

Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD

Appellate Division

---

In the Case of:	)	
	)	DATE: June 20, 2003
Social Security Administration,	)	
	)	
Petitioner,	)	Civil Remedies CR968
	)	App. Div. Docket No. A-03-16
	)	Decision No. 1885
- v. -	)	
	)	
National Federation of Retired	)	
Persons,	)	
Respondent.	)	

---

RECOMMENDED DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION

This case is before the Board on a request for review filed by the National Federation of Retired Persons (NFRP). NFRP is appealing an October 28, 2002 decision by Administrative Law Judge (ALJ) Carolyn Hughes that imposed a civil money penalty pursuant to section 1140 of the Social Security Act (Act).

Section 1140 authorizes the imposition of civil money penalties on persons who misuse symbols, emblems, or words related to the Social Security or Medicare programs. In her October 28, 2002 decision, the ALJ determined that NFRP had used Social Security program words on mailed solicitations in a manner proscribed by section 1140. We affirm that determination because it is supported by substantial evidence and consistent with applicable legal authorities. However, we reduce the civil money penalty imposed by the ALJ from \$167,138 to \$83,569.

Statutory and Regulatory Background

Section 1140(a) of the Act provides that -

- (1) No person may use, in connection with any item

constituting an advertisement, solicitation, circular, book, pamphlet, or other communication . . . alone or with other words, letters, symbols or emblems-

(A) the words "Social Security", "Social Security Account", "Social Security System", "Social Security Administration", "Medicare", "Health Care Financing Administration", Department of Health and Human Services", Health and Human Services", "Supplemental Security Income Program", or "Medicaid", the letters "SSA", "HCFA", "DHHS", "HHS", or SSI", or any other combination or variation of such words or letters, or

(B) a symbol or emblem of the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services (including the design of, or a reasonable facsimile of the design of . . . envelopes or other stationery used by the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services) or any other combination or variation of such symbols or emblems,

in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services or that such person has some connection with, or authorization from, the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services.

42 U.S.C. § 1320b-10(a). Section 1140(a) also provides that a determination of liability under that section must be made without regard to whether the communication or solicitation in question contains a disclaimer of governmental affiliation. 42 U.S.C. § 1320b-10(a)(3).

Section 1140 provides for civil money penalties (CMPs) of up to \$5,000 for each violation of its provisions. 42 U.S.C. § 1320b- 10(b). Each piece of mail containing "one or more words, letters, symbols, or emblems in violation of subsection (a)" constitutes a separate violation. Id.; see also 20 C.F.R. § 498.102(c).

The regulations implementing section 1140 are found in 20 C.F.R. Part 498. Echoing the statutory language, the regulations authorize the Social Security Administration's Inspector General (I.G.) to impose a civil money penalty (CMP) against any person who -

has made use of certain Social Security program words, letters, symbols, or emblems in such a manner that they knew or should have known would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that an advertisement or other item was authorized, approved, or endorsed by the Social Security Administration, or that such person has some connection with, or authorization from, the Social Security Administration.

20 C.F.R. § 498.102(b).

In determining the amount of a CMP, the I.G. must take into account the following: (1) the nature and objective of the advertisement, solicitation, or other communication, and the circumstances under which it was presented; (2) the frequency and scope of the violation and whether a specific segment of the population was targeted; (3) the prior history of the individual, organization, or entity and their willingness or refusal to comply with informal requests to correct violations; (4) the history of prior offenses of the individual, organization, or entity in their misuse of program words, letters, symbols, and emblems; (5) the financial condition of the individual or entity; and (6) such other matters as justice may require. 20 C.F.R. § 498.106(a).

If the I.G. seeks to impose a CMP, it must first serve the alleged violator (respondent) with a written notice of intent. 20 C.F.R. § 498.109(a). In addition to specifying the amount of the proposed penalty, the notice of intent must identify the factual predicate and statutory basis for the penalty. Having received a notice of intent, the respondent is entitled to a hearing before an administrative law judge to contest the I.G.'s findings and the amount of the proposed CMP. 20 C.F.R. § 498.202.

An ALJ may affirm, deny, increase, or reduce a CMP proposed by the I.G. 20 C.F.R. § 498.220(b). A respondent who has invoked his administrative hearing rights may seek judicial review of the penalty finally imposed. See 42 U.S.C. §§ 1320b-10(c)(1), 1320a- 7a(e); 20 C.F.R. § 498.127.

### Factual Background

The following facts are drawn largely from the ALJ's decision and are undisputed. (Record citations are abbreviated as follows: NFRP's exhibits ("RX"), SSA's exhibits ("PX"), hearing transcript ("Tr."), and ALJ exhibits ("ALJX").)

NFRP is a Texas nonprofit corporation. RX 1, 2. Mr. Elmer Gibson, a former insurance agent, is NFRP's president. Tr. at 35. He is married to Deborah Gibson, the president and sole owner of Nacogdoches Business Center, Inc., a company that "generates revenues and profits from its commercial business dealings with the NFRP." ALJX 1; Tr. at 390, 468-70. NFRP purports to be an organization dedicated to promoting and furthering the interests of senior citizens. Tr. at 472-473, 518-19; RX 2.

NFRP's chief commercial activity is the provision of direct mail services to insurance agents, brokers, or companies. ALJX 1; Tr. at 390. These services consist mainly of the bulk mailing of "lead card" solicitations. ALJX 1; Tr. at 35, 59-60, 86-87, 167-169. Lead card solicitations are used to identify consumers who may buy insurance. Tr. at 349, 452-54. NFRP mails lead card solicitations in bulk to a geographical area selected by the customer (usually an insurance agent), which pays \$300-\$350 per thousand solicitations. Tr. at 35, 166-69, 480.

NFRP mails its lead card solicitations in at least two different types of envelopes. For some mailings, a standard business envelope with a transparent addressee window is used. Tr. at 148-150, 155, 485-87; RX 26, 27. Other mailings use what is called a "snap mailer." Tr. at 134; PX 10-14. Snap mailers are envelopes with perforations along the sides that can be torn away, allowing the recipient to view or remove the contents. See PX 10-14. All of the disputed solicitations in this case were sent in snap mailers.

Inside NFRP's snap mailer envelope is a lead card. The lead card alludes to what is in fact a private insurance product, then tells the recipient that additional information about the product can be obtained by providing certain personal information and returning the card to NFRP. See PX 10-14. NFRP gives the

completed lead cards it receives to the insurance agent who paid for the solicitation. Tr. at 82-84. The agent then contacts the recipient by telephone or other means. Tr. at 84-86, 126. The agent is not obliged to tell the consumer that he is working from a lead card received from NFRP. Tr. at 504.

Five different snap mailers – by “snap mailer” we mean both the envelope and the interior lead card – are at issue in this case. The five contested mailers are called the Snap 5, Snap LT-1, Snap LT-2, Snap C-6, and Snap M&B4. See RX 20-24; PX 10-14. As we explain below, the primary differences between the mailers appear on the lead cards. Mr. Gibson chose the design of, and composed the text in, each snap mailer. Tr. at 165, 546.

We first describe the snap mailer envelope. For each mailer except the Snap 5, the outside back of the envelope looks like this:

**NFRP**  
**P.O. Box 17943**  
**San Antonio, TX**  
**78217**

## **SOCIAL SECURITY PAMPHLETS.**

Social Security Survivors Death Benefits  
 Right To Appeal Supplemental Security Income  
 Social Security And Your Right To Representation  
 SSI Supplemental Security Income  
 Social Security Benefits For Husbands And Widowers  
 How You Earn Social Security Credits  
 Social Security, How It Works For You  
 What You Have to Know About SSI  
 How Disability Is Determined  
 Your Right To Question Your Medical Insurance Payment

These pamphlets have been reprinted by NFRP from brochures by the U.S. Department of Health and Human Services as a public service and are part of education programs conducted by NFRP and are available to all ages regardless of socioeconomic levels, race, sex, religion or national origin. To receive any of these pamphlets or information concerning our organization and the benefits of membership, please send a self-addressed stamped envelope to: **NFRP, P.O. Box**

See PX 11-14. The outside back of the Snap 5 is identical to what appears above except that NFRP’s name and address do not

appear in the upper left hand corner. PX 10.

The outside front of each mailer is partially blackened to obscure its contents – a feature called a “privacy block.” Four of the five mailers show no return address on the outside front. The fifth mailer – the Snap 5 – does show a San Antonio return address on the front. NFRP’s name does not appear next to or over the San Antonio address, but next to that address is an image of a building resembling the United States Capitol. The following are images of the outside front of the Snap 5 and Snap C-6 mailers:



The outside fronts of the other three mailers are identical in material respects to the Snap C-6, except that the M&B4 and LT-1 mailers have the words "Medicare Supplement Lower Rates" and "Long Term Care," respectively, along the top.

The lead card inside each snap mailer is essentially a postcard. One side of the card contains NFRP's mailing address and looks like this:



The back of each lead card contains text that asks the recipient to indicate his or interest in receiving information about the insurance products alluded to. An image of the Capitol appears in the background.

