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# United States Senate

WASHINGTON, DC 20510

January 28, 2020

Mr. Andrew M. Saul
Commissioner
Social Security Administration
6401 Security Blvd.
Baltimore, MD 21207

RE: Comment on Notice of Proposed Rulemaking, RIN 0960-AI27, Rules Regarding the Frequency and Notice of Continuing Disability Reviews

Dear Commissioner Saul:

I write to oppose the Social Security Administration's (SSA) proposed regulations altering when and how often SSA conducts continuing disability reviews (CDR), published in the Federal Register on November 18, 2019.

In a separate comment letter also submitted to SSA today, January 28, 2020, a group of 41 members of the United States Senate, including myself, express our strong opposition to this proposed rule and call on SSA to withdraw it immediately. In that letter, my colleagues and I make clear our position that the agency's Notice of Proposed Rulemaking (NPRM) fails to clearly establish a need for the proposed changes, fails to justify the specific procedural changes proposed, fails to fully evaluate the effects these changes will have on beneficiaries and fails to provide an adequate cost-benefit analysis. This comment letter reaffirms the contents of that letter, and provides additional detail on the substantial and unjustifiable shortcomings of SSA's proposal. SSA should consider this letter a separate comment and should not construe anything contained in this letter or omitted from this letter as replacing or modifying in any way the contents of the comment letter submitted by 41 United States Senators to SSA today.

The NPRM produced by SSA is incomplete, inconsistent and entirely insufficient. SSA repeatedly fails to present evidence to support the agency's assertions or justify procedural changes made by the proposed rule. SSA ignores substantial bodies of academic literature relating explicitly to arguments made by the agency in the NPRM, and provides incomplete, selective interpretations of the inexcusably small number of sources the agency does cite. SSA presents no details of the analyses and calculations the agency used to produce the limited estimates of potential costs and benefits presented, and the agency omits from these analyses consideration of several foreseeable costs and negative outcomes for beneficiaries and the agency. SSA also uses unnecessarily vague and inconsistent language throughout the NPRM when describing the agency's current practices, proposed changes and estimates of anticipated

benefits and costs, making it frequently impossible to ascertain the agency's intentions or assess the agency's methodology.

Collectively, these numerous failures result in the NPRM failing to meet the basic standards set by the Administrative Procedure Act (APA) as well as the requirements established by Executive Orders 12866 and 13563. SSA has not provided sufficient background information, justification of proposed changes or details of agency calculations and methodologies to allow the public to assess the proposed rule and provide meaningful comment. The magnitude of these shortcomings is such that SSA cannot address them in a final rule without introducing a substantial amount of new information and data that the public would have no opportunity to provide comment on. SSA has failed to meet its obligations as set forth in statute and by Executive Order, and it would be unacceptable for the agency to move forward with this rulemaking.

Below is additional detail on the numerous and substantial shortcomings of SSA's NPRM. The comments are organized by the section of the NPRM to which they are most relevant, but this does not mean that the shortcomings listed under a specific section are relevant only to that portion of the NPRM. SSA must review and respond to all substantive comments on the proposed rule, including those contained in this comment letter and in the tens of thousands of additional comments submitted by stakeholders and members of the public opposing this regulatory action.

**Section II. A. Expanding the Medical Diary Categories From Three to Four**

- SSA states that the agency schedules cases for CDRs based on the agency's "predictive model that identifies the cases most likely to exhibit MI," where "MI" is shorthand for medical improvement. This predictive model is mentioned five additional times in the NPRM, but nowhere does SSA provide any description of the model or how it works. SSA provides no information on whether the changes made by the proposed rule will necessitate changes in the predictive model, or how the agency will reinterpret the model's outputs to assign cases to the four medical diary categories if the new Medical Improvement Likely (MIL) diary category is created. Likewise, SSA does not document what costs would be incurred by the agency to reinterpret the model's outputs, which would include developing guidelines, producing training materials, training personnel and conducting reliability monitoring to ensure the outputs of the model are being used accurately. This lack of information inhibits the public's ability to understand the changes that would be made by the proposed rule, their implications for beneficiaries and the agency and the costs associated with the proposed rule.

- In proposing to add a fourth medical diary category, SSA cites the supporting document "Cessation Rates by Impairment" and states:

> "When we analyzed CDR case outcomes for MIE diaries, we noticed that there were some types of cases where the MIE category resulted in a continuance for the first CDR but resulted in a cessation for the subsequent CDR. This was often an indication that the first CDR was conducted too early to identify MI."

SSA does not present, describe or analyze any of the data contained in the "Cessation Rates by Impairment" supporting document to support SSA's conclusion that CDRs are occurring too early to identify medical improvement. In the NPRM, SSA does not share if the agency has benchmarks for what the agency considers high, low or acceptable cessation rates for first or subsequent CDRs, nor does the agency communicate what it considers acceptable or unacceptable differences between cessation rates for first CDRs and subsequent CDRs. SSA does not state how it expects the creation of the new MIL diary category to affect the cessation rates cited or what target cessation rates for first CDRs and subsequent CDRs the agency is aiming to achieve. Without any such information or analysis, SSA cannot state that the data presented in "Cessation Rates by Impairment" support the agency's contention that a new medical diary category is needed or that it would meaningfully improve the CDR process. The failure to provide any benchmarks also makes it impossible for the public to understand how SSA would place any of the hundreds of impairments for which cessation data is not provided into CDR diary categories, which makes it impossible for the public to meaningfully comment on the proposal.

- The supporting document "Cessation Rates by Impairment," states that it presents data on "Centrally-initiated Periodic CDRs and CDR Mailer Deferrals With Initial Determination or Deferral Decision in FYs 2014-2016 Top Fifteen Impairments Based on Highest Ultimate Cessation Rate." SSA does not say why it chose to include the top fifteen impairments by ultimate cessation rate, as opposed to the top ten, twenty or one hundred impairments. SSA does not provide information on what share of CDRs or disability beneficiaries are covered by the data presented, making it impossible to evaluate how representative these data are of all CDRs or the beneficiary population as a whole. SSA does not state why it chose to look specifically at data from fiscal years 2014 through 2016, nor does SSA explain why it cannot present data from more recent years. SSA does not make clear whether all cessations documented were the result of beneficiaries' benefits being terminated as a result of medical improvement identified during the CDR process or due to nonresponse, deaths or other reasons. SSA provides no information on when the Medical Improvement Expected (MIE) diary CDRs described by the data occurred (e.g. at 6 months post benefit award, 18 months or a point in between). This makes it impossible to assess SSA's statement that the agency requires a new medical diary category with a 2-year review period to address the issues the agency says it has identified in these data or if the agency could use the existing flexibility it has for scheduling MIE diary CDRs to address them. Overall, the decisions SSA made in assembling and presenting these data appear arbitrary and the lack of context and explanation prevent the public from being able to assess the data presented and SSA's claims that rely on these data.

