October 17, 2016

The Honorable Carolyn Colvin
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Docket No. SSA-2013-0044, Revisions to Rules of Conduct and Standards of Responsibility for Appointed Representatives

Dear Commissioner Colvin:

The undersigned Co-Chairs of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force are pleased to submit the following comments regarding the Notice of Proposed Rulemaking (NPRM) published on August 16, 2016 (81 Fed. Reg. 54520, Docket No. SSA-2013-0044). CCD is the largest coalition of national organizations working together to advocate for Federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Social Security Task Force (SSTF) focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

Social Security Task Force members share SSA's desire to assure the integrity of the disability-determination process and clarify representatives' responsibilities. We are concerned, however, that many of the changes proposed in this rulemaking will have a negative impact on claimants' ability to clearly and effectively present their cases, and on representatives' ability to assist them in so doing. Inappropriate representative behavior is rare and the current code of conduct can address those situations when they arise. SSA can, and should, take a targeted approach of disciplining those responsible for the few recent, high-profile cases of fraud in which representatives allegedly played a role. This proposed rule, however, is not such an approach and would have the unintended consequences of reducing access to representation, placing representatives in ethical quandaries, and increasing SSA's already enormous backlogs and wait times. For these reasons, the SSTF urges SSA to withdraw the proposed rule.

Following are our specific concerns with regard to the proposed rule:

Sec. 404-1705(b)(4); 416.1505(b)(4) Who may be your representative
The proposed rule imposes a lifetime ban on certain individuals serving as non-attorney representatives, and appears to ignore expungement, sealing, or overturning of convictions, even for misdemeanor offenses. In addition to professional representatives, appointed representatives covered by this provision would include friends or family members as well as those provided at no cost to the claimant by an insurer, hospital, state government or other

source. In these and other situations, claimants may not be aware of the background of their appointed representative. Further, certain misdemeanor offenses in an appointed representative's past may have no bearing on their ability to fairly and effectively assist a claimant. SSA should limit its clarification of persons lacking good character (and therefore ineligible to serve as appointed representatives) to those convicted of a felony. Under SSA's existing rules it can reject a specific representative if it finds that individual is not "generally known to have a good character and reputation." The proposed rule's blanket disqualification is neither necessary nor appropriate, and could have the effect of denying claimants access to a representative.

Sec. 404.1740; 416.1540 Rules of conduct and standards of responsibility for representatives

The Co-Chairs of the SSTF are extremely concerned that paragraph (b)(3)(iv), which states that a representative "should not withdraw after a hearing is scheduled unless the representative can show that a withdrawal is necessary due to extraordinary circumstances, as (SSA) determines on a case-by-case basis," violates claimants' right to a fair hearing and raises significant ethical issues for representatives. The term "extraordinary circumstances" is vague and subjective and will result in varied interpretations from one administrative law judge to the next about under what circumstances they will allow the representative to withdraw.

Situations necessitating withdrawal can occur shortly before hearings. Clients can disclose information that makes representation impossible or they may become impossible to contact even after diligent efforts. Evidence may be received that significantly affects the claim. Claimants who fire their representatives may be unwilling to inform SSA of their decision to do so. These claimants would then be placed in a position where their representative is not given leave to withdraw, and they would be represented when they do not wish to be, or represented by someone not of their choosing.

Requiring representatives to disclose the circumstances of their withdrawals may cause them to act in opposition to ethical rules about zealous advocacy and client confidentiality. For attorney representatives, these rules include those issued by bar associations; non-attorney representatives may be social workers or belong to other professions with their own ethical codes. As a result, representatives may be placed in situations where withdrawal is not permitted, but continuing the representation would violate other affirmative duties.

From a practical perspective, this requirement would pose a significant additional administrative burden on SSA because it requires ALJs to make a new category of determinations, about whether withdrawal is justified. It would be counterproductive to SSA's backlog-reduction efforts because would require ALJs to hold hearings and issue decisions in situations where they are not necessary. It also would create logistical problems when claimants are represented by different employees of the same firm. For all these reasons, SSA should not adopt this provision.

The Co-Chairs also have serious concerns about the requirement in paragraph (b)(5) that the representative "disclose in writing, at the time a medical or vocational opinion is submitted to us or as soon as the representative is aware of the submission to us, if:…(ii) The representative referred or suggested that the claimant seek an examination from, treatment by, or the assistance of the individual providing opinion evidence." Many, if not most, representatives provide their clients with a list of local agencies that provide mental or physical medical care at low cost or for free. This is part of good representation, and is consistent with prior versions of SSA's "Best Practices for Claimant's Representatives," urging representatives to "obtain a medical source statement from a treating source which identifies the limitations imposed by the

claimant's impairments." The skepticism the proposed rule indicates about medical-source statements is a significant departure from previous SSA policy.

Medical evidence, regardless of who sent or recommended the evaluation, needs to stand on its own and be weighed against the totality of all of the evidence in the case. Requiring representatives to disclose that they counseled a client to seek medical care will have the effect, whether or not it is SSA's intent, of groundlessly and unfairly discounting the medical evidence provided by that treating source. SSA should not include this provision in any final rule. However, if it is implemented, the final rule should make clear that opinions are entitled to the exact same weight regardless of whether the representative requested them or referred a client for treatment.