The text on the back of the lead card varies from mailer to mailer, as follows:



**The Snap 5.** The back of the Snap 5 lead card (PX 10) looks like this:

PLEASE see that I receive full information about DEATH BENEFITS available to me under the Social Security System.

DETAILS & COST on how I can supplement it with a \*cash funeral expense benefit. To find out how you may qualify, complete card and mail today! There is no obligation for your inquiry.

Please indicate the amount you anticipate needing for a funeral.  
 (Check one) \$3,000    \$5,000    \$7,500    \$10,000

**Completed Card  
 Must Be Returned  
 Within 5 Days**

Date of Birth (self) \_\_\_\_\_ Date of Birth (spouse) \_\_\_\_\_  
 Phone ( ) \_\_\_\_\_ Signature \_\_\_\_\_

\*Life Ins. Proceeds Issued By A Company Licensed In Your State

© NFRP

The phrase "Life Ins. Proceeds Issued by A Company Licensed In Your State" appears, in relatively small font, at the bottom of all five lead cards.

**The Snap C-6.** The back of the Snap C-6 lead card (PX 11) reads in part:

In response to numerous requests we reviewed several Medicare Supplements, Long Term Care and Home Health Care policies being offered nationally:

**Medicare Supplement, Plan F (100%),**  **Plan C (20%),** at the lowest cost available nationwide with no waiting period and you can choose your own doctors and hospitals.  **Long Term Nursing Care** covering all levels of care.  **Home Health Care** so you can stay at home and receive the nursing care you may need with all levels of care:  **Custodial, Intermediate & Skilled Care** in the comfort of your own home; lifetime benefits available. For full information, complete this card and mail today. Please indicate above the particular information you wish to receive by marking the appropriate box.

The bottom half of the Snap C-6 card is identical to the bottom half of the Snap 5 card, with instructions to return the card within five days and spaces for personal information.

**The M&B4.** The back of the M&B4 lead card (PX 12) is titled "MEDICARE SUPPLEMENT LOWER RATES" (in bold font). Below that title is the following text:

AS OF JANUARY, A.A.R.P. AND OTHER MEDICARE SUPPLEMENT INSURERS HAVE INCREASED THEIR RATES UP TO 40% ON MEDICARE SUPPLEMENT COVERAGE.

POLICIES A THROUGH F ARE NOW AVAILABLE AT LOWER RATES IN THE STATE OF TEXAS TO SUPPLEMENT MEDICARE FOR TEXAS RESIDENTS THAT QUALIFY.

ALLSO (sic) YOU MAY QUALIFY FOR A FINAL EXPENSE PROGRAM THAT COULD PAY UP TO \*\$10,000 TO YOUR BENEFICIARY. PLEASE INDICATE BELOW THE INFORMATION YOU WISH TO RECEIVE, AND MAIL COMPLETED CARD TODAY FOR FULL INFORMATION.

[ ] \*\$10,000 FINAL EXPENSE PROGRAM. [ ] MEDICARE SUPPLEMENT POLICIES

Below this text, on the left, is a signature line, with spaces for the recipient to fill in age, spouse's age, and phone number.

**The Snap LT-2.** The text on the back of the LT-2 lead card (PX 13) states in part:

MEDICARE DOES NOT PAY FOR EXTENDED LONG TERM CARE EVEN THOUGH 2 OUT OF 5 SENIORS WILL NEED THIS CARE. INDIVIDUALS ARE RESPONSIBLE FOR THEIR OWN LONG TERM CARE NEEDS AND THE COST CAN RUN UPWARDS OF \$50,000 PER YEAR! CONGRESS RECENTLY PASSED TAX INCENTIVES THAT HIGHLIGHT THE IMPORTANCE OF LONG TERM CARE COVERAGE AND TO ENCOURAGE THE PURCHASE OF LONG TERM CARE INSURANCE. TO FIND OUT IF YOU QUALIFY FOR THESE TAX ADVANTAGES, COMPLETE CARD AND MAIL TODAY! WE WILL SEE THAT YOU RECEIVE FULL INFORMATION.

Below this text is the invitation (essentially identical to the one on the M&B4) to provide personal information.

**The Snap LT-1.** The LT-1 lead card (PX 14) is titled "LONG TERM CARE" (in bold font). Below the title, is the following text:

DELAYING THE PURCHASE OF LONG TERM CARE COVERAGE CAN LEAVE YOU SUSCEPTIBLE TO FINANCIAL LOSS. THE CENSUS BUREAU HAS ESTIMATED THAT THE NUMBER OF NURSING HOME RESIDENTS, ALREADY AT 1.5 MILLION, WILL INCREASE BY 22% BY THE YEAR 2000.

THIS TYPE OF CARE CAN COST \$180 TO \$250 A DAY AND MEDICARE DOES NOT COVER A PERIOD OF BROAD LONG TERM CARE. ANY ALTERATION IN YOUR HEALTH CAN AFFECT YOUR FUTURE ABILITY TO BUY THE PROTECTION YOU NEED.

DO NOT DELAY! TO FIND OUT MORE ABOUT THIS NECESSARY PROGRAM, AS WELL AS NEW TAX ADVANTAGES COMPLETE THE POSTAGE-PAID CARD AND MAIL TODAY!

The bottom half of the card is identical to the bottom of the lead cards in the Snap M&B4 and LT-2 mailers.

#### Procedural Background

On August 1, 2000, the I.G. advised NFRP by letter that it was violating section 1140. PX 6. The letter, signed by Kathy Buller, SSA's Counsel to the Inspector General, enclosed a copy of section 1140 and explained that it authorizes CMPs against those who misuse Social Security program words, letters, symbols, or emblems in connection with an advertisement, solicitation, or other communication. Also enclosed with the letter was a photocopy of the Snap 5 mailer and lead card. The letter asked NFRP to -

immediately cease and desist from all direct mailings in a facsimile Government document and use of the words "Social Security," "Social Security System," Supplemental Security Income," [and] "Social Security Benefits" in a manner which reasonably can be construed as conveying the false impression that the mailings are authorized, approved or endorsed by SSA.

Id. In addition, the letter asked NFRP to provide evidence of its compliance within 30 days. Id.

In an August 25, 2000 letter, Mr. Gibson responded that "NFRP does not believe that it is breaking any rules, regulations or law in Section 1140." RX 18. Mr. Gibson also asked the I.G. to

transfer the matter to the Texas Attorney General's office. Id. The I.G. denied NFRP's transfer request in a letter dated January 17, 2001. PX 7. The January 17 letter gave NFRP 14 days to provide evidence of compliance, indicating that "[s]uch evidence should include copies of your current solicitations and information regarding when you stopped mailing the volatile [sic] solicitations." Id. NFRP did not submit evidence in response to the I.G.'s January 17 letter and continued to send out solicitations using the Snap 5 mailer. Tr. at 37, 131.

On March 15, 2001, the I.G. issued a subpoena requesting that NFRP produce copies of current solicitations containing Social Security program words. PX 8 at 3. In the cover letter accompanying the subpoena, the I.G. eminded NFRP that it had failed to provide evidence of compliance with the August 2000 cease-and-desist letter. Id. at 1.

In its response to the subpoena, NFRP revealed that, in addition to the Snap 5, it was using the LT-1, LT-2, C-6, and M&B4 mailers. See RX 43, at 12.

On July 6, 2001, the I.G. issued NFRP and Mr. Gibson a notice of intent pursuant to 20 C.F.R. § 498.109. PX 9. The notice indicated the following:

- The I.G. was proposing to impose a CMP against NFRP and Mr. Gibson (jointly and severally) because of their continued mailing of solicitations that violated section 1140.
- The five contested mailers were misleading in part because they contained or used various Social Security program words along with "privacy block" and a likeness of the U.S. Capitol, and because they were designed to resemble "official government mailings."
- Although NFRP and Mr. Gibson had known of the alleged violations since August 2000, the I.G. was proposing a CMP only for the period from April 1, 2001 to June 15, 2001. At least 83,659 contested mailers were sent out by NFRP during this period, the large majority of which were Snap 5 mailers.  
RX 46 at 2.
- In light of NFRP's and Mr. Gibson's financial condition, the proposed CMP would be limited to

\$1.00 per violation, for a total of \$83,659.

(By stipulation, the parties later lowered the number of mailings subject to the CMP from 83,659 to 83,569. Tr. at 5; ALJX 2.)

In accordance with the regulations, NFRP and Mr. Gibson contested the I.G.'s penalty determination by requesting a hearing before an administrative law judge. The I.G. subsequently withdrew the proposed penalty against Mr. Gibson in his personal capacity.

The ALJ held a hearing in this case on April 30 and May 1, 2002. After the hearing, the parties submitted post-hearing briefs ("SSA PHB" and "NFRP PHB").

#### The ALJ Decision

The ALJ determined that NFRP's liability under section 1140 for the contested mailers depended on answers to two questions: (1) "Did NFRP know, or should it have known, that its solicitations conveyed the false impression that its mailings were approved, endorsed, or authorized by SSA or that NFRP had some connection with or authorization from the agency?" and (2) "Could the solicitations reasonably be interpreted or construed as conveying the false impression that they were approved, endorsed, or authorized by SSA or that NFRP had some connection with or authorization from the agency?" ALJ Decision at 6.