- SSA cites the supporting document "Cessation Rates by Diary Category" and states:

  > "Based on the number of cases that seemed to fall between the MIE and MIP diary periods, we analyzed CDR outcomes for certain conditions, their assigned diary categories, and their associated MI rates. We identified several conditions that could have diaries in either the MIE or MIP categories. The MI rates were

similar between both diary categories, suggesting that the MIP diary may not have captured MI at the optimum time."

SSA makes this assertion without explaining its conclusion or why medical improvement rates being similar between both categories indicates that the Medical Improvement Possible (MIP) diary may not have captured medical improvement at the optimum time. It is unclear how SSA has concluded that similarity between the cessation rates indicates a shortcoming of the MIP diary category, or how it does not indicate a shortcoming of the MIE category or the agency's process for assigning cases to the MIP and MIE diary categories.

SSA describes cessation rates as "similar" between both the MIP and MIE diary categories, but fails to mention that significant differences exist between cessation rates for several impairments listed in the document. For example, for individuals with upper limb fractures, the cessation rate for individuals in the MIE diary category is 50 percent, but for individuals in the MIP diary category, the cessation rate is 16.7 percent. In fact, of the 17 impairments listed in the supporting document, the difference between cessation rates is greater than ten percentage points for four. SSA provides no explanation for what it considers "similar" and does not explain why the agency bases its conclusions arbitrarily on the conditions with similar cessation rates while ignoring conditions with dissimilar cessation rates.

SSA also does not present, describe or analyze any of the data contained in the supporting document to support the agency's assertions. No meaningful discussion of the data contained in the document is provided, and SSA presents only a single sentence interpreting the contents of the document. SSA also refers to the supplementary document when discussing "MI rates," despite the fact that the document contains data on cessation rates. While these rates are inherently related, this unclear and non-specific presentation serves only to create confusion. SSA also does not state how it expects the creation of the new MIL diary category to affect the cessation rates cited or what target cessation rates for impairments in the each diary category the agency is aiming to achieve. Without any such information or analysis, SSA cannot state that the data presented in "Cessation Rates by Diary Category" support the agency's contention that a new medical diary category is needed or that it would meaningfully improve the CDR process.

- The supporting document "Cessation Rates by Diary Category," states that it presents data on "FY2016 CDR Outcomes by Primary Impairment." SSA does not make clear if the impairments listed in this document are all impairments for which individuals are placed in both the MIE and MIP diary categories or what, if any, criteria the agency used to select the listed impairments for this analysis. SSA does not make clear whether these are cessation rates for individuals going through a first CDR or a subsequent CDR, or if these are ultimate cessation rates. SSA does not make clear whether the data presented include all CDRs or just full medical CDRs. SSA does not make clear whether all cessations documented resulted from the termination of beneficiaries' benefits as a result of medical improvement identified during the CDR process or due to nonresponse, deaths

or other reasons. SSA provides no information on the number of cases that fall into each impairment and diary category. SSA does not explain why it chose to look at data only from fiscal year 2016 or why the agency cannot present data from more recent years. SSA also does not explain why in the "Cessation Rates by Impairment" supporting document the agency examined data from three years, but in this supporting document the agency only analyzes data from a single year. Overall, the decisions SSA made in assembling and presenting these very limited data are arbitrary and the lack of context and explanation provided prevent the public from being able to assess the data presented and SSA's claims that rely on these data.

- SSA cites evidence showing many individuals with multiple chronic conditions often delay or are not able to obtain medical care due to cost or other non-cost reasons. SSA then states that one of the reasons the new MIL diary category is needed is because "Scheduling a CDR under the MIE category (6 to 18 months) may be premature when MI does not occur as expected due to unmet health care needs." The agency, however, presents no empirical evidence that individuals who are unable to obtain medical care in the first 18 months after developing an impairment will be able to obtain that care by the 24-month mark, which is when an individual's CDR would occur under the proposed new MIL diary category. No studies are cited that indicate an increased likelihood of medical treatment for a beneficiary during this additional six month period, and no studies are cited that document how long it typically takes individuals to receive treatment for specific conditions. With a 29-month wait for Medicare (five months for SSDI and an additional two years for Medicare) plus the time it takes to make medical appointments, undergo testing, and realize the full benefits of treatment, it seems likely that two years is too soon to detect medical improvement for many disability beneficiaries. SSA also does not explain why a lack of access to medical care is only relevant for individuals in the MIE diary category or why the agency is not citing delays in receiving medical care as a reason to delay CDRs for individuals in the MIP or Medical Improvement Not Expected (MINE) diary categories. Without such evidence and explanation, SSA's conclusions in the NRPM relating to the proposed MIL diary category's utility for accounting for access to medical treatment are unjustified and arbitrary.

- SSA states "When we identify and evaluate MI at its earliest point, beneficiaries know the CDR outcome and can make plans for their return to the labor force within a shorter period of time." SSA should clarify that this proposed rule would make no changes to the process or timeline by which beneficiaries are informed of their CDR outcome and have their benefits terminated. Beneficiaries would not receive a decision on a completed CDR more quickly than they currently do, and, if anything, increased CDR backlogs that may result from this proposed rule could lengthen the time it takes for a decision to be rendered. Nor will beneficiaries have any additional time to make plans for what to do after their benefits are terminated. Instead, the proposed changes in the NPRM will simply result in many beneficiaries seeing their benefits terminated sooner than they would have been otherwise.

- To support the agency's assertion that the proposed rule may have "positive employment effects" SSA cites the study "The employment effects of terminating disability benefits" by T.J. Moore published in the Journal of Public Economics in 2015, stating:

> "For example, using our administrative data on entitlement periods and earnings for a group of beneficiaries and recipients whose benefits terminated due to a 1997 statutory change, a researcher at the National Bureau of Economic Research looked at the effect of the loss of benefit eligibility on work activity during the year of benefit termination and the next 11 years (1997 through 2008). Overall, about 22 percent returned to work at an SGA level during the first three years following benefit termination."

SSA fails to mention that the 1997 statutory change referenced is when drug and alcohol addictions were removed as qualifying conditions for disability benefits and that the study looked only at individuals who had such conditions. SSA never explains why the agency takes the position that findings specific to this population are generalizable across the entire population of beneficiaries that would be affected by the proposed rule. SSA also fails to reference the author's statement that, "Given that DI beneficiaries with drug or alcohol addictions were the only ones removed, it is difficult to know how the findings would generalize to other beneficiaries." This study cannot be used to make conclusions about the full population of title II and title XVI beneficiaries. SSA would need to reference and examine additional studies, crossing impairment populations, to make any meaningful conclusions regarding potential employment and earnings outcomes.

Moreover, the evidence cited in Moore's study suggests the vast majority of beneficiaries will not see positive effects. While a minority of beneficiaries may have been able to reach an SGA level of earnings at some point after having their benefits terminated, the study shows that 78 percent of individuals studied did not return to work at an SGA level during the first three years following benefit termination. The study also states that for those individuals that did reach an SGA level of earnings, "The employment effects decline after four years…" SSA is citing the study's findings relevant only to a minority of a non-representative group of beneficiaries from the late 1990s to argue that the proposed rule may have positive effects. A more accurate interpretation of the study is that the vast majority of beneficiaries who experience benefit cessation do not return to work at an SGA level and that a significant share of the minority who do return to work at an SGA level cannot sustain that level of work. The study is entirely insufficient to support SSA's assertion that the proposed rule may result in overall positive employment outcomes.