Paragraph (b)(6) requires representatives to "disclose to us immediately if the representative discovers that his or her services are or were used by the claimant to commit fraud against us." This provision may place representatives in ethical quandaries and at risk of malpractice to the extent that it conflicts with professional ethics regarding client confidentiality.

Beyond these legal questions, the Task Force is concerned that the provision is unworkable. Many medical conditions manifest in ways that cause claimants to have limitations that vary from day to day and week to week. Representatives cannot be guarantors of the truth or validity of a claimant's claims, but have a responsibility to advocate on the claimant's behalf. If a claimant says her back pain prevents her from working and the judge disagrees, could that be construed as fraud? SSA should not include this provision in any final rule.

Paragraph (c)(3) of the proposed rule removes the term "knowingly" from the prohibition on making or presenting, or participating in the making or presentation of, "false or misleading oral or written statements, evidence, assertions or representations about a material fact or law concerning a matter within our jurisdiction…in matters where the representative has or should have reason to believe that those statements, evidence, assertions or representations are false or misleading." Representatives routinely assist claimants in submitting activities of daily living forms and function forms. If a claim is denied based on the ALJ finding the claimant's statements "not fully credible," would the representative be guilty of "misleading" the judge? Evidence that is from its stated source and is not altered in a manner designed to change how it is perceived should not be considered misleading. Written statements that advocate for a particular finding, using evidence as well as SSA law, regulations and sub-regulatory guidance, should not be considered misleading. Submitting such written statements is an important part of a representative's job and should not be curtailed or described as misleading. In any final rule, SSA should retain the term "knowingly" and should omit the phrase "or should have" from the above-mentioned clause.

Proposed paragraph (c)(ii)(C) would forbid representatives from "[c]ommunicating with agency staff or adjudicators outside the normal course of business or other prescribed procedures in an attempt to inappropriately influence the processing or outcome of a claim(s)…". Any final rule should indicate that, if SSA staff request that a claimant or representative contact them in a specific manner, that such contact is by definition within the normal course of business or prescribed procedures. Furthermore, SSA's unprecedented workloads and budgetary shortfalls at times cause the agency to lose materials, delay decisions or processing, route documents improperly or make other errors. At such times, representatives may contact supervisory SSA staff for assistance in problem solving. Any final rule should indicate that inquiries to SSA and state agency staff about the status of a case, requests for the case to be processed, and Congressional inquiries about the case are not sanctionable.

Sec. 404.1750 – 404.1799 Charges against a representative
These sections of the proposed rule deal with charges against a representative, hearing, review and application for reinstatement. The proposed changes include shortening the time to answer a charge and file a request for review from 30 days to 14 days. They remove the representative's right to appear in person at a hearing or at oral argument before the Appeals Council. They shift the burden of gathering material evidence from the Appeals Council to the representative and make the Appeals Council's consideration of that evidence permissive, rather than required as under the current rules. And they extend the period of time a suspended or disqualified representative must wait to request reinstatement after a previous request has been denied from one to three years.

The Task Force's mission is to ensure that interests of people with disabilities are protected with regard to Social Security and SSI policy changes. While these proposed changes do not directly apply to claimants, we are concerned about the impact they may have on claimants' access to professional representation. It is important to ensure that representatives who are accused of wrongdoing have adequate opportunity to defend themselves and to serve their clients without unnecessary constraints.

These changes, which SSA has proposed to "…provide efficient service to claimants, potential claimants, recipients and beneficiaries," may in fact have the opposite effect. Denying a representative adequate time to defend themselves against a charge that will cost them their livelihood and removing their ability to choose the manner of a hearing will likely lead to more requests for review by the Appeals Council, thus increasing SSA's administrative burden. Forcing a suspended or disqualified representative to wait three years to again request reinstatement is a harsh and indiscriminate penalty. The existing requirement that the representative wait one year is sufficient disincentive to discourage further requests for reinstatement without first remedying the violation.

General Comments
We also note that, while not mentioned in the Supplementary Information discussing the proposed changes, in several sections of the bill SSA has changed the term "shall" to "will" in describing SSA's responsibilities with regard to the hearing process. What is the reason for this change? Does "will" convey a lesser obligation that "shall"? It is essential to the clarity of the proposed rule to understand the distinction between the terms and SSA's intent in proposing the change.

Conclusion
The availability of competent professional representatives is essential to assuring that individuals with severe disabilities have access to experienced and well-informed assistance as they navigate the often lengthy and complex process of applying for Social Security and SSI disability benefits. The Task Force encourages SSA to use its existing tools to aggressively prosecute individual representatives who violate its laws and regulations. We are concerned, however, that many of the provisions in this proposed rule are overly broad, create ethical dilemmas for professional representatives, place their livelihoods unnecessarily at risk, and have the potential to deprive claimants of the assistance of friends or loved ones in filing their appeals. They present a significant disincentive to serving as an appointed representative. A resulting increase in unrepresented claimants will increase SSA's workloads and lead to more appeals, thus further exacerbating wait times and hearings backlogs.

Congress recognized the value of claimants having access to competent representation in enacting the "Social Security Disability Applicants' Access to Professional Representation Act" in 2010. As then-Chairman of the House Ways & Means Social Security Subcommittee said

upon introduction of the bill, "ensuring that individuals with severe disabilities have the help they need to navigate the complex benefit application process is a goal on which we can all agree." Unfortunately, this proposed rule will do just the opposite. The Task Force urges SSA to withdraw the proposed rule.

Sincerely,

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