Before answering these questions, the ALJ examined the legislative history of section 1140, about which she noted the following (see ALJ Decision at 7-9):

- Congress enacted section 1140 as part of the Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360. As originally enacted, section 1140 authorized the imposition of a CMP, not to exceed \$5,000 *per mass mailing* (and \$100,000 per year), against any person who "knew or should have known" that use of Social Security or Medicare program words, letters, symbols, or emblems would convey a false impression that its mailing or other communication was connected with the Social Security Administration (SSA) or the Health Care Financing Administration (HCFA).
- In 1992, the House subcommittees on Social Security and Oversight held a hearing to examine the effectiveness of section 1140 and other laws designed to prevent deceptive advertising and

solicitations relating to Social Security and other federal programs. See SSA PHB, Attachment E ("Deceptive Mailings and Solicitations to Senior Citizens and Other Consumers," 102d Cong., 2d Sess. 124 (Comm. Print 1992)). Following the hearing, the subcommittees issued an "oversight report" entitled "Deceptive Solicitations" (hereinafter referred to as the 1992 House report), a copy of which is Attachment C to SSA's post-hearing brief. The 1992 House report described an ongoing "pattern of deceptive solicitation" that involved (among other things) the use of Social Security and Medicare information "as a ruse" to obtain sales leads for insurance companies and other businesses. SSA PHB, Attachment C, at 3-4.

- According to the 1992 House report, a typical practice of lead card mailers was to use the words "Important Social Security Information Enclosed," or "Important Medicare Benefit Information Enclosed" on the front of an envelope to get the addressee's attention. Inside the envelope would be a letter with general information about the Social Security or Medicare programs and a request that the recipient return a preprinted card for additional information. Addressees who returned the card expected to receive additional information about Social Security or Medicare. Instead, they often received a phone call or unannounced personal visit from an insurance agent trying to sell them a policy. Id. at 9-10.

- The 1992 House report stated that lead-card mailings "can be particularly confusing for the elderly . . . [because they] may include prominently displayed words such as Social Security and Medicare or Government symbols such as . . . the U.S. Capitol . . . [and] may closely resemble a typical Government envelope." Id. at 10.

- The 1992 House report expressed concern that the proliferation of mailings that falsely suggested official government business interferes with the government's ability to correspond with the public because it increases the likelihood that true government mailings will be destroyed without being opened. Id. at 11.

- The House subcommittees recommended various changes to section 1140, including a provision that allows for the imposition of penalties irrespective of the alleged violator's intent. Id. at 13.
- In 1994, as part of the Social Security Independence and Program Improvements Act (Pub. L. No. 103-296), Congress amended section 1140 by eliminating the annual penalty cap, prohibiting the use of disclaimers (of governmental connection) as a defense to liability, creating an alternative standard of liability independent of the actor's knowledge or intent, and redefining a violation as any piece of mail (rather than a "mass mailing") that misuses the protected program words.

After setting out this background information, the ALJ answered both of the liability questions she posed in the affirmative. Noting that NFRP's solicitations all contained protected Social Security program words, the ALJ first determined that NFRP "knew or should have known" that the solicitations conveyed the false impression of governmental connection or authorization. ALJ Decision at 10. In support of this determination, she found that: (1) NFRP's direct mail services allowed insurance agents to solicit business without violating state insurance disclosure rules; (2) NFRP's promise of Social Security pamphlets was a "ruse" to justify its misuse of protected program words; (3) NFRP deliberately displayed protected words on the outside of its snap mailers to induce recipients to respond; (4) NFRP had received repeated warnings that its mailers violated section 1140; and (5) Mr. Gibson's claim that the I.G. had led him to believe that NFRP's mailers did not violate section 1140 was "wholly incredible." Id. at 12, 17, 19, 23, and 25.

Second, the ALJ determined that a reasonable person could, based primarily on an inspection of the outside of NFRP's mailers, get the false impression that they were approved, endorsed, or authorized by SSA. See ALJ Decision at 16, 29. The ALJ identified a number of factors that led her to this conclusion, including the visual prominence of Social Security program words on the back of the mailers, the image of the U.S. Capitol on the front of the envelope,<sup>1</sup> the fact that the outside of the mailers offers little or no explanation of their purpose, and testimony from witnesses who received the mailers.

-----  
<sup>1</sup>Only the Snap 5 mailer had this image on the outside front.

After concluding that NFRP's mailings violated section 1140, the ALJ considered whether the proposed CMP was appropriate based on the regulatory factors in 20 C.F.R. § 498.220. ALJ Decision at 36-40. The ALJ concluded that \$1.00 per violation was an inadequate penalty in light of several factors, including Mr. Gibson's "lack of veracity" and "refusal to acknowledge the seriousness of the offense." Id. at 39. Consequently, the ALJ doubled the penalty to \$2.00 per violation, for a total of \$167,138. Id. at 40.

### Standard of Review

The regulations at 20 C.F.R. § 498.221(i) specify the Departmental Appeal Board's standard of review. Section 498.221(i) provides that the DAB "will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained an error of law." Substantial evidence exists to support a factual finding "if a reasonable mind reviewing the evidence in the record as a whole could accept it as adequate to support his conclusion." Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938); see also Richardson v. Perales, 402 U.S. 389, 401 (1971).

Regarding the substantial evidence standard, the Board has said that –

the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the decision below. The reviewer does not, however, reweigh the evidence nor substitute his or her judgment for that of the initial decision-maker. Thus, the reviewer must not displace a "choice between two fairly conflicting views," even though a different choice could justifiably have been made if the matter had been before the reviewer de novo.

Carehouse Convalescent Hospital, DAB No. 1799, at 6 (2001)  
(citations omitted).

The regulations instruct us to apply a harmless error rule. Title 42 C.F.R. § 498.422 provides that:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or



order or act, unless refusal to take such action appears to the ALJ or the DAB to be inconsistent with substantial justice. The ALJ and the DAB at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

### Discussion

NFRP makes numerous contentions in this appeal. We address them in the four sections below. Section A addresses the contentions regarding the ALJ's section 1140 liability findings. Section B addresses NFRP's contention that the ALJ abused her discretion by doubling the CMP proposed by SSA. Section C addresses NFRP's constitutional arguments. Finally, Section D addresses NFRP's contentions regarding the ALJ's evidentiary and other rulings.

#### A. Section 1140 liability

Section 1140 establishes two liability standards, which we refer to as the "knowledge standard" and the "reasonableness standard." A person violates section 1140 under the knowledge standard if he uses Social Security program words in a solicitation or other communication "in a manner which [he] knows or should know would convey . . . the false impression that such item is approved, endorsed, or authorized by the Social Security Administration[.]" Under the reasonableness standard, a person violates section 1140 if the communication "reasonably could be interpreted or construed as conveying" the false impression that it was approved, endorsed, or authorized by SSA. For narrative purposes, we first consider the ALJ's findings under the "reasonableness" standard.

1. Substantial evidence supports the ALJ's finding that the contested mailers "reasonably could be interpreted or construed as conveying the false impression" of SSA approval, endorsement, or authorization.

On its face, the reasonableness standard does not require SSA to establish that some person actually had a false impression that the communication was endorsed, approved, or authorized by SSA. Section 1140 requires only that a person of average intelligence "could" get such a false impression from inspecting the communication. In addition, section 1140 does not require a factual misrepresentation or proof that some person was actually deceived by the communication. It requires only that the communication leave or create a "false impression." An impression is "a notion, feeling, or recollection, esp[ecially] a

vague one." Webster's New World Dictionary (2d College ed.).<sup>2</sup> A false impression, then, is a suspicion or vague notion based on an incomplete or erroneous understanding of the facts.

The ALJ's determination under the reasonableness standard was based primarily on the appearance and content of the mailer's envelope. See ALJ Decision at 29-36. On the back of each envelope, in bold upper case letters, are the words "Social Security Pamphlets," followed by a list of pamphlet titles, all of which relate to Social Security's benefit programs. Focusing only on this list, a recipient could reasonably believe that the mailer came from the Social Security Administration (SSA). Of course, the recipient could deduce, from looking at the entire envelope (front and back), that the mailer was not from SSA. However, that deduction requires close inspection, in part because all of the mailers except for the Snap 5 lack a return address on the outside front, where such information is normally found. NFRP's name does appear in the small, pre-printed postmark in the upper right hand corner, but this is not where most persons would look to determine the identity of the sender.

The only other clues about the sender's identity are on the back of the envelope. The NFRP acronym and address are displayed above and to the left of the list of pamphlets (except on the Snap 5). NFRP's name and address are also contained in the paragraph that appears, in comparatively small font, below the list of pamphlets. This paragraph advises the recipient that he can obtain any of the listed pamphlets by writing to NFRP at its San Antonio address.