- To support the agency's assertion that the proposed rule may have "positive employment effects" SSA next cites the agency's own analysis of administrative data examining the relationship between time spent out of work and subsequent likelihood of returning to work at an SGA level. The agency, however, fails to correctly cite the numbers contained in the supplementary document referenced, "Likelihood of Returning to Employment by Age and Time Out of the Labor Market." For example, SSA states, "…in 2013, 35.5 percent of the 40-year-old adults who had been out of the work force for 1 year returned

to work at an SGA level." In the supporting document, that number is 36.4 percent, not 35.5 percent. None of the percentages cited from the supporting document in the NPRM match the numbers presented in the supporting document.

SSA's description of these numbers in the NPRM also characterizes the supporting document as showing what percentage of individuals worked "at an SGA level" in 2013, where SGA references SSA's substantial gainful activity earnings threshold. In 2013, per SSA's website, the monthly SGA threshold was $1,740 for blind individuals and $1,040 for non-blind individuals. On an annual basis, this would equal $20,880 and $12,480, respectively. The supporting document cited by SSA, however, states, "We define employment as annual earnings above $1,000 dollars. Time out of the labor market equals years without earnings above $1,000." This $1,000 amount is not close to $20,880, $12,480 or to the SGA threshold in any year close to 2013, and nowhere in the supporting document is SGA mentioned. SSA has either inaccurately described how it conducted its data analysis in the supplementary document or inaccurately characterized the numbers it references in the NPRM.

SSA also admits at the end of its description of the analysis contained in the supplementary document that, "Although the data shows a modest correlation between the length of time outside of the workforce and likelihood of reentering at an SGA level, the data does not provide evidence of causality between the two." If the analysis does not identify any form of causal relationship, then it is inappropriate for SSA to cite the analysis as providing any support for the agency's contention that this rule change will cause any form of "positive employment effects." SSA has not accounted for any number of other factors that could be responsible for the "modest correlation" that SSA identified, and the agency has conducted no rigorous statistical evaluation of the data presented. Overall, SSA's flawed analysis, mischaracterization and inaccurate citation of the data contained in the supplementary document render any assertions made by the agency relying on the data deeply flawed and prevent the public from being able to accurately assess SSA's assertions. Basing a regulatory change on a correlation that could be spurious and influenced by many other variables is arbitrary.

- The supporting document, "Likelihood of Returning to Employment by Age and Time Out of the Labor Market," states that it "uses data from the Continuous Work History Sample (CWHS) to estimate the probability of employment by time out of the labor market for individuals ages 40, 50, and 60." However, the document fails to include information on sample size, any justification for why 2013 was selected as the reference year or why the analysis uses data from only a single year. This is particularly problematic given that national economic conditions, among many other factors not accounted for, likely had a significant impact on these numbers. Footnote 42 in the NPRM states the group of people analyzed in this document "...includes people who are not SSA beneficiaries, as well as people who are SSA beneficiaries," but this is never stated in the supplementary document's description of its methodology nor is any justification for this choice provided. Similarly, no explanation is provided for why the analysis examines only 40-year-olds, 50-year-olds and 60-year-olds when the proposed rule will impact workers of all ages. Overall, the decisions SSA made in assembling and

presenting these data appear arbitrary and the lack of context and explanation prevent the public from being able to assess the data presented and SSA's claims that rely on these data.

- To support the agency's assertion that the proposed rule may have "positive employment effects" SSA cites the study "Earnings after DI: evidence from full medical continuing disability reviews" by Jeffrey Hemmeter and Michelle Stegman Bailey published in the IZA Journal of Labor Policy in 2016 and states:

> "The employment response to Social Security Disability Income (SSDI) and SSI income loss is supported by recent research by our Office of Research, Demonstration, and Employment Support (ORDES), that looked at earnings for the 5-year period after SSDI and SSI beneficiaries had their benefits ceased following a FMR. The ORDES researchers found that '[t]he majority of ceased beneficiaries have some earnings in the 5 years after a FMR cessation.'"

SSA fails to cite the authors' statement that, among beneficiaries who had their benefits terminated and were examined by this study, "...many appear to be unable to maintain employment: only one in three would have earnings over the full follow-up period. Further, far fewer would reach any of several measures of earnings sufficiency." SSA also neglects to cite the authors' statement that, "Since our estimates are based on a specific segment of the CDR population, we caution the reader against drawing broad conclusions about implications for the entire CDR population," and the agency never explains why it takes the position that these findings are generalizable to the entire population that will be affected by the proposed rule.

Additionally, despite frequently using SGA as an earnings benchmark in the agency's discussion of other data, SSA fails to cite this study's findings relating to earnings at the SGA level and cites only the study's findings relating to whether individuals had any earnings at all. For example, SSA does not cite the study's finding that among terminated beneficiaries studied, "...only 20% were able to maintain earnings above the annualized SGA level or the poverty threshold in the 5 years after program exit." Again, SSA is selectively citing portions of a study the agency contends support its assertions while failing to provide adequate context, describe limitations of the study or reference the study's findings that suggest the proposed rule could have significant negative outcomes for impacted beneficiaries.

- To support the agency's assertion that the proposed rule may have "positive employment effects" SSA cites the study "The effect of disability payments on household earnings and income: Evidence from the SSI children's program" by Manasi Deshpande published in the Review of Economics and Statistics in 2016 and states:

> "Further, there is evidence that parents of SSI children who medically improve offset the loss of SSI benefits through earned income. Research on the effect of SSI payments on household income and earnings found that ". . . a [household] loss of $1,000 in the child's SSI payment [due to the loss of payments after a

> CDR] increases parental earnings—by $700 to $1,400." Furthermore, there was ". . . some evidence that the volatility [variability] of parental earnings decreases in response to the child's removal from SSI." The evidence did not demonstrate a similar rise in income from other unearned income sources, including other disability income sources."

SSA fails to cite the authors' statement that this study's findings "...do not have clear normative implications" and that parents having their benefits terminated "may be costly in the sense that it reduces the amount of time available for parents to care for their disabled children." SSA does not address these warnings in any way and instead appears to argue that the proposed rule could have positive effects on beneficiaries because terminating benefits may force parents of sick children to find other income sources to keep their families' heads above water. SSA also neglects to acknowledge that an increase of $700 in parental earnings would not offset the loss of $1,000 in benefits, and does not discuss how this could reduce income to already low-income households with disabled children. Again, SSA has selectively cited portions of a study it contends support its assertions while failing to provide adequate context or describe findings that suggest the proposed rule could have significant negative outcomes for impacted beneficiaries.

