January 16, 2018

Michael Mulvaney, Director

Office of Management and Budget

725 17th Street, NW

Washington, DC 20503

Re: RIN: 0960-AI12

Dear Director Mulvaney:

In mid-2017, the Social Security Administration (SSA) submitted an ANPRM (RIN: 0960-AI12) to the Office of Management and Budget, Unified Agenda, proposing that an advance notice of proposed rule-making be published to solicit public input on utilizing the Agency's Appeals Council to hold hearings to address the pending service crisis.

The Association of Administrative Law Judges, which represents 1400 Administrative Law Judges (ALJs) employed by SSA in 166 hearing offices throughout the country, opposes this proposal as contrary to the interests of the American public and in violation of the current regulations.

In 2016, SSA announced that the Appeals Council would begin holding hearings in non-disability cases. After Congressional pressure was brought to bear during a hearing before the Senate Subcommittee on Regulatory Affairs and Federal Management, the Agency abandoned this plan. The current ANRPM is a re-hash of the same general idea of having the Appeals Council conduct hearings and issue decisions.

While SSA contends that the regulations allow the Appeals Council to hold hearings, this assertion is misleading. The current regulations only allow the Appeals Council to hold hearings and issue decisions in very limited circumstances. As the enclosed memorandum from Harold Krent, Dean of the Chicago-Kent College of Law and an administrative law expert, sets out, the Agency's plan is contrary to the existing regulatory scheme.

The Appeals Council is comprised of attorney advisors who have the internal title of "Administrative Appeals Judge" (AAJ). Unlike ALJs, who are appointed pursuant to the Administrative Procedure Act (APA) and who possess judicial independence, Appeals Council AAJs are creatures of the Agency and subject to its control.

Congress passed the APA to ensure that federal agencies could not improperly influence their adjudicators, and it created ALJs to provide independent judges to the American people to decide their cases when they challenge adverse government action. ALJs are selected by federal agencies through the Office of Personnel Management (OPM) after a rigorous hiring process, the requirements of which include years of trial or administrative experience, a full-day written examination, and a structured interview conducted by, among others, sitting ALJs and law professors. The applicants' qualifying

experience, together with the results of the test and interview, are scored and the names of the top candidates are sent to any Agency seeking to appoint an ALJ.

ALJs are forbidden by law to have ex-parte communications with certain Agency personnel, to receive bonuses or awards, or to undergo performance appraisals. Suspension and removal for good cause must be accomplished by filing charges at the Merit Systems Protection Board. All of these measures are Imbedded in the statute to protect the American people by ensuring that ALJs can exercise their judicial independence in applying the law.

In contrast, the Appeals Council AAJs are attorney-advisors who are promoted by the Agency from within its own ranks. Appeals Council attorney advisor AAJs can receive bonuses, are subject to performance evaluations and have no judicial independence; in fact, the Agency could direct AAJs to rule a particular way on cases, should it choose to do so; the APA does not apply to AAJs and they are subject to agency influence.

Moreover, should Appeals Council AAJs be permitted to hold hearings, the American public will lose the right to one level of appeal. Instead of appealing an adverse ALJ decision to the Appeals Council (which requires no expense and can be done with simply a letter), a claimant will be required to appeal the AAJ's decision to Federal Court, a much more onerous and expensive process.

We are not aware that the Appeals Council has time on its hands to hold hearings and issue decisions on other than the regular appeals caseload. The pending backlog of over a million claims could better be reduced by hiring clerical employees and attorneys for the hearings operation – that is where the real need is. Moreover, if the Agency would enact some of the reforms recommended by the AALJ, the system could run more efficiently, more cases could be heard and more decisions issued.

Reducing the pending backlog is a laudable aim. However, using the AC staff to do so is both ill-advised and unnecessary.

Respectfully,

Marilyn Zahm, President

Association of Administrative Law Judges