The Snap 5 shows a return address on the outside front. However, NFRP's name does not appear above the address. A recipient of the Snap 5 can positively identify NFRP as the sender only by comparing the return address on the outside front with the name and address in the paragraph below the list of pamphlets. Assuming that he can identify NFRP as the sender, a recipient may not immediately recognize NFRP as what it purports to be - namely, a private membership organization. None of the envelopes (or, for that matter, the interior lead cards) identify NFRP as such. Moreover, the mailers do not identify NFRP by its full name, using only its acronym. This may confuse recipients

-----  
<sup>2</sup>In the American Heritage Dictionary (4<sup>th</sup> ed. 2000), the primary definition of "impression" is "[a]n effect, feeling, or image retained as a consequence of experience." A secondary definition is "a vague notion, remembrance, or belief."

because government agencies and programs often identify themselves by their acronyms (e.g., SSI, SSA, HCFA, CMS, FEMA, HUD). On the Snap 5 envelope, the image of the U.S. Capitol next to NFRP's return address hints that NFRP is affiliated with or connected to the federal government in some respect.

The paragraph on the outside back of each mailer states that the listed Social Security pamphlets were reprinted and distributed by NFRP as a "public service." To some, the words "public service" connote governmental or official activity. Given that the pamphlets relate to benefit programs financed and operated by the federal government, and seeing no other significant information about NFRP on the envelope, a reasonable person could, by looking at the outside back of the mailer, reasonably surmise that the offer of pamphlets – and by extension the mailer's contents – were endorsed, approved, or authorized by the agency responsible for those programs.

SSA put on testimony from three persons – Marian Oden, Ima Gray, and George Rodriguez – who actually received NFRP mailers. These persons are, in the ALJ's opinion, well-educated or astute consumers, a characterization that NFRP does not dispute. See ALJ Decision at 31-32; NFRP Brief at 81-82. Ms. Gray and Mr. Rodriguez discerned that the solicitations were unconnected with SSA shortly after opening the mailers and reading the lead cards. Ms. Oden reached this conclusion before opening the envelope by reading the fine print below the list of pamphlets.

Nevertheless, the ALJ found, and NFRP does not dispute, that all three witnesses initially assumed that the mailers had some connection with SSA, or were uncertain or confused about the origin or purpose of the mailer and its connection with the government. ALJ Decision at 31; NFRP Brief at 81. NFRP acknowledges, for example, that Mr. Rodriguez opened his mailer (the Snap 5) –

initially thinking it might be expected materials from the SSA. . . . Almost immediately, within 15-30 seconds, however, Mr. Rodriguez realized that the snap mailer had nothing to do with Social Security.

NFRP PHB, at 39, ¶ 145. Mr. Rodriguez, who recently reached retirement age, is not an average consumer. He worked as a prosecutor in the Texas Attorney General's office. Tr. at 272. His knowledge, training, and experience suggest that he was less likely to have a false impression than the average senior

citizen, the group targeted by these mailers.<sup>3</sup>

When asked about her initial impression of the front of the Snap M&B4 mailer, Ms. Oden testified:

A First of all, the part that deals with, "Medicare supplement lower rates," with the capitol building superimposed and the fact that it was a snap-out-type solicitation -- I took it to be a very official document.

Q Okay.

A The way it was addressed to me had a very official way by using my complete name, which I don't normally use for anything other than voter's registration or a driver's license.

Tr. at 220.

In short, the ALJ identified – and the record discloses – various elements of the mailers that made them potentially misleading, including: (1) the visual prominence of the words "Social Security"; (2) the lack of clarity on the outside of the mailer concerning the origin and purpose of the solicitation; (3) the statement that NFRP distributes the Social Security pamphlets as a "public service"; and (4) the use of an image of the U.S. Capitol. These elements, coupled with the testimony of Mr. Rodriguez and the other complaining witnesses, constitute substantial evidence that the contested mailers could convey to the average person the false impression that they were authorized, approved, or endorsed by the Social Security Administration.

NFRP contends that the ALJ applied an incorrect legal standard in reaching this conclusion. NFRP Brief at 82-87. Relying on cases interpreting the Lanham Act, 15 U.S.C. § 1051 et seq., NFRP asserts that the reasonableness standard "precludes the imposition of liability where the number of complaints about confusion are few and far between, particularly if there are a large number of transactions." Id. at 84. NFRP asserts that the

-----  
<sup>3</sup>Sally Hurme, a consumer protection specialist employed by the American Association of Retired Persons (AARP), testified that senior citizens over the age of 65 are comparatively more vulnerable to fraud and persuasion than younger cohorts. Tr. at 353-354.

number of complaints about its mailers – an average of one complaint per year between 1997 and 2002 – was insufficient to support the ALJ’s determination that the mailers “reasonably could be interpreted or construed” as conveying a false impression. Id. at 83.

The ALJ found, and we agree, that the Lanham Act cases are inapplicable because section 1140 and the Lanham Act set forth different liability standards. Under the Lanham Act, liability exists if a term, word, or description is “likely to cause confusion, or to cause mistake, or to deceive” (emphasis added). 15 U.S.C. § 1125(a)(1)(A). The Lanham Act thus requires a showing that confusion, mistake, or deception is “likely” – that in many or most cases the probable result is that a reasonably prudent person will be confused, confounded, or mistaken. What section 1140 requires, however, is not mistake, confusion, or deception but a “false impression” – a notion or vague belief about something that is not in fact true. Moreover, section 1140 does not require proof that someone actually had a “false impression” or that the false impression result in someone being misled to his detriment. And, unlike the Lanham Act, section 1140 does not require that confusion or mistake be the “likely” result of the communication’s misleading elements. All that section 1140 requires, under the reasonableness standard, is the possibility that an average consumer will have a false impression.

The ALJ’s construction and application of section 1140 is consistent with its legislative history. Congress enacted, and later amended, section 1140 after hearing testimony that lead card mailers deliberately place program words in their solicitations to draw attention to products having little or nothing to do with Social Security or other federal program benefits. See SSA PHB, Attachments C and E. The ALJ found, and the evidence shows, that NFRP used precisely this method to draw attention to the inside of the mailer. See ALJ Decision at 23. The outside of the five mailers hawk the availability of Social Security pamphlets. Inside the mailer, however, the recipient finds nothing on the lead card about such pamphlets or how to obtain them.<sup>4</sup> Instead, the lead card solicits the recipient’s interest in private insurance products, products that are not clearly identified as “insurance.” A recipient who is interested

-----  
<sup>4</sup>The Snap 5’s lead card invites the recipient to obtain “full information” about Social Security death benefits but does not refer to “pamphlets” or otherwise indicate what “information” would be sent regarding death benefits. PX 10.

in receiving information about Social Security cannot use the lead card to request those pamphlets but must request them separately and furnish NFRP with a self-addressed stamped envelope.

Congress was also concerned that mailings that falsely suggest some connection with the government increase the likelihood that true government mailings will be destroyed without being opened. SSA PHB, Attachment C, at 11. In this case, a person who opens one of NFRP's snap mailers with the initial impression that its contents are approved or endorsed by SSA, only to learn that the solicitation has no connection with SSA, may in the future be more likely to throw out, without opening, similar looking envelopes sent by SSA or other government agency.

NFRP correctly asserts that in applying the reasonableness standard, the ALJ failed to note that four of the five mailers (all but the Snap 5) contain no image of the U.S. Capitol on the outside front. See ALJ Decision at 29. However, the ALJ implied – and we agree – that the offer of Social Security pamphlets on the back of the mailers was sufficient to create a false impression given the dearth of information on them about NFRP's identity and purpose.<sup>5</sup> We note that Ms. Oden's testimony that the mailer looked "official" was based on her receipt of a mailer that did not contain an image of the Capitol on the front.

2. Substantial evidence supports the ALJ's finding that the NFRP knew or should have known that its mailers would convey the false impression proscribed by section 1140.

Section 1140's knowledge standard is in fact a negligence standard. See Huntzinger v. Hastings Mutual Ins. Co., 143 F.3d 302, 312 (7th Cir. 1998) ("knew or should have known" are words connoting a liability standard sounding in negligence); Levine v. CMP Publishers, Inc., 738 F.2d 660, 672 (5th Cir. 1984). Thus, NFRP has violated section 1140 if it knew or, in the exercise of reasonable care, should have known that the mailers would create the false impression of official endorsement, approval, or

-----  
<sup>5</sup>The ALJ stated: "On the back of the envelope is the prominently displayed "**Social Security**" language. The outside of the mailer thus offers little or no explanation as to its purpose, but strongly suggests that it is somehow related to Social Security. It could thus reasonably be construed that the document is, at least, approved, endorsed, or authorized by SSA."  
 ALJ Decision at 29.

authorization.

The ALJ found that NFRP deliberately used Social Security program words for the primary (if not sole) purpose of inducing recipients to open the mailers and read the lead cards. The ALJ determined that this fact – coupled with NFRP's long history of using program words in its solicitations and its receipt of the August 2000 cease-and-desist letter – demonstrated that NFRP knew or should have known that its mailers would convey a false impression.