- SSA further cites additional findings from the study "The effect of disability payments on household earnings and income: Evidence from the SSI children's program" by Manasi Deshpande, stating:

> "The evidence also showed that the loss of the child's SSI payments decreased the number of SSDI and SSI applications from other members of the household. These responses to the loss of SSI payments suggest that there may be a shift in the reliance on SSDI and SSI as a permanent, reliable income source for the household."

SSA appears to believe these findings represent additional potential benefits of the proposed rule, although SSA's lack of clarity and failure to provide additional interpretive comment on these findings makes it difficult to assess exactly how the agency views such potential outcomes. If the agency does consider these findings to represent potential benefits, this position would stand at odds with SSA's core mission and Congressional intent. SSA is solely tasked with providing all eligible adults and children the benefits they have earned and are entitled to by statute. Taking actions that could reduce benefit uptake by eligible individuals or harm the public's confidence in the agency's programs would run directly counter to this mission. SSA fails to address this conflict in the NPRM and does not in any way justify why reducing SSDI and SSI applications from households or causing families to cease viewing SSDI and SSI as reliable supports is in the best interests of beneficiaries or in keeping with the agency's mandate.

- SSA's overall assessment of how the proposed rule could impact beneficiaries' employment outcomes is entirely insufficient. SSA references only three academic

studies, ignoring a substantial body of literature explicitly examining the intersection of disability benefit receipt and employment outcomes. SSA provides no explanation for why the agency provides such an incomplete evaluation of this literature or why the agency selectively cited only the three specific studies referenced in the NPRM. SSA cannot credibly contend that these three studies represent the only academic literature relevant to the agency's analysis or that they are representative of the entire body of literature on this topic. The only other source SSA references is the agency's own examination of employment data, which the NPRM incorrectly references and which the agency admits provides no evidence of a causal relationship that would be relevant to the agency's analysis.

What findings SSA does selectively cite from the three academic studies appear to have been chosen solely to support the agency's pre-established position, as the findings are repeatedly presented without adequate context or explanation. SSA fails to note other findings present in the same studies that suggest beneficiaries whose benefits are terminated would experience substantial negative outcomes. SSA fails to explain how the findings of studies looking at specific subgroups of beneficiaries are generalizable to the beneficiary population that will be impacted by the proposed rule. SSA never justifies the agency's position that overall employment effects would be "positive" when the very findings the agency cites suggest that the majority of beneficiaries will not be able to consistently earn significant income after having their benefits terminated. Overall, this analysis selectively and misleadingly cites findings from an unjustifiably small number of studies while ignoring a vast body of relevant research and failing to reference important conclusions and cautions within the few studies that are cited. SSA's analysis of the research is not complete and is not sufficient to justify the changes the proposed rule would enact.

- SSA attempts to argue that the proposed rule could be beneficial to beneficiaries by asserting that the addition of a fourth medical diary category and earlier identification of medical improvement could result in beneficiaries experiencing positive employment effects but the agency provides no analysis of how the proposed rule would impact other measures of beneficiary wellbeing. For example, SSA makes no mention of how the proposed rule would impact beneficiaries' financial security or health, or the health and financial security of their children. Given that the central purpose of the SSDI and SSI programs is to provide financial security to individuals with disabilities that prevent them from working and that many beneficiaries' eligibility for Medicare and Medicaid benefits are tied to their eligibility for disability benefits, these exclusions are unjustifiable. SSA's selection of which aspects of beneficiary welfare it evaluates is arbitrary and insufficient, and the agency's analysis of the proposed rule's potential effects is consequently incomplete.

**Section II. B. Revising the Criteria We Follow to Assign Each Case to Each Diary Category**

- Among the primary proposed changes in the NPRM are how categories of impairments and individuals with specific impairments should be assigned to medical diary categories. Nowhere in the NPRM does SSA present any medical evidence to justify why the agency

believes specific categories of impairments should be assigned to any of the three existing medical diaries or to the proposed new MIL diary category. SSA makes vague, unsubstantiated references to what the agency has learned through experience, but presents no actual medical evidence pertaining to expectations of medical improvement within specific time frames by impairment. Not a single academic study focused on medical improvement or treatment advancements is cited by SSA, apart from a single report relating to changes SSA already made in 2016 to the method by which the agency evaluates HIV cases.

Particularly egregious is the fact that SSA presents no evidence to support the selection of a 2-year review cycle for the proposed MIL diary category other than to describe what the agency unconvincingly claims are shortcomings of the MIE and MIP diary categories. No studies, data or medical opinions are cited that show a 2-year review period is appropriate for any individual impairment. The assignment of cases to medical diary categories is meant to be driven by medical evidence, but such evidence is entirely lacking in the NPRM, rendering SSA's analysis incomplete and undermining the agency's justification for the changes to medical diary assignments the agency proposes.

An NPRM for a proposed rule of this nature should include a clear presentation of the current assignment of all impairment categories to the existing medical diaries and the proposed assignment of all existing impairment categories to the proposed configuration of four medical diaries. It should also include citation and description of medical evidence that justifies why each impairment category should be assigned to a specific medical diary. The failure to provide this information prevents the public from being able to assess what changes SSA is proposing and their potential effects and indicates that the process SSA used to arrive at these proposals was insufficiently thorough and arbitrary.

- In describing which impairments will be included in the diary categories, the NPRM provides extremely little specific information on which impairments will be included in each of the medical diaries. The NPRM does not state which medical diary categories would be used for a large number of the common impairments and conditions such as diabetes or hypertension. SSA makes only general statements about the approach the agency will take to categorizing impairments and states that the agency will publish lists of specific impairments at some unidentified point in the future. This makes it impossible for the public to evaluate which beneficiaries will be impacted by the changes SSA is proposing, thus making it impossible to determine the potential costs to beneficiaries.

  Additionally, nowhere does SSA present any specific estimate of the costs the agency will incur to create and publish these new detailed lists of impairments that would be necessary to implement the rule. SSA provides no estimate of the personnel hours required to conduct such analyses and assignments, nor does the agency provide an estimate of the costs associated with providing necessary training to SSA and DDS staff throughout the states and territories to ensure staff are able to understand and implement the proposed new diary structure. No information is provided on the timeline for such training and how it would affect the time needed to implement the proposed rule. No estimates of the costs associated with monitoring the accuracy of the implementation of

the new diary structure are provided either. SSA's failure to provide any of this information makes it impossible for the public to evaluate the anticipated cost of the proposed rule or understand the timeline over which the rule will be implemented.

- SSA does not provide specific operational definitions of several terms used to describe how the agency assigns cases to medical diary categories. For example, SSA states that several factors can result in assignment to the MIE diary category, such as "current significant, sustained, and progressive improvement." No explanation is provided of what factors are evaluated to establish that improvement is "significant," "sustained," or "progressive." The proposed creation of a new medical diary category will necessitate the reassignment of existing impairment categories to different categories. Without clear operational definitions, the public cannot understand and evaluate the SSA's current practices, the proposed changes contained in the NPRM and the proposed rule's potential effects on current and future title II and title XVI beneficiaries.

