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:

We 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. The proposed rule would dramatically increase the number of CDRs the agency conducts every year and burden millions of Americans with disabilities with more frequent, unjustified reviews of their eligibility for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) benefits. At a time when leadership from SSA is sorely needed to further reduce unacceptably long disability application wait times and eliminate the disability hearing backlog, it is alarming that the agency appears more concerned with devoting limited resources toward making it harder for people with disabilities to receive essential benefits. This proposal appears to be yet another attempt by the Trump Administration to make it more difficult for Americans to access essential supports.

Specifically, we oppose SSA's proposal to create a new medical diary category with a two-year CDR review period, to change the criteria used to assign cases into each medical diary category and to change the frequency with which the agency performs CDRs for cases in one existing medical diary category. In its Notice of Proposed Rulemaking (NPRM), SSA fails to justify the need for this rule. Specifically, SSA fails to clearly establish a need for these 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. SSA does not even provide a cursory estimate of the number of people who will lose access to benefits earlier than they would have otherwise as a result of this rule.

The result of these failures is that substantial portions of the proposed rule are arbitrary in nature and the public cannot fully evaluate the proposal with the inadequate information provided. All that appears certain is that the proposed rule would significantly increase time and paperwork burdens on people with disabilities, cause many people with disabilities to lose access to essential benefits sooner than they otherwise would have and significantly increase SSA's administrative costs. For these reasons, it would be inappropriate for SSA to move forward with a final rule, and we urge SSA to withdraw the proposed rule immediately.

Failure to Establish Need for Proposed Changes

In the NPRM, SSA states that the proposed changes are needed to enable the agency to identify medical improvement (MI) at its earliest point and provide the agency needed flexibility to adjust the scheduling of CDRs when there have been advancements in medical treatments. SSA fails to justify these changes are needed to accomplish these goals and does not to explain how the specific proposed changes would achieve these goals. For example, when the agency cites CDR outcome data to support its assertion that the existing diary categories are insufficient, SSA provides no substantive or transparent analysis of the data contained in the supplementary materials and never states what benchmarks the agency uses to evaluate whether continuance rates are too high or too low. SSA also states that it already conducts CDRs at 2-year intervals for specific conditions such as leukemia because medical evidence warrants it, seemingly contradicting the agency's contention that a new Medical Improvement Likely (MIL) diary category is needed to give the agency flexibility to conduct CDRs at 2-year intervals. SSA further presents no medical evidence to justify why specifically a 24-month review period is appropriate for each of the types of conditions it would include in the new MIL diary category.

SSA states that a primary reason it has proposed these changes is so the agency can avoid conducting CDRs too early, before measurable MI occurs, particularly for beneficiaries currently categorized in the Medical Improvement Expected (MIE) diary category. In the NPRM, SSA states that its MIE CDR outcome data shows that often "the first CDR was conducted too early to identify MI," and further states that because some beneficiaries may face a delay in accessing medical treatment, it would be appropriate to delay some MIE CDRs. This goal contradicts SSA's own projections showing that the proposed rule would increase the number of MIE CDRs conducted by 22.2 percent. SSA does not explain the discrepancy between the agency's argument that the proposed rule is needed to reduce the number of premature MIE CDRs and the actual changes the agency has proposed, which, by the agency's own estimation, would dramatically increase the number of MIE CDRs conducted.

Failure to Justify Proposed Procedural Changes

Throughout the NPRM, SSA repeatedly fails to justify the specific procedural changes it is proposing to make. For example, in explaining what cases will be included in the new MIL diary category, SSA provides no rationale for including step 5 allowances, which are cases in which beneficiaries were determined eligible for disability benefits at the last step of the five-step disability claims process. SSA never explains why this arbitrary administrative distinction, and not medical evidence, should dictate that these individuals have their cases reviewed every two years. Further, SSA provides no evidence that the current method of processing step 5 cases is inadequate. SSA also provides no medical or administrative rationale for assigning children approaching ages 6 and 12 to the new MIL diary category other than stating that these are ages at which many children transition into formal education or transition into adolescence. SSA provides no explanation for how such transitions relate to a child's underlying medical condition or likelihood of experiencing MI nor does SSA explain why such beneficiaries would require more frequent review of ongoing eligibility.

The proposed changes to the Medical Improvement Not Expected (MINE) diary category similarly lack justification. For example, SSA states that step 5 allowances based only on 17 specific impairments or conditions will continue to be included in the MINE diary category, but

provides no explanation of the criteria used to distinguish these impairments and conditions from all others. In proposing to change the CDR review period for cases in the MINE diary category from between 5 and 7 years to every 6 years, SSA does not provide any explanation of why a 6-year review period is more appropriate than a 7-year review period and provides no data on current MINE case review periods to justify the proposed change. In addition, SSA does not explain why, despite the agency repeatedly citing the need for greater flexibility as among the primary reasons it has issued this proposed rule, the agency is proposing to significantly curtail its flexibility to schedule CDRs for the wide variety of cases included in the MINE category.