Substantial evidence supports the ALJ's determination. The record shows that NFRP has a history of using program words in a misleading manner. That history goes back at least fifteen years. In 1987, one of NFRP's solicitations was brought to the attention of Congress at hearings that preceded section 1140's enactment. See SSA PHB, Attachment A. The solicitation stated that "Social Security benefits include funds to help pay burial expenses," then indicated that there are ways to increase those benefits. Social Security does not, in fact, provide a funeral benefit, only a lump-sum death benefit that is unrelated to the cost of a funeral. See 20 C.F.R. § 404.390.

In 1996, NFRP was the subject of an I.G. inquiry concerning a mailer called the SS 5. On October 3, 1996, the I.G. notified NFRP by letter that the SS 5 violated section 1140. See RX 13, 15. The following is an image of the outside of the SS 5 mailer (and the front of the interior lead card):

03-21-1996 11:51

2102294704

SOCIAL SECURITY SOUTH SIDE

P.03



NO POSTAGE  
NECESSARY  
IF MAILED  
IN THE  
UNITED STATES

**BUSINESS REPLY MAIL**  
FIRST-CLASS MAIL PERMIT NO.7026 SAN ANTONIO TX  
POSTAGE WILL BE PAID BY ADDRESSEE



**NFRP**

PO BOX 17943  
SAN ANTONIO TX 78217-9930

RECEIVED

JUL -5 1996

SSA-OIG



SOCIAL SECURITY  
NFRP FORM NO.9107

NFRP  
P.O. 17943  
San Antonio,  
Tx 78217



NON-PROFIT ORG.  
U.S. POSTAGE  
**PAID**  
PERMIT NO. 3288

\*\*\*\*\*CAR-RT-SORT \*\*\*\*\*0009  
31 370

**IMPORTANT**

↑ HOLD FIRMLY HERE ↑

Docket No. C-01-980950  
R. Ex. 15  
Page 3 of 3



In response to the I.G.'s letter, NFRP revised the SS 5, removing all content from the outside front of the envelope (except for the addressee's name and address). See RX 16. In a letter dated October 23, 1996, NFRP's attorney sent the I.G. a copy of the revised SS 5 and asked the I.G. to advise it of any objection. Id. The I.G. subsequently closed its file on the matter. RX 17; Tr. at 315-316.

NFRP's contact with the I.G. in 1996 did not deter NFRP from using Social Security program words on the outside of its mailers. Unlike the SS 5 envelope, the snap mailer envelopes in this case do not blatantly pretend to come from SSA. They do, however, contain several elements – a prominent display of program words, deliberate vagueness about the sender's identity, and use of an image of a government building – that combine to create or convey an impression that the mailer has official or governmental endorsement, approval, or authorization.

Given the prominence of the Social Security pamphlet titles on the outside of the mailers, a recipient would reasonably expect to find additional information about Social Security benefits inside. Instead, what the recipient discovers is a lead card that says little or nothing about the Social Security program and that inadequately discloses the wholly private purpose of the solicitation, which is to generate leads for private insurance sellers. At the very bottom of each card are the following words, arrayed in small type: "Life Ins. Proceeds Issued By A Company Licensed In Your State." On most of the cards, these words are virtually the only indication that the products being described are insurance policies issued by a for-profit company. None of the cards, in fact, characterize the products being touted as "insurance." The LT-2 lead card does refer to "long term care insurance," but the surrounding text invites the recipient to request information about unspecified "tax incentives" for purchasing such insurance. This suggests that the recipient will receive information about tax incentives to purchase long term care insurance, not information about a specific insurance policy or policies.

The ALJ found that "[t]he only reasonable inference to be drawn from the absence of the term 'insurance' from the mailers is that the Gibsons did not want the lead-card recipients to know that the mailer solicited names for insurance sales, because, knowing

-----

6In some cards, references to the product are preceded or followed by an asterisk that refers the recipient to the bottom of the card.

that, people would be less likely to respond." ALJ Decision at 22. This inference was reasonable given the format of the lead cards, the legislative background material describing similar tactics used by lead card mailers, and the Gibsons' failure to credibly explain the absence of the word "insurance" on the cards.<sup>7</sup>

While vaguely alluding to commercial insurance products, the lead cards contain elements that reinforce, or at least do not dispel, the impression of official authorization or approval conveyed by the outside of the mailers. For example, some of the cards refer to the insurance products as "benefits" or a "program," words that some might associate with Social Security or some other public benefits program.<sup>8</sup> See PX 10 ("funeral expense benefits" and "death benefits"); PX 12 ("You may qualify for a final expense program"). Three of the lead cards use the term Medicare, and the Snap 5 lead card refers to the Social Security death benefit as a prelude to soliciting the recipient's interest in "funeral benefits." See PX 10. In addition, all of the lead cards contain, on both sides, a background image of the U.S. Capitol.<sup>9</sup> Finally, all of the cards request a signature and personal information. The ALJ found, and NFRP does not dispute, that the signature requirement served no useful purpose, see ALJ Decision at 23, and we agree with the ALJ – and with the only court to apply section 1140 – that requesting a signature along

-----  
<sup>7</sup>When asked about why the word "insurance" was not used, Mr. Gibson testified that the terms "long-term care" and "death benefit" were synonymous with insurance. Tr. at 541-43. Mrs. Gibson could provide no explanation for the omission. Tr. at 511.

<sup>8</sup>The Snap 5 invites the recipient to obtain information about "DEATH BENEFITS available . . . under the Social Security System." This is followed by a statement that the death benefit can be "supplemented" with a "cash funeral expense benefit." PX 10. Absent a fuller explanation, the grouping of these two "benefits" on the lead card suggests a connection that is, in fact, nonexistent.

<sup>9</sup>NFRP suggests that the image of the U.S. Capitol does not conjure up an association with the federal government because the image has been part of its logo or trademark since 1979. NFRP Brief at 73. However, NFRP's logo is not an unadorned image of the Capitol, but an image of the Capitol encircled by the words "National Federation of Retired Persons." RX 65. None of the five mailers use the logo.

with personal information may, in conjunction with other factors, help convey the false impression that the solicitation comes from the federal government. See United States v. Federal Record Service, 1999 WL 335826 (S.D.N.Y. 1999) (noting that a form soliciting consumer signatures was one factor contributing to the false impression that the mailings came from the federal government).

At the hearing, Mr. Gibson did not admit that he designed the mailers with the purpose of creating a false impression. However, he stated that the words "Social Security" were strategically placed on the outside of the mailers to keep recipients from tossing them away. Tr. at 125-26. This admission, coupled with NFRP's long history of using program words in its solicitations, implies an awareness of the importance of Social Security to the lives of senior citizens and a corresponding belief that such persons will not likely ignore, and may act on, a solicitation that calls attention to that program. It is worth noting that NFRP purportedly distributes pamphlets on topics other than Social Security or Medicare. See RX 9. However, no reference to these other pamphlets appears on NFRP's mailers.

NFRP contends that the primary purpose of the contested mailers is to educate senior citizens about Social Security and other public benefit programs, that its offer of Social Security pamphlets merely advanced that purpose. NFRP Brief at 67. However, if educating senior citizens was the primary purpose of the mailers, a recipient could reasonably expect to find information inside the mailer about NFRP, its mission and services, the pamphlets referenced on the outside back of the mailer, and other publications and resources useful to senior citizens. Instead, the recipient is informed, in vague terms, about insurance products provided by a third party. There is no further information on the lead cards about the pamphlets that are so boldly featured on the outside of the mailer. Moreover, it is apparent that NFRP did not consider the distribution of accurate, up-to-date Social Security information to be a priority. As the ALJ noted (ALJ Decision at 18-19), SSA demonstrated that some of the listed pamphlets were out-of-date, and Mr. Gibson admitted that he did not verify their accuracy or currency. See RX 8-9; Tr. at 47-59.

NFRP suggests that it had no reason to know that its mailers violated section 1140 given the outcome of the I.G.'s 1996 investigation. NFRP Brief at 92. In particular, it asserts that the I.G. tacitly approved its use of a list of Social Security pamphlets because the same or a similar list was printed on the

back of the revised SS 5 mailer it sent to the I.G. in 1996.<sup>10</sup>

See NFRP Brief at 76-78. The ALJ rejected this contention in part because NFRP failed to produce a complete copy of the SS 5 – i.e., one that showed the front and back of the envelope. ALJ Decision at 27-28. We find no error in this ruling. The ALJ could reasonably infer from NFRP's failure to produce a complete copy of the SS 5 mailer (or, for that matter, any mailer from the mid-1990s) that it did not in fact contain a list of Social Security pamphlets.<sup>11</sup>

Based on all these circumstances – including the content of the contested mailers, NFRP's contact with the I.G. in 1996 (resulting in the removal of program words from the SS 5), its history of using program words to suggest a linkage between public benefits and private insurance, and its receipt in August 2000 of a letter stating that the I.G. had found the mailers to be in violation of section 1140 – the ALJ could reasonably find that NFRP knew, or in the exercise of reasonable care should have known, that its mailers would convey a false impression that they were endorsed, approved, or authorized by SSA.