- SSA states in the NPRM that all step 5 allowances will be assigned to the MIL diary category except for a subgroup of step 5 allowances that will be assigned to the MINE diary category. In a briefing provided to Congressional staff on January 16, 2020 on the current CDR process, SSA staff stated that step 5 allowances are currently assigned to all three current medical diary categories based on individual case circumstances. SSA does not provide even this level of rudimentary description of how step 5 allowances are currently assigned in the NPRM, however, making it is impossible for the public to evaluate the changes the agency is proposing.

  SSA also provides no actual justification for the inclusion of step 5 cases in the new MIL diary category and provides no evidence that the current method of processing step 5 allowances is inadequate. The agency cites no medical or administrative rationales for this proposed change and provides no explanation for why an arbitrary administrative distinction between beneficiaries, and not medical circumstances, should dictate that these individuals have their cases reevaluated every two years. SSA also provides no information on how many beneficiaries are categorized as step 5 allowances or what share of all beneficiaries they comprise, making it impossible for the public to understand and assess the potential effects of this change. Without any explanation or justification, this proposed rule's reassignment of step 5 allowances into the proposed new MIL diary category is arbitrary.

  Additionally, SSA does not mention what will happen to individuals for whom the agency has difficulty identifying whether benefits were granted at step 3 or step 5. This is particularly relevant to widows and widowers with disabilities and adult children with disabilities. SSA presents no data on what share of beneficiaries the agency is unable to categorize as step 3 or step 5 and provides no explanation of how these individuals will be assigned to medical diary categories. This lack of information and incomplete analysis prevents the public from evaluating the changes the agency is proposing and the potential costs these changes may impose on beneficiaries.

- SSA states that the new MIL diary category will also include cases of children "who are approaching a chronological age with key developmental activities, for example, age 6 with a transition into formal education, and at age 12 with a transition into adolescence." SSA provides no medical or administrative justification for these proposed choices and provides no explanation of how transitions into formal education or adolescence relate to a child's underlying medical condition or likelihood of experiencing medical improvement. SSA does not provide any detailed explanation of why children at these points in their life span should require more frequent review than children at other points in their life span. SSA does not explain whether the proposed rule would require children awarded benefits very close to a 6th or 12th birthday to complete a CDR almost immediately after being deemed eligible for benefits, nor does the agency provide information on the likelihood of a CDR conducted after such a short period identifying significant medical improvement.

  SSA also does not explain how it arrived at these two specific ages. Not all children enter formal education at the same age, and there is significant variability in the age at which adolescence begins in children and how it progresses. For example, the National Institute on Early Education Research reported in 2017 that approximately one third of all children are in formal education by age four, and, according to the National Academy of Sciences, the onset of adolescence can occur between the ages of eight and fifteen.[1] Even if SSA presented evidence that entering formal education or beginning adolescence could affect a child's likelihood of experiencing medical improvement, which SSA does not, these findings call into question SSA's specific choices of ages 6 and 12 as representing when formal education and adolescence begin. Without any explanation or justification of why the ages of 6 and 12 were chosen to conduct additional CDRs, SSA's proposed changes appear arbitrary.

- SSA states that the agency will assign impairments to the new MIL diary category "because they are amendable to treatment and likely to improve." The agency states that it will assign impairments to the MIE diary category "because we expect them to improve." SSA provides no clear substantive distinction between these two definitions. SSA cites no medical evidence or administrative data to illustrate the difference between an impairment that SSA expects to improve and one which is amendable to treatment and likely to improve. SSA does not clarify why, if an impairment is amendable to treatment and likely to improve, SSA would not then expect it to improve. The only clear difference SSA establishes between these categories is the frequency with which CDRs are administered. Due to this lack of information, the assignment of cases to one category or the other appears arbitrary.

- SSA states that step 5 allowances based on only 17 specific impairments or conditions will continue to be included in the MINE diary category. SSA provides no explanation of the criteria used to distinguish these impairments and conditions from all others and

[1] Friedman-Krauss et al., "The State of Preschool 2017," National Institute for Early Education Research (2018), available at http://nieer.org/state-preschool-yearbooks/yearbook2017; Kipke, MD., "Adolescent Development and the Biology of Puberty; Summary of a Workshop on New Research," National Research Council (US) and Institute of Medicine (US) Forum on Adolescence (1999), available at https://www.ncbi.nlm.nih.gov/books/NBK224692/.

provides no explanation of how the agency will assess functional limitations, age and time outside of the workforce to determine which people with these impairments should be placed in the MINE diary category. Without any explanation or justification, this choice by the agency appears arbitrary.

**Section II. C. The Frequency of a CDR for Each of the Four Medical Diary Categories**

- To illustrate the changes the proposed rule would make to the frequency of CDRs in each diary category, SSA presents the following table:

| Diary category | Current policy | Proposed policy |
|---|---|---|
| MIE | 6-18 months | 6-18 months (unchanged). |
| MIL | NA | 2 years. |
| MIP | 3 years | 3 years (unchanged). |
| MINE | 5 to 7 years | 6 years. |

Regarding the MIE diary category, in this table and throughout the NPRM, SSA states that the agency currently schedules MIE diary categories between 6 and 18 months. The only exception to this review period, noted only once in the NPRM, are several impairments, such as leukemia and lymphoma, for which SSA "set longer MIE diaries (2 years)." However, during a briefing provided to Congressional staff on January 16, 2020 on the current CDR process, SSA staff presented the attached document stating that the CDR review cycle for MIE cases "May be as long as 30 months."[2] Nowhere in the NPRM is it stated that MIE review periods can already be set beyond 24 months and up to 30 months. This omission and inconsistency makes it impossible for the public to evaluate the proposed changes or SSA's arguments for why the proposed rule is necessary because SSA has not provided a complete and accurate description of current SSA practices.

Regarding the MIP diary category, the table states that SSA currently schedules CDRs at "3 years" and will continue to schedule CDRs at "3 years", but the description of SSA practices immediately below the table states that CDRs are scheduled "at least once every 3 years." These are substantively different definitions, as "at least once every 3 years" means an event can occur more often than every 3 years, while "3 years" means exactly every 3 years. This inconsistency makes it impossible for the public to evaluate the proposed changes and SSA's stated justifications for these changes because SSA has not provided a consistent description of current SSA practices and the rule's intent.

Regarding the MINE diary category, the table states that the proposed policy would change the frequency of MINE diary CDRs to every "6 years," but the description of the

[2] See attachment "CDR Overview 2020-01-16" provided to Congressional staff by SSA for staff briefing on January 16, 2020.

proposed rule's intent elsewhere in the NPRM states CDRs would be scheduled "at least once every 6 years." Again, these are substantively different definitions, as "at least once every 6 years" means that the agency would be able to perform CDRs more frequently than every 6 years. This inconsistency makes it impossible for the public to evaluate the proposed changes because SSA has not provided a consistent description of the rule's intent.