Failure to Fully Evaluate Effects on Beneficiaries

SSA also fails to fully evaluate the effects the proposed rule would have on beneficiaries. The only aspect of beneficiary welfare that SSA provides any analysis of is the proposed rule's potential impact on beneficiary employment outcomes, and that analysis is entirely insufficient. On the issue of beneficiaries' potential return to employment, SSA selectively references only three academic studies, ignoring a substantial body of literature looking explicitly at the intersection SSDI and SSI benefit receipt and employment outcomes. SSA also interprets the findings of these few studies – which seemingly show that the majority of people who lose access to SSDI benefits are not able to consistently earn significant income in the years after losing access – as somehow being supportive of the agency's position that the proposed rule will improve overall beneficiary outcomes. The only additional evidence SSA cites to support its assertions are numbers the agency produced itself looking at the relationship between time spent out of the labor force and future earnings. SSA, however, then admits that its numbers provide no evidence of a causal relationship between the factors examined, rendering the agency's findings completely immaterial to its analysis of the proposed rules' effects.

SSA provides no analysis of how the proposed rule will impact beneficiaries' financial security, health or any other measure of individual wellbeing. These exclusions are not explained in the NPRM. SSA's contention that this rule could have positive effects on for beneficiaries cannot be considered complete if the agency arbitrarily selects which aspects of beneficiary welfare it analyzes. Employment is not the only outcome of importance to the welfare of beneficiaries.

Perhaps the most egregious omission from SSA's analysis of effects on beneficiaries is that the agency provides no estimate of the number of children, youth and adults who will lose access to benefits more quickly than they would have otherwise as a result of the proposed rule. This includes losing access to SSDI and SSI cash benefits, but also Medicare and Medicaid coverage that are frequently tied to a person's eligibility for SSDI and SSI. SSA should be capable of producing such estimates with available data, and the fact that SSA already presents estimates of the proposed rule's effects on SSDI and SSI benefit expenditures in the NPRM suggests that SSA has already produced an estimate. Without an estimate of the number of children, youth and adults who would lose access to their cash and health care benefits sooner than under current rules, the public cannot evaluate the effects of the proposed rule.

Failure to Provide Adequate Cost-Benefit Analysis

In the NPRM, SSA acknowledges the proposed rule meets the criteria for a significant economic regulatory action under Executive Orders 12866 and 13563, but the agency does not present a detailed cost-benefit analysis as required by those Executive Orders. While SSA presents limited

cost estimates, these estimates are not complete and no details of the underlying analyses that produced them are provided for the public to evaluate their accuracy. Nowhere does SSA present the calculations and assumptions used to produce the agency's estimate of the projected increase in total CDRs, the reduction in SSDI and SSI benefits paid out or the increase in agency administrative costs. While it is difficult to state conclusively, given the inadequate information presented, SSA also does not appear to have calculated other anticipated costs. These include beneficiary costs for retaining representation during CDRs and CDR appeals, SSA administrative costs created by appeals of new CDRs and SSA administrative costs and beneficiary costs incurred when beneficiaries who lose access to benefits reapply for benefits. SSA also provides no information on how the likely increase in CDR appeals and earlier reapplications for benefits will impact the existing disability hearing backlog and disability application wait times.

SSA does not provide a comprehensive comparison of the costs and benefits of the proposed rule or present an argument that the proposed rule's benefits justify its costs. The agency has not presented any information on potential alternative approaches the agency could pursue to achieve its stated outcomes, nor has it presented evaluations of the comparative costs and benefits of pursuing those alternatives. The agency has further presented no information on what steps it has taken to tailor the proposed regulation to impose the least possible burden on beneficiaries.

Based on the information provided, our conclusion is that SSA's proposed rule to change when and how the agency conducts CDRs is unjustified and arbitrary. The proposal would require millions of Americans who rely on SSDI and SSI to re-prove their eligibility for benefits more frequently without reason, placing significant additional burden on individuals and families that are already stretched thin. The dramatic and unwarranted increase in CDRs would also drain SSA of essential resources that would be better directed toward shortening still unacceptably long disability application wait times and eliminating the disability hearing backlog. This proposed rule appears to simply be another transparent attempt from the Trump Administration to make it more difficult for Americans to access essential supports and benefits. We urge SSA to withdraw the proposed rule immediately.

Sincerely,

Robert P. Casey, Jr.
United States Senator

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United States Senator

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United States Senator

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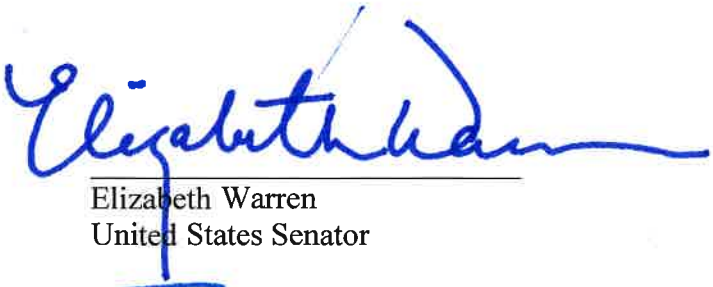

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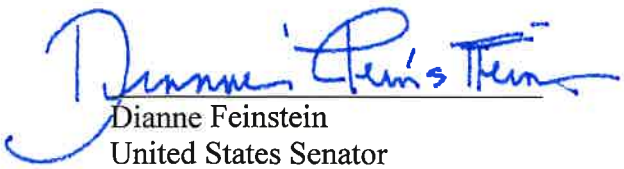

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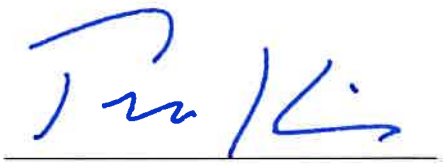

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