3. NFRP's other objections to the ALJ's liability findings lack merit.

NFRP contends that SSA erroneously characterized the contested mailers as "facsimile government documents" or "official government mailings" (terms used in the cease-and-desist letter and the notice of intent) and failed to explain how such communications violated section 1140. NFRP Brief at 54, 74; NFRP Reply Brief at 19-21. However, SSA was not required to show that the mailers fit these particular descriptions, only that NFRP used Social Security program words in a manner that could create the false impression that the mailers were endorsed, approved, or authorized by SSA.

NFRP asserts that the words "Social Security" do not appear in isolation on the mailers but as "part of lawful recitations of the complete titles of SSA pamphlets whose distribution is authorized" by section 1140(a)(2). NFRP Brief at 56, 66-67, 89-92. Section 1140(a)(2) provides that no person may "for a fee"

-----  
<sup>10</sup>NFRP asserted that it started listing SSA pamphlets on its mailers in the early 1990s. Tr. at 29. However, it produced no documentary evidence of this.

<sup>11</sup>NFRP's October 23, 1996 letter to the I.G. enclosed only a "copy" of the front of SS 5's envelope. RX 16.

reproduce, reprint, or distribute forms, applications, or publications of SSA or HHS unless he obtains "specific, written authorization for such activity." 42 U.S.C. § 1320b-10(a)(2). According to NFRP, this provision indicates that Congress expected private entities to distribute Social Security program information for free, just as it has tried to do. NFRP Brief at 55-56. Noting that "virtually any reference to SSA-related terms is likely to momentarily call to mind [the Social Security Administration] without ultimately misleading anyone," NFRP asserts that section 1140(a)(2)'s "authorization" for the free distribution of Social Security information "should be viewed as creating an exception to the restrictions contained in Section 1140(a)(1)." Id. at 56.

We find no merit to this argument. Although section 1140(a)(2) does not prohibit the distribution of free Social Security information, it does not affirmatively "authorize" such activity. Moreover, section 1140(a)(1) makes unlawful any use of program words if those words, in conjunction with other elements of the communication, convey the false impression that the communication is approved, endorsed, or authorized by SSA. In this case, the ALJ did not find that NFRP's offer to distribute Social Security pamphlets constituted a per se violation of section 1140. Rather, she determined that a false impression had been, or could have been, conveyed by NFRP's use of program words in conjunction with other elements of the mailers.

NFRP also contends that the ALJ improperly relied upon the use of Medicare terminology to support her liability determination under section 1140. NFRP Brief at 52. The record and text of the ALJ's decision do not substantiate this contention. The ALJ imposed the CMP based on a determination that a reasonable person could get a false impression, from seeing the Social Security program words and other content on the snap mailer's envelope, that NFRP's solicitation was approved, endorsed, or authorized by SSA. ALJ Decision at 16. The ALJ suggested that other elements of the mailers, including the references to Medicare on the lead cards, contributed to that false impression. See ALJ Decision at 32. The ALJ did not err in taking note of these elements. It is not the appearance of the program words per se that violates section 1140, but the use of those words "in a manner" that conveys a false impression. Consequently, SSA was free to point out – and the ALJ could consider – any aspect of the mailer that, in conjunction with the program words, helped to create or convey

a false impression.<sup>12</sup>

B. The CMP

In its notice of intent, the I.G. stated that the maximum allowable penalty of \$5,000 per violation would be reduced to \$1.00 per violation based on the evidence of NFRP's financial condition. PX 9, at 4. On the first day of the hearing, the parties stipulated that the number of alleged violations – i.e., contested mailers – was 83,569. Tr. at 5. Later, in an opening statement, NFRP said the following about the penalty proposed by the I.G.:

As for the penalty, if it has to be addressed, although \$1 a mailer is a tremendous mitigation off the \$5,000 potential, it in fact is excessive when you consider the NFRP's good record and its understanding of what the investigation was about. It in fact happens to be two times the annual income of the Gibsons personally, it's four times the net income of the NFRP last year, and it's well above the combined net income if you combine the NFRP and the Nacogdoches Business Center.

Tr. at 33.

On the second day of the hearing, SSA advised the ALJ that it had dropped plans to call two financial experts and that, in their place, it was proposing a set of written "financial stipulations." Tr. at 389-90. Three of these stipulations stated:

- "NFRP withdraws opening statement remarks regarding the financial condition and income of the NFRP, Nacogdoches Business Center, Inc. and the Gibson's. Also NFRP withdraws remarks concerning the appropriateness of the proposed penalty." ALJX 1.
- "Parties stipulate that they will not raise any further financial issues during the remaining course of the hearing." Id.

-----  
<sup>12</sup>We agree with SSA that use of the term Medicare contributed to the false impression created by the mailers. Medicare is a program frequently associated with Social Security, in that Medicare entitlement is based on entitlement to Social Security benefits.

- "Parties stipulate that neither party will raise any issues regarding the amount in the notice of proposed penalty." Id.

In post-hearing briefs to the ALJ, NFRP suggested that the parties had stipulated to the amount of the penalty, or to the amount per violation that could be assessed for each mailer. See NFRP Reply to SSA PHRB, at 18. However, the ALJ determined that she was not bound to impose the \$1.00-per-violation CMP proposed by the I.G., finding that the parties had agreed only to the number of solicitations. ALJ Decision at 38.

NFRP now contends that the ALJ "overrode" the pre-hearing stipulation and that the parties "did agree that the penalty amount in the penalty letter would be the amount assessed if the ALJ ruled against the NFRP." NFRP Brief at 90. We agree. It is apparent from the stipulations, when they are read in conjunction with the notice of intent and NFRP's withdrawal of its opening statement, that the parties did in fact agree that \$1.00 per violation was an appropriate penalty. The I.G. had previously found, based on an inspection of records, that NFRP's financial condition warranted a reduction in the maximum penalty from \$5,000 to \$1.00 per violation. At the hearing, NFRP insisted that any penalty was excessive given its income and assets. By withdrawing that statement and agreeing not to "raise any issues regarding the amount" of the CMP proposed by the I.G., NFRP gave up its right to petition for a reduction of the penalty below \$1.00 per violation. Under the circumstances, it is reasonable to assume that the parties had agreed that \$1.00 per violation was an appropriate penalty if NFRP was found to have violated section 1140.

Despite this apparent understanding, the ALJ doubled the CMP based in part on her assessment of NFRP's financial condition. We think this was prejudicial to NFRP. The ALJ found that NFRP's financial condition posed no obstacle to a \$167,138 penalty, when the parties had previously agreed that its financial condition warranted a penalty only half that amount. The ALJ gave no reason for disregarding the I.G.'s considered judgment about NFRP's ability to pay, and her decision does not address relevant evidence – including tax returns and balance sheets – concerning NFRP's assets and income, focusing instead on NFRP's "revenues."

In addition, while NFRP clearly waived its right to present evidence and argument in opposition to the \$1.00 per violation penalty, the stipulations are as a whole unclear about whether they were intended to limit the ALJ's discretion. In this regard, we note that the ALJ's remarks at the hearing about

the stipulations suggest some confusion or uncertainty about their meaning and scope. Tr. at 391 ("And I will at some point parse these out and figure out exactly what they mean").

Even if she reasonably found that the stipulations did not specify an appropriate penalty, the ALJ should have notified NFRP in advance that she was considering an increase in the CMP because it was clear that NFRP had withdrawn its ability-to-pay arguments based on the I.G.'s proposal and would have likely reconsidered that decision had it known of the ALJ's intention to increase the CMP. Contrary to SSA's assertion (which is unsupported by any legal authority), nothing in the regulations or statute bars the parties from stipulating to an appropriate penalty amount, particularly when the stipulation is based on uncontested findings regarding the respondent's financial condition.

For the foregoing reasons, the Board finds that the ALJ's decision to double the CMP proposed by the I.G. was not supported by substantial evidence and was an abuse of discretion. In accordance with the parties' pre-hearing agreement, we reinstate the CMP proposed by the I.G.

### C. Constitutional claims

During the proceedings before the ALJ, NFRP contended that SSA's enforcement action amounted to an unlawful infringement of its First Amendment rights. See NFRP Motion for Summary Judgment. The ALJ declined to address this constitutional challenge, finding that she was bound to apply section 1140 and the accompanying regulations. See Rulings and Summary of Telephone Conference, dated April 16, 2002.

It is well-settled that administrative tribunals do not have the power to declare a statute or regulation unconstitutional. *Sentinel Medical Laboratories*, DAB No. 1762 (2001). Section 498.204 of SSA's regulations reflects this principle, stating that an ALJ lacks the authority to "[f]ind invalid or refuse to follow Federal statutes or regulations." 20 C.F.R. § 498.204.

NFRP contends that section 498.204 does not apply because it is alleging only an "unconstitutional application" of federal law, not that the law is invalid. NFRP Brief at 97-98. However, the terminology used by NFRP in its argument calls to mind a claim that the statute and regulations are unconstitutional as applied. We interpret section 498.204 as precluding the ALJ from considering both facial and "as applied" challenges to the statute and regulations. Thus, to the extent that NFRP's



contention is that section 1140 and its regulations are unconstitutional as applied, the ALJ committed no error in refusing to address it. In any event, as we now explain, the constitutional arguments made by NFRP are substantively meritless or constitute facial challenges to the statute that are beyond our authority to address.