- Throughout the NPRM, SSA describes the scheduling of CDRs as occurring "every 6-18 months" or "at least once every 3 years," but SSA never states what initial point in time these time periods are relative to. SSA never provides any information on whether they are measured from the date a beneficiary is awarded benefits, the date a beneficiary first develops an impairment or the date a beneficiary receives a specific type of medical treatment or undergoes a specific procedure. Without such information, it is impossible for the public to evaluate the proposed rule's intent when it states that CDRs shall happen after a certain number of months or years.

- To justify SSA's proposal to change the MINE diary review period from between 5 and 7 years to every 6 years (or at least once every 6 years depending on the section of the NPRM referenced), the agency states:

> "Since we began using the current rules in 1986, we have not used a shorter review period for permanent impairments. When we have identified the need to change the diary categories for specific impairments, it has involved a change in classification from permanent to nonpermanent impairments. For example, we changed the overall classification of HIV from a permanent to nonpermanent impairment. We have not identified any permanent impairments for which a 5-year review period is medically appropriate. Based on this experience, we believe that maintaining the variable period of review for permanent impairments is not necessary. Therefore, we propose to set the review period for permanent impairments, that is, the MINE diary, at 6 years in order to identify such improvement at its earliest point while providing enhanced consistency and clarity surrounding the review cycle's timeline."

Nowhere in the NPRM does SSA provide any actual justification for the selection of a 6-year review period. SSA only states that the agency has not identified any impairments for which a 5-year review period is medically appropriate. SSA presents no evidence that 7-year review periods are medically inappropriate or that 6-year review periods are appropriate for any of the impairments assigned to the MINE diary category. No medical evidence relating to any condition in the MINE diary category is presented at all.

SSA also does not explicitly state in the NPRM that all CDRs in the MINE diary category are currently conducted on a 7-year review cycle.[3] SSA does reference this by describing a 1986 rule and saying that the agency has not used a "shorter review period for permanent injuries" since then, but this is not sufficiently clear. This is important for the

[3] In a briefing provided to Congressional staff on January 16, 2020 on the current CDR process, SSA staff stated that all MINE medical diary category CDRs are assigned a 7-year review period.

public to understand, because it means that SSA's proposed rule would require that every beneficiary assigned to the MINE diary category have their eligibility reviewed more frequently than it currently is. Nowhere does SSA state that explicitly, nor does SSA acknowledge that these changes to the frequency of MINE diary CDRs will significantly increase the burden on beneficiaries assigned to the MINE diary category.

- Throughout the NPRM, SSA uses inconsistent terminology when referring to CDRs. In different sections of the NPRM, SSA uses "full medical CDRs," "medical CDRs," "full medical reviews," "FMRs," "mailer CDRs," "mailers," "mail questionnaire," "CDR mailer reviews" and "CDR Mailer" to refer to CDRs, despite there only being two forms of CDR. This inconsistency makes for poor communication about a critical topic and inhibits the public's ability to understand the proposed rule.

- To illustrate how the proposed rule will change the number of CDRs conducted, SSA provides the following table and explanation:

  "As a result of the addition of the MIL category and the change in frequency for certain categories, we expect the following workload shifts in the anticipated number of full medical CDRs completed over the 10-year period from FYs 2020-2029:"

| **Diary category** | **CDRs under current category [1]** | **CDRs under proposed category [1]** | **Net change [1]** | **Percent change vs. current category total** |
|---|---|---|---|---|
| MIE | 986 | 1,205 | 219 | 22.2 |
| MIL | | 1,764 | 1,764 | |
| MIP | 4,605 | 3,738 | −867 | −18.8 |
| MINE | 559 | 559 | | |
| Total | 6,150 | 7,267 | 1,116 | 18.1 |

[1] *Calculated in thousands.*

SSA omits from this table and explanation significant information that is necessary to evaluate the proposed rule's effects. SSA fails to provide any information on movement between medical diary categories and shows only total net changes. SSA only shows changes in full medical CDRs by diary category, but presents no disaggregated data on anticipated net changes in full medical CDRs by impairment. The 18.1 percent increase in total full medical CDRs shown in the table does not appear to match a statement made elsewhere in the NPRM that the proposed rule will result in "1.1 million (an 18.4 percent

increase) additional FMRs." Additionally, SSA only presents estimates of changes in net CDRs by medical diary category for full medical CDRs, but no similar table or disaggregated estimates are presented for the 1.5 million additional mailer CDRs SSA projects will occur as a result of the proposed rule. All of this information is necessary for the public to evaluate the increased burden the proposed rule will place on beneficiaries and it should be possible for SSA to produce. SSA provides no explanation for the omission of this information.

- SSA estimates that the number of full medical CDRs for beneficiaries in the MIE diary category will increase by 219,000, or 22.2 percent, over 10 years. Elsewhere in the NPRM, SSA cites as a central justification for the agency's proposed creation of the new MIL diary category the fact that the agency feels CDRs in the MIE category are frequently conducted "too early to identify MI." This would suggest that the changes made by the proposed rule are intended to *decrease* the number of MIE diary CDRs. Nowhere does SSA clearly explain what changes being made by the rule would result in the dramatic *increase* in MIE diary CDRs the agency projects. The projected increase in MIE diary CDRs of over 22 percent over the ten year period appears to directly contradict the agency's assertion that the NPRM is necessary to reduce premature MIE diary CDRs.

- SSA estimates that the number of full medical CDRs for beneficiaries in the MINE diary category will not change as a result of the proposed rule, remaining at 559,000 over 10 years. The proposed rule, however, changes the frequency of MINE diary CDRs as well as the criteria used to assign cases to diary categories including the MINE category. It seems implausible that these changes would not impact the number of MINE diary CDRs conducted over the 10-year window examined. SSA's failure to provide any details of the calculations used to produce these estimates prevents the public from being able to understand this projection, and SSA provides no explanation of how this projection could be accurate given the changes proposed.

## IV. Regulatory Procedures

- Under the heading "Executive Order 12866, as Supplemented by Executive Order 13563" SSA states:

> "We consulted with the Office of Management and Budget (OMB) on the significance of these proposed rules. Because the projected 10-year administrative costs of these proposed rules are $1.8 billion, we determined that this NPRM meets the criteria for a significant economic regulatory action under Executive Order 12866, section 3(f)(1), as supplemented by Executive Order 13563. Therefore, OMB reviewed it."

The analysis presented in the NPRM is entirely insufficient for a proposed rule deemed economically significant by OMB. Executive Orders 12866 and 13563 do not only require that OMB review economically significant rules, they require that agencies take a number of specific steps to thoroughly and publicly document a proposed rule's

anticipated costs and benefits, quantify them where possible and illustrate that a proposed rule's projected benefits outweigh projected costs. SSA provides no detailed cost-benefit analysis as required by those Executive Orders.

As described in greater detail above and below, nowhere does SSA present any of the calculations and assumptions used to produce the agency's estimates of the projected increase in CDRs, the reduction in OASDI and SSI benefits paid out or the increase in agency administrative costs. What limited qualitative and quantitative estimates of the proposed rule's costs are provided appear to omit significant and foreseeable costs such as those associated with an increase in CDR appeals and benefit reapplications. The few estimates provided are also routinely described using unnecessarily vague and unclear language. What little evaluation there is in the NPRM of potential benefits is limited to poorly justified claims that the rule will provide SSA with greater flexibility and ability to identify medical improvement sooner and an incomplete and weakly sourced qualitative discussion of "positive employment effects" that ignores a multitude of likely negative outcomes for beneficiaries.

