Workflow Processor will be a tool used to establish the work flows required for establishing and maintaining a data exchange. There will be direct communication between the customer connection and the workflow processor to ensure timely establishment of the exchange. The Workflow Processor will provide functionality for:

- Account feasibility analysis

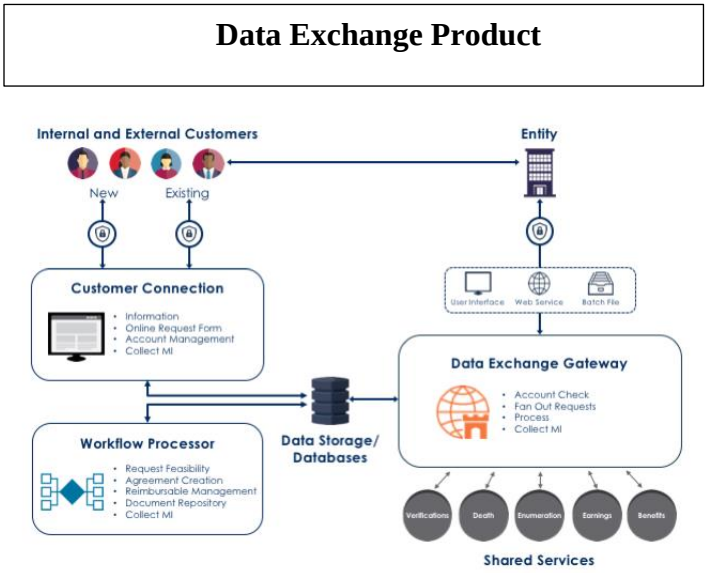
- Agreement creation
- Reimbursable billings
- Account payments and fund allocations
- Document repository
- Collection of management information

Data Exchange Gateway -- Implementing the Request and Sending the Data

The Data Exchange Gateway will provide a centralized location for entities to send and receive data. The Data Exchange Gateway will communicate with the data stored from the customer connection and workflow processor to ensure that data is exchanged in compliance with the corresponding legal agreement. The gateway will allow for entities to transfer data using online applications, web services, and batch files. The Data Exchange Gateway will provide functionality for SSA to:

- Have a single access point for data exchange transactions
- Accurately track data sent and/or received from customers
- Ensure data is in compliance with the various agreements
- Have sufficient information in application logs to identify and debug issues
- Capture meta-data for every exchange transaction
- Fan out data requests to various services
- Use Application Program Interfaces to process data through selectable and reusable business process logic
- Process data through flexible and standardized business rules stored in a central location

Note: This is not a final list of functionality; planning and analysis and/or Agile methodology will identify and develop additional functionality



Appendix G: State Legal Barriers Chart

The table below reflects the study team's findings about the three main types of statutes or judicial rules that potentially serve as legal barriers in each state. As discussed in the report, some of these statutes explicitly exempt state courts (or are otherwise not applicable). As a result, the fact that a state has been identified as having one of these statutes does not necessarily mean the law poses a barrier. For that reason, those state laws the study team has identified as not applying to state courts have been marked with an asterisk. For example, because Alabama has a statewide statute governing the disclosure of SSNs, but it does not apply to state courts, the entry is followed by an asterisk.

To gather this information, the study team has generally reviewed the statutory code in each state; searched for key words within each state's code, including the words "privacy," "open records," and "social security number;"[235] and reviewed the judicial rules on state court or government websites.

State	Statewide Privacy Law?	Statewide Statute Specifically Governing the Disclosure of SSNs?	Statewide Judicial Rules Governing Disclosure of Case Records by Courts?
Alabama	YES*	YES*	YES
Alaska	YES*	YES*	YES
Arizona	YES*	YES	YES
Arkansas	YES*	YES	YES
California	YES*	YES	YES
Colorado	YES*	YES*	YES
Connecticut	YES*	NO	YES
Delaware	YES*	NO	YES
Florida	YES	YES	YES
Georgia	YES*	YES*	NO
Hawaii	YES*	YES	NO
Idaho	YES	YES	YES
Illinois	YES*	YES*	YES
Indiana	YES*	YES*	YES

[235] Because of the wide diversity and complex nature of state statutory codes, the study team acknowledges the small possibility that some state laws falling within one of these three categories may not have been identified using these search terms. Even so, because the purpose of the survey was to gain a *general* understanding of the significance and operation of state laws that may serve as a barrier to information sharing, not to determine or analyze the precise legal barriers present in each state, the study team is confident its survey, as a whole, accurately reflects the general significance of each type of state law identified in the study.

Iowa	YES*	YES*	YES
Kansas	YES*	YES*	YES
Kentucky	YES	NO	NO
Louisiana	YES	NO	NO
Maine	YES	NO	YES
Maryland	YES*	YES*	YES
Massachusetts	YES*	NO	YES
Michigan	YES*	YES	YES
Minnesota	YES*	YES*	YES
Mississippi	YES	YES	YES
Missouri	YES*	YES*	YES
Montana	YES	NO	NO
Nebraska	YES	NO	YES
Nevada	YES*	YES	YES
New Hampshire	YES*	NO	YES
New Jersey	YES*	YES*	YES
New Mexico	YES*	YES*	YES
New York	YES*	YES*	NO
North Carolina	YES*	YES	NO
North Dakota	YES*	YES	YES
Ohio	YES*	YES	YES
Oklahoma	YES*	YES	YES
Oregon	YES*	YES*	NO
Pennsylvania	YES	YES*	YES
Rhode Island	YES*	YES*	YES
South Carolina	YES*	YES	YES
South Dakota	YES*	YES	YES
Tennessee	YES*	YES	NO
Texas	YES*	YES*	YES
Utah	YES	YES	YES
Vermont	YES*	YES*	YES
Virginia	YES*	YES*	NO
Washington	YES*	NO	YES
West Virginia	YES	NO	NO
Wisconsin	YES	NO	YES
Wyoming	YES*	NO	YES