NFRP broadly contends that SSA "is engaging in content-based regulation" that violates the First Amendment. It asserts that its free speech rights were violated in at least three respects. First, it contends that section 1140 was applied to these circumstances in an "unconstitutionally vague" manner because SSA failed to provide fair notice about the types of solicitations it believes are prohibited by section 1140. NFRP Brief at 102. NFRP suggests that SSA provided "subjective" and shifting interpretations of section 1140 by mischaracterizing the mailers as "facsimile Government documents" or "official government mailings," then failing to define what those terms mean. Id. at 103. "Absent any written guidance as to what is meant by these unwritten and ever-evolving standards, and with no means to challenge them," says NFRP, "an entity's only option is to negotiate against itself until the SSA deigns to give its blessing, if ever." Id.

Vagueness is a concept that concerns the clarity of a statute or regulation. The standards for assessing vagueness are set out in Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit

the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked. [internal quotations and footnotes omitted]

NFRP does not assert that section 1140's meaning is unclear with respect to its conduct. Nor does it contend that the statute and regulations contain inadequate standards or criteria for officials to apply. In fact, NFRP is challenging not the vagueness of the law, but the supposed vagueness or clarity of the I.G.'s interpretation of section 1140. However, the I.G.'s interpretation and application of section 1140 are precisely what this administrative proceeding is supposed to consider. Nothing in the cases cited by NFRP indicates that a deprivation of due process occurs simply because an agency sets forth an erroneous or debatable interpretation of the statute at the commencement of the administrative hearing process.

At bottom, NFRP's complaint of vagueness is an expression of disagreement with the merits of the I.G.'s enforcement action. NFRP might in fact have been confused or uncertain about the precise basis for SSA's determination that the mailers violated section 1140. However, it had the opportunity to test the validity of SSA's determination in informal discussions with the I.G. (prior to issuance of the notice of intent) and, later, during this administrative proceeding.

Second, NFRP contends that the enforcement action was "unconstitutionally overbroad" because SSA sought to prohibit NFRP from engaging in the lawful, nondeceptive activity of distributing SSA pamphlets. NFRP Brief at 104-05. As a preliminary matter, the "overbreadth" doctrine seems inapt because NFRP is not alleging a defect in the statute or regulations.<sup>13</sup> We see no merit in this contention in any event.

-----  
<sup>13</sup>A statute is constitutionally overbroad if it "does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities" that constitute an exercise of protected rights. Thornhill v. Alabama, 310 U.S. 88, 97 (1940). The overbreadth doctrine is typically invoked to invalidate a statute that, although valid as applied to a party before the court, is written so broadly that it inhibits the constitutionally protected speech of third parties. See Members of the City Council of Los Angeles

(continued...)

Content-neutral laws,<sup>14</sup> like section 1140, that incidentally burden protected speech are constitutional if they are narrowly tailored to serve a significant or substantial governmental purpose.<sup>15</sup> See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). NFRP does not deny that section 1140 serves a substantial governmental purpose. It also concedes that section 1140 is narrowly tailored to achieve that purpose. NFRP Brief at 53. In addition, NFRP does not argue that section 1140, as applied to these circumstances, curtails more speech than is necessary to accomplish the statute's purposes. Under the circumstances, NFRP's contention that section 1140 is being used to censor protected speech is little more than an assertion that its conduct is not covered by the statute.

NFRP's third contention is that the enforcement action constitutes an unlawful "prior restraint" of protected speech because section 1140 affords a party "absolutely no right to judicial review without risking crippling penalties." NFRP Brief at 109-110. It asserts that judicial review is available only after "extensive administrative hurdles within the SSA have been navigated," and that "[t]he only possible opportunity for an alleged violator to obtain judicial review 'before the fact' – i.e., without subjecting itself to penalties – is if the SSA seeks early injunctive relief against the alleged transgressor." Id. at 110. NFRP asserts that "[a]s a result of SSA's

-----  
<sup>13</sup> (...continued)

v. Taxpayers for Vincent, 466 U.S. 789, 798-99 (1984) ("The Court has repeatedly held that such a statute may be challenged on its face even though a more narrowly drawn statute would be valid as applied to the party in the case before it").

<sup>14</sup>Content neutrality is judged by whether the law "distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed[.]" Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 643 (1994). A measure designed to control the "secondary" effects of speech will generally be deemed content neutral. See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). Section 1140 and the relevant regulations do not discriminate on the basis of views expressed, and they target the potential secondary effects (the creation of "false impressions") of any communication or solicitation.

<sup>15</sup>This intermediate level of scrutiny closely resembles the framework for evaluating restrictions on commercial speech. See Florida Bar v. Blakely, 515 U.S. 618, 622-24 (1995).

unconstitutional failure to specify how the NFRP might comply with section 1140 [after receipt of the August 2000 cease-and-desist letter], the NFRP was confronted with a Hobson's Choice: (1) to not utilize the snap mailers, period; or (2) to speak and expose itself to the risk of severe financial penalties [during an administrative enforcement proceeding] under the SSA's unwritten interpretation of Section 1140." Id. at 111.

Inasmuch as the I.G. was not required to seek an injunction or other judicial review prior to instituting this administrative proceeding, NFRP's contention that the enforcement action constituted an unlawful prior restraint because of inadequate procedural safeguards is a facial challenge to the enforcement scheme created by the statute and regulations. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223-24 (1990) (a facial challenge is appropriate when there is a lack of adequate procedural safeguards necessary to ensure against undue suppression of speech). Pursuant to section 498.204, the Board lacks the authority to consider such a challenge.

#### D. Miscellaneous evidentiary and other issues

##### 1. Denial of summary judgment

NFRP contends that the ALJ erred in refusing to grant its motion for summary judgment. NFRP Brief at 113-15. In accordance with federal court practice, we find that the denial of summary judgment is not appealable when there has been a full hearing on the merits. Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 434 (8th Cir.1994); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990).

##### 2. Denial of request to treat SSA's attorneys as material witnesses

NFRP contends that the ALJ improperly denied its request to call SSA's attorneys, Glenn Sklar and Erin Justice, as material witnesses. NFRP Brief at 116-17. The ALJ found that NFRP "has not presented a compelling reason . . . to allow Ms. Justice or Mr. Sklar to remain on its witness list, especially as allowing them to remain on its witness list might cause a delay in the hearing." Ruling Granting Petitioner's Motion (dated March 28, 2002). The ALJ also noted that because the hearing was "de novo," their knowledge about the investigation or decision to prosecute the case was irrelevant. Id. For the following reasons, we find that the ALJ's ruling was not an abuse of discretion, or was harmless error.

In support of its request to call the I.G. attorneys as witnesses, NFRP advised the ALJ that they were "the only SSA personnel capable of testifying about the evidence forming the basis of the SSA's case[.]" NFRP Response to Petitioner's Motion to Strike at 2. NFRP also asserted that they were necessary witnesses because they played critical roles in the process leading to the penalty determination. Id. at 3. However, SSA's notice of intent and pre-hearing submissions adequately advised NFRP about the legal and factual bases for SSA's enforcement action and penalty determination. Moreover, NFRP had an opportunity to cross-examine the official of record, Counsel to the Inspector General Kathy Buller, whom the I.G. designated as a witness prior to the hearing, about the basis for the enforcement action.

NFRP also told the ALJ that it wanted to investigate the circumstances surrounding the preparation of declarations signed by the three complaining witnesses (Oden, Gray, and Rodriguez), believing that Mr. Sklar or some other I.G. employee "substituted the words and thoughts of the witnesses with [SSA's] own legal conclusions, and tainted the minds of these witnesses as to their impression of the NFRP mailings." See NFRP Response to Petitioner's Motion to Strike (March 11, 2002) at 6. However, all of these witnesses testified at the hearing about their response or reaction to the mailers. Any alleged taint could have been probed during their cross-examination. NFRP does not say what facts Mr. Sklar and Ms. Justice would or could have added to bolster its case.

Finally, NFRP advised the ALJ that -

[D]uring August 2000 and continuing for almost a year, the NFRP complied with multiple and extensive requests for information from the SSA/OIG. In doing so, the NFRP believed that the SSA/OIG was studying whether the NFRP was truly violating section 1140 of the Social Security Act. Little did the NFRP realize that the SSA/OIG was actually working on securing a heavy monetary penalty against this small, non-profit entity, based upon the NFRP's ongoing disclosures.

NFRP Response to Petitioner's Motion to Strike, at 4-5 (citations omitted). In suggesting that it was misled about the I.G.'s intentions, NFRP failed to describe or identify for the ALJ any statements or representations by Ms. Justice upon which Mr. Gibson allegedly relied. On that basis alone the ALJ was justified in finding that NFRP had failed to demonstrate a need for her testimony.