Most egregiously, nowhere does SSA provide any estimate or discussion of the number of children, youths and adults who will lose access to benefits more quickly than they would have otherwise as a result of the proposed rule or those who would not have lost access to benefits at all were it not for the proposed rule. Benefits lost would include not only SSDI and SSI benefits, but Medicare and Medicaid benefits as well, because eligibility for these health care programs is frequently tied to a person's eligibility for disability benefits. SSA should be capable of producing such estimates, disaggregated by age, impairment and state of residence if the agency is capable of estimating the reduction in benefits paid out. No evaluation of the rule's costs can be considered complete without such estimates and discussion. No meaningful analysis of the NPRM by the public is possible without this information.

Additionally, nowhere in the NPRM does SSA explicitly make the case that the proposed rule's projected benefits will exceed the rule's projected costs. SSA also presents no potential alternatives to the proposed rule, nor does the agency evaluate if such alternative approaches could achieve the agency's stated goals at lower cost to the government and the public. The analysis SSA presents in the NPRM is incomplete and impossible for the public to evaluate, and it does not approach the level of analysis expected and required of an economically significant rule.

- Under the heading "Anticipated Costs to Our Programs" SSA presents the following estimates:

> "We estimate, based on the best available data, that this proposed rule, assuming that rediarying under the proposal would be implemented for all medical determinations or decisions made on or after June 1, 2020, would result in a net increase of roughly 2.6 million additional CDRs over the period from FY 2020-2029—1.1 million (an 18.4 percent increase) additional FMRs and 1.5 million additional CDR mailer reviews. The additional FMRs are estimated to result in a

net reduction in Old-Age, Survivors, and Disability Insurance benefit payments of $2.0 billion and a net decrease in federal SSI payments of $0.6 billion over that same period."

SSA fails to present any details of the calculations or assumptions used to produce these estimates, making it impossible for the public to assess their validity. Any estimate of the effects of a policy on OASDI and SSI benefit payments produced by SSA's Office of the Chief Actuary incorporates a large number of assumptions and generally produces significantly more detailed outcome estimates than those presented in this NPRM. SSA has provided no justification for why so little information has been provided. For the general public, stakeholders, beneficiaries and Congress to be able to adequately evaluate the NPRM, SSA must provide more detail about how these top-line estimates were produced.

SSA's presentation of the limited cost estimates provided is also unjustifiably vague and unclear. For example, "roughly 2.6 million additional CDRs" is an unnecessarily approximate estimate, and nowhere is the precise estimate produced by SSA presented. SSA states that full medical CDRs will increase by 18.4 percent, but presents no similar estimate of the projected percentage increase in CDR mailer reviews. SSA also presents costs only as 10-year net values, but presents no year-by-year estimates and no information about trends in these values over the 10-year window examined or projected changes in CDR numbers by year.

- Under the heading "Anticipated Costs to the Public" SSA presents the following opportunity cost estimates, some details of which are presented in tables under the heading "Paperwork Reduction Act:"

  > "We estimate that these additional CDRs will result in increased public 'opportunity costs' of $16,352,000 over a 10-year period. This figure represents an estimated hourly average Disability Insurance (DI) payment (in lieu of an hourly wage, since respondents to this collection are not generally employed) of $10.22 multiplied by the additional annual burden hours resulting from the increased use of the two CDR Information Collection Requests (ICR) (OMB No. 0960-0072, full medical review and OMB No. 0960-0511, CDR Mailer) × 10 (representing a 10-year period)."

SSA does not explain how the agency produced the $10.22 "estimated hourly average" DI payment used in these calculations. It is unclear if this figure is a projection produced by a model or an average derived from SSA data from a specific time period. Without providing any of this information, it is impossible for the public to assess whether SSA's methodology is sound.

SSA's decision to use a single hourly average DI payment for all beneficiaries is also unexplained. SSA should be able to calculate average DI payments for beneficiaries in each diary category and use those estimates along with the agency's projections of the total increase in CDRs by diary category to provide more accurate estimates of

beneficiary opportunity costs. If SSA is not able to do so, SSA should provide an explanation of why it is not possible.

- The CDR form response time assumptions used by SSA to calculate beneficiary opportunity costs appear improbably short. For example, for completing a full medical CDR form (Form SSA-454), SSA assumes a beneficiary will require only 60 minutes. This form is 15 pages long, includes many questions that can require lengthy explanations and requires beneficiaries to assemble and attach all medical records covering the previous 12-month period. The form requires individuals to recall and list the contact information of all doctors, hospitals, clinics and other health care facilities they have had appointments at over the previous year. The form requires individuals to recall the dates and types of all individual medical tests administered or scheduled by their health care providers. The form requires individuals to not only list any prescription medicines they have taken over the past year, but also any non-prescription medications they have taken. The form even requires individuals to list all of the activities they do in a typical day and their personal hobbies and interests. The assumption that completing such a form only takes 60 minutes appears unjustifiable, particularly when accounting for the population that comprises SSDI and SSI beneficiaries. Due to their disabilities, impairments and conditions, these individuals will have a significant number of health care providers, medical events, medications and treatments to document. In addition, a significant number of beneficiaries have functional and intellectual conditions that necessitate both additional time and assistance to complete the documentation. Given these factors, SSA should produce the evidence and assumptions used to estimate the response time assumptions included in the NPRM to allow for meaningful public comment on what appear to be improbably low burden estimates.

- SSA also appears to be significantly underestimating costs faced by beneficiaries by failing to account for other burdens placed on beneficiaries by more frequent CDRs. In the "Anticipated Costs to the Public" portion of the NPRM, SSA only accounts for time beneficiaries will spend filling out CDR forms, but the full CDR process frequently requires significant additional expense, effort and time. For example, SSA has not accounted for the fact that a significant number of beneficiaries will spend resources and time going to field offices or on the phone with SSA staff receiving help completing their CDR forms. Given that SSA's initial contact with beneficiaries regarding a CDR typically includes a written notice with a request to call or come into a field office, this omission is particularly problematic. SSA also does not account for time beneficiaries will spend obtaining medical records and completing consultative exams (CEs) that beneficiaries would not have undergone but for the need to complete their CDR.

  SSA has also not accounted for any beneficiary costs associated with the CDR appeal process or benefit reapplication process for beneficiaries whose CDRs result in benefit cessations. Given that SSA's rule will significantly increase the number of CDRs over a ten year period, it will also increase significantly the number of CDR appeals and benefit reapplications beneficiaries submit. SSA should be able to calculate how many additional appeals and new benefit applications would occur based on current data, and the agency should be able to produce paperwork and response time estimates for beneficiaries

completing them. SSA should also be able to account for the cost of retaining representation during these processes given that SSA has data on the percentage of beneficiaries with representation at each stage of the CDR appeals process. That SSA has neglected to account for any of these easily foreseeable costs that would not be incurred by beneficiaries but for this proposed rule illustrates how incomplete and arbitrary the agency's cost estimates are.