### 3. Improper use of Medicare terms

NFRP asserts that the ALJ erred in allowing SSA to expand its theory of the case. NFRP Brief at 117-18. In particular, NFRP asserts that SSA, in response to a motion for summary judgment, "for the first time sought to expand the case by asserting that the NFRP's reference to Medicare-related terms in some pamphlets violated Section 1140 and its regulation." *Id.* at 117. However, we find no indication that SSA charged NFRP with violating section 1140 based on its use of Medicare terms or otherwise expanded its theory of the case to the detriment of NFRP.

Consistent with the notice of intent, SSA alleged that NFRP had violated section 1140 by using Social Security program words in the proscribed manner. *See* Petitioner's Opposition to NFRP's Summary Judgment Motion at 10. SSA argued that Medicare words on some of the lead cards contributed to the false impression that the mailers were endorsed, approved, or authorized by SSA, *id.* at 22, but one cannot reasonably infer from that argument that SSA sought to charge NFRP with misuse of Medicare terms. (The parties concede that only the Department of Health and Human Services can bring an enforcement action based on a misuse of Medicare program words.) In any event, NFRP has shown no prejudice to its substantial rights as a result of this alleged error.

### 4. Use of legislative materials

NFRP contends that the ALJ improperly relied on certain legislative materials (e.g., House subcommittee hearing testimony, the findings of the 1992 House report) "as factual support" for her decision. NFRP Brief at 118. With one minor exception,<sup>16</sup> however, NFRP does not specify what portions of the legislative materials the ALJ improperly relied upon, or indicate why the testimony or findings in those legislative materials were

-----  
<sup>16</sup>In footnote 15 of its opening brief, NFRP states that the ALJ's "reliance upon decade-old congressional testimony to suggest that the NFRP follows the alleged 'common tactics' of unidentified commercial lead card companies, is wholly improper and irrelevant to this case." NFRP Brief at 65. That testimony, and the related subcommittee findings, are clearly relevant because they tend to confirm SSA's assertion that NFRP uses Social Security program words for the purpose of drawing attention to insurance products having nothing to do with federal benefit programs. NFRP provided the ALJ with no grounds to question the reliability or accuracy of the legislative testimony and findings.

irrelevant or unreliable. See id.; NFRP Reply Brief at 17-19, 52-53. Moreover, NFRP fails to explain precisely how it was prejudiced by this alleged error. We decline to fill in these gaps.

#### 5. Post-hearing research by the ALJ

NFRP contends that the ALJ engaged in "partisan" fact-finding by reading current Social Security pamphlets on SSA's internet website in order to verify that NFRP's reprinted versions were out-of-date. NFRP Brief at 69-70, 118-19; see also ALJ Decision at 19 n.8. We do not decide what pre-decisional procedures the ALJ should have followed in reading these website materials because any alleged error was harmless. There was sufficient other evidence that NFRP's pamphlets were out-of-date and that NFRP had not updated them since at least the mid-1990s.<sup>17</sup> See Tr. at 48-59, 194, 299-301, 499. Also, NFRP does not contend that the information cited by the ALJ was inaccurate.

We reject NFRP's contention that the ALJ's actions reflected bias or partisanship. SSA, not the ALJ, raised this issue by questioning Mr. Gibson and others about the currency of NFRP's pamphlets. The ALJ sought to confirm that the pamphlets were out-of-date by reading publicly available documents from an official U.S. government website. It is entirely appropriate for a judge to take notice of publicly available facts. See Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); Austin v. American Ass'n of Neurological Surgeons, 253 F.3d 967, 971 (7<sup>th</sup> Cir.2001)(taking judicial notice of reliable information published on the internet).

#### 6. Expert testimony

NFRP contends that the ALJ erred in allowing Sally Hurme, a consumer protection specialist employed by AARP, to testify as an "expert" witness. NFRP Brief at 119. NFRP asserted that the ALJ

-----  
<sup>17</sup>The pamphlet regarding Social Security death benefits appears on its face to be out-of-date. See RX 8. It specifies the 1990 levels for annual earning exemptions and the accrual of work credits. The death benefits pamphlet also contains an obsolete toll-free number for the Social Security Administration. Compare the toll free numbers in RX 8 and RX 9.

ignored the Supreme Court's standards for expert witnesses and "wholly embraced the unsupported testimony [of] Ms. Hurme throughout the decision." *Id.* at 120.

The Supreme Court's rulings regarding the admission and use of expert testimony are based on Federal Rule of Evidence 702. See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The ALJ is not (with certain irrelevant exceptions) bound by the Federal Rules of Evidence. 20 C.F.R. § 498.217(b). Moreover, she made it

clear on the record that she was not qualifying Ms. Hurme as an expert in the formal sense, but that she would determine what weight, if any, to give her testimony and opinion based on their reliability, relevance, and other factors (including her qualifications). *Tr.* at 352.

As indicated, the ALJ found that NFRP deliberately displayed program words on the back of its mailers to induce recipients to open them. ALJ Decision at 19. In making this finding, the ALJ relied in part on testimony by Ms. Hurme that (1) an "insurance lead card" is designed to develop the names and addresses of persons interested in a particular topic, primarily to identify vulnerable persons to whom insurance agents may attempt to sell insurance or some other product (living trust, estate plan); (2) persons over age 65 are more vulnerable to fraud and persuasion than younger cohorts; (3) NFRP's target audience was senior citizens; and (4) the words "Social Security" were used on the mailers as attention grabbers. Id. at 19-20. NFRP complains that these statements were "rank and wholly unsupported speculation" by a person with "no training in these fields." NFRP Brief at 71. However, Ms. Hurme adequately established herself as knowledgeable about consumer protection issues affecting senior citizens (see *Tr.* at 347-48), and her observations are either undisputed (e.g., NFRP does not dispute that senior citizens are the targets of the mailings) or corroborated by other evidence in the record, including witness testimony, congressional oversight findings, NFRP's documented history and pattern of using program words in a misleading manner, and the disconnection between the text on the envelopes of the contested mailers and the content of the interior lead cards. Ms. Hurme's assertion that persons older than age 65 are more vulnerable to fraud than younger cohorts is supported by studies commissioned by AARP and is otherwise not rebutted. See e.g., PX 31, at 16. For these reasons, and because NFRP was able to put on its own "expert," Mr. Neal, a specialist in marketing, we cannot find that the admission of, or reliance upon, Ms. Hurme's testimony impaired NFRP's substantial rights.



## 7. Mr. Gibson's credibility

NFRP contends that the ALJ's finding that Mr. Gibson was not a credible witness was unwarranted. NFRP Brief at 57. In general, we defer to an ALJ's assessment of witness credibility absent a compelling reason not to. *Meadow Wood Nursing Home*, DAB No. 1841 (2002); *Woodstock Care Center*, DAB No. 1726 (2000).

NFRP has identified no compelling reason for us to disregard the ALJ's credibility finding regarding Mr. Gibson. NFRP asserts that the finding "reflect[s] a gross misconstruction" of Mr. Gibson's testimony and "fails to recognize both Mr. Gibson's own advanced age of 75 and the impact of his having to suffer cross-examination by a material fact witness for the SSA [Ms. Justice], whom Mr. Gibson believed had deceived him over the course of many months of their dealings." NFRP Brief at 58. NFRP does not explain why or how Mr. Gibson's age undermines the ALJ's credibility finding. There is no allegation that Mr. Gibson suffered lapses in comprehension, memory, or verbal ability. In addition, NFRP does not attempt to posit a relationship between Mr. Gibson's personal dealings with SSA counsel and the areas of his testimony which the ALJ found dubious or problematic.

NFRP suggests that the ALJ was motivated by her "personal dislike" of Mr. Gibson. An ALJ's alleged bias disqualifies her only if it stems from an extrajudicial source and results in an opinion that is based on something other than what the judge learned from his or her participation in the case. *St. Anthony Hospital*, DAB No. 1728 (2000), *aff'd St. Anthony Hospital v. U.S. Dep't of Health and Human Services*, 309 F.3d 680 (10th Cir. 2002)(citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)). NFRP does not point to any extrajudicial source of bias.

## 8. Other Contentions

NFRP's appeal briefs contain numerous other contentions, each of which we considered. None of these other contentions provide a basis for modifying or reversing the ALJ's decision.

Conclusion

For the reasons above, we affirm the ALJ's determination that NFRP's mailers violated section 1140 of the Act. In addition, pursuant to 20 C.F.R. § 498.221(h), we reduce the civil money penalty from \$167,138 to \$83,569.

Pursuant to 20 C.F.R. § 498.222(a), this recommended decision becomes the final decision of the Commissioner 60 days after the date on which the DAB serves the parties to the appeal and the Commissioner with a copy of the recommended decision, unless the Commissioner reverses or modifies the DAB's recommended decision within that 60 day period. Judicial review of the Commissioner's final decision is available. 20 C.F.R. § 498.127. A petition for judicial review must be filed with the U.S. Court of Appeals within 60 days after the parties are served with a copy of the final decision. See 20 C.F.R. § 498.222(c).

---

Cecilia Sparks Ford

---

Donald F. Garrett

---

Mark R. Hillson  
Presiding Board Member