- In describing potential opportunity costs incurred by medical offices as a result of the proposed rule, SSA states:

> "In some, though not all, cases, we may need to ask respondents' medical offices to provide us with updated medical records to supplement the CDR documentation submitted by the respondents. The time these offices' administrative staff spend to gather and submit files to us represents another potential source of opportunity costs. However, since we do not have data on the percentage of cases in which we need to request additional information, it is not currently possible for us to estimate lost opportunity costs in this area. However, if the public wishes to submit comments on this issue, we will take them under consideration for future opportunity cost calculations."

SSA fails to provide an explanation of exactly which cases require such collection of additional information and states only that it is "some, though not all, cases." This is unnecessarily vague and harms the public's ability to assess SSA's qualitative description of medical office opportunity costs. Additionally, SSA presents no explanation of why the agency is unable to collect any data pertaining to how often it makes requests for additional information or how long it typically takes medical offices to gather and submit files to SSA. SSA has, for decades, interacted with tens of thousands of medical offices on a regular basis as requesting medical records is a routine process for SSA. SSA should be able to collect such information from medical offices the agency routinely interacts with, and this information would allow the agency to present a quantitative estimate of opportunity costs using time estimates and typical wages for workers in the health care industry.

- SSA has not addressed the issue of how the increase in the number of CDRs and the accompanying increase in appeals and reapplications will affect the wait times for title II and title XVI disability determinations. In a more recent NRPM, issued on December 20, 2019, SSA states that wait times for an Administrative Law Judge hearing can currently be between "a low of about 8.5 months to a high of about 20 months."[4] If implemented, the NPRM will have an effect on the appeals wait times as well as the overall application decision determination. SSA makes no mention of this in the NPRM and offers no estimate of the cost of increasing appeal wait times or overall determination wait times for the agency, applicants or current beneficiaries.

[4] Notice of Proposed Rulemaking, RIN 0960-AI25, Hearings Held by Administrative Appeals Judges of the Appeals Council, available at https://www.federalregister.gov/documents/2019/12/20/2019-27019/hearings-held-by-administrative-appeals-judges-of-the-appeals-council.

- Under the heading "Anticipated Administrative Costs to SSA" SSA presents the following estimates:

> "Our Office of Budget, Finance, and Management estimates increased administrative program integrity costs, in addition to current costs, of approximately $1.8 billion for the 10-year period from FYs 2020-2029. The costs are driven largely by a projected net increase of roughly 2.6 million CDRs over the 10-year timeframe. This NPRM assumes the fully-loaded costs of performing the full medical CDRs, work CDRs, and mailers, consistent with methodology used in the budget."

SSA fails to present any of the calculations or assumptions used to arrive at these estimates, making it impossible for the public to assess their validity. No information is provided about how costs of conducting full medical CDRs and mailer CDRs are estimated or what personnel costs, overhead costs and costs of obtaining necessary materials such as medical records from health care providers are accounted for. No information is provided on what data from what years are being drawn upon to model these costs. As such, it is impossible to determine whether any rigorous modeling methodology was employed at all, thus making it impossible for the public to have any confidence in the stated estimates.

Given the complete lack of detail presented, it is impossible to assess whether SSA has accounted for several foreseeable administrative cost increases, although the fact that they are not described anywhere in the NPRM would suggest that SSA has not accounted for them. For example, SSA does not appear to account for the increase in CDR appeals and benefit reapplications that will result from the agency performing 2.6 million additional CDRs over a 10-year period. SSA has data on the percentage of CDRs that are appealed and academic literature provides documentation of the percentage of beneficiaries that reapply and are re-awarded benefits after having their benefits terminated as the result of a CDR.[5] SSA does not present any of this information nor does the agency provides estimates of the costs of these appeals and reapplications to the agency. Relatedly, as stated earlier, SSA provides no description of how the predictable increase in CDR appeals will impact existing hearing backlogs.

SSA's presentation of the limited administrative cost estimates it does provide is also unjustifiably vague and unclear. SSA states that total administrative costs over the 10-year period examined would amount to "approximately $1.8 billion." There is no reason for an approximation of this estimate, and nowhere is the precise number produced by SSA's calculations presented. SSA's statement that these costs are "driven largely" by the projected net increase in CDRs implies that other significant factors are also driving the cost estimate, but no information on those factors is presented. SSA states that the NPRM assumes "fully-loaded costs" of CDRs and accounts for costs of "work CDRs,"

[5] For one example of this academic literature, see Hemmeter and Stegman, "Subsequent Program Participation of Former Social Security Disability Insurance Beneficiaries and Supplemental Security Income Recipients Whose Eligibility Ceased Because of Medical Improvement," Social Security Bulletin, Vol. 73, No. 2 (2013), available at https://heinonline.org/HOL/P?h=hein.journals/ssbul73&i=133.

but neither of those terms is defined and neither appear anywhere else in the NPRM. SSA's attempt to gloss over this lack of detail and clarity by stating that this methodology is "consistent with methodology used in the budget" is also entirely insufficient. This is not only because no budget documents are referenced that would allow the public to assess this claim, but because the standards and requirements that apply to rulemaking are not the same as those that apply to an agency's budget process.

The proposed rule is complex and the fiscal and programmatic effects that it would have on SSA, SSA personnel and the procedures they implement would be significant. The effects the rule would have on current and future beneficiaries who have earned eligibility for disability benefits would be even more substantial. These beneficiaries deserve to be treated in a manner that is transparent, equitable and fair, but SSA has failed on this account. As illustrated in detail above, the shortcomings of SSA's NPRM are pervasive and severe. SSA fails to present evidence that that the proposed rule is needed or that the changes contained in the proposed rule would achieve the agency's stated goals. SSA fails to appropriately weigh the potential costs and negative outcomes of the proposed rule and fails to provide the public with sufficient information to meaningfully comment on the proposed rule. Overall, SSA fails to meet its obligations as established by statute and Executive Order.

All that appears consistent in the proposed rule is that SSA is proposing to make procedural changes that would dramatically increase the number of CDRs the agency conducts, placing additional undue burden on Americans with disabilities and their families and slashing benefit payments by billions. The proposed rule would also significantly increase SSA administrative costs at a time when the agency's attention and resources would be better directed toward long-standing issues that directly negatively impact beneficiaries, such as wait times for benefit applications to be processed and disability hearing backlogs. Instead, this proposed rule fits into a pattern of actions from the Trump Administration that seek to make it more difficult for Americans to access essential benefits and supports for which they are eligible under statute. This proposed rule is unnecessary and burdensome, and SSA has failed to present a credible justification for it. I urge SSA to withdraw the proposed rule immediately.

Sincerely,

Bob Casey, Jr.

Robert P. Casey, Jr.
United States Senator