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The Honorable Tommy G. Thompson
c/o Food and Drug Administration
Division of Dockets Management
5630 Fishers Lane, Room 1061
Rokville, MD 20852-20201

Re: **Comments on the DHHS/SSA Plan for the
Transfer of Responsibility for Medicare
Appeals, Docket No. 2004S-0270**

Dear Mr. Thompson,

Thank you for the opportunity to submit this statement regarding the DHHS/SSA Plan for the Transfer of Responsibility for Medicare Appeals. My name is Robin J. Arzt. I am an Administrative Law Judge (“ALJ”) who has been hearing Social Security disability and Medicare cases at the Office of Hearings and Appeals (“OHA”) of the Social Security Administration (“SSA”) in New York and the Bronx, New York, for over ten years.

My position with the Social Security Administration is stated for identification purposes only. This statement was written in my private capacity and without the use of federal government resources or federal work time. No official support or endorsement by the Social Security Administration or the United States is or should be inferred. The views expressed in this statement are mine and do not necessarily represent the views of the Social Security Administration or the United States.

Suggestions to assure ALJ independence:

1. A strong Chief ALJ in an independent ALJ-administered unit that controls its budget: The transition statute requires steps to ensure the independence of ALJs, including placing ALJs in an administratively separate unit that (a) reports directly to the Secretary, and (b) is outside the unit that makes the initial decisions on claims (CMS) and its contractors. §§ 931(a)(2)(H), 931(b)(2). The requirement of ALJ placement in an administratively separate unit that reports directly to the Secretary appears to require that a Chief ALJ report directly to the Secretary as one of the steps that should be taken to assure ALJ independence. I have heard that DHHS is considering placing the Medicare ALJs in a separate unit within the DHHS Departmental Appeals Board. This is a good step, but the statute permits the creation of a far greater degree of structural independence for the ALJs to protect the ALJs' decisional independence for the benefit of Medicare beneficiaries and providers, such as allowing the Medicare ALJs to independently administer their unit.

To assure the independent functioning of the Medicare ALJ Office and its Chief ALJ in his or her role to effectively preserve the impartiality and independence of the ALJs, and administer the process to achieve timely, high quality Medicare appeals decisions for the beneficiaries and providers, I suggest that you consider including the following provisions regarding the Chief ALJ position and Medicare ALJ Office budget:

- a. The head of the Medicare ALJ Office is the Chief ALJ, who must report directly to the DHHS Secretary.
- b. The Chief ALJ shall be responsible for taking personnel actions regarding ALJs, including assignment and removal of such judges, in accordance with the provisions of sections 1305, 3105, 3344, 4301(2)(E), 5335(a)(B), 5372, and 7521 of title 5, United States Code.
- c. The Chief ALJ shall be appointed by the DHHS Secretary for a term of six years and may be reappointed for a second term. The Chief ALJ may serve until the appointment of a qualified successor. To be eligible for appointment as Chief ALJ, an individual shall have expertise in administrative law and have completed not less than five years of employment as an ALJ.

- d. The Chief ALJ may be removed by the DHHS Secretary as provided in section 7521 of title 5, United States Code, for inefficiency, ineligibility, neglect of duty, malfeasance in office, or nonfeasance in office, and for no other cause. Removal from the position of Chief ALJ shall not be considered removal as an ALJ employed by the DHHS.
- e. If the Chief ALJ resigns, is removed from office, or ceases to act, the DHHS Secretary shall appoint a successor to serve the remainder of the term.
- f. At the end of the term of service as Chief ALJ, the Chief ALJ may return to employment as an ALJ employed by the DHHS.
- g. The Secretary shall initially appoint an ALJ to fill the position of Chief ALJ under this section not later than the first day of the implementation of the transition plan, and preferable before to help plan the transition.
- h. The Chief ALJ shall be compensated at the rate of AL-1 as is provided in section 5372(b)(1) of title 5, United States Code.
- i. The Chief Judge shall prepare an annual budget for the Medicare ALJ Office, which shall be submitted by the President to the Congress without revision, together with the President's annual budget for the Medicare ALJ Office. The Medicare ALJ Office shall include in the annual budget an itemization of the amount of funds required by the Medicare ALJ Office for the fiscal year covered by the budget to support efforts to combat fraud committed by applicants, beneficiaries and providers. Appropriations requests for staffing and personnel of the Medicare ALJ Office shall be based upon a comprehensive work force plan, which shall be established and revised from time to time by the Chief Judge. The Medicare ALJ Office administrative budget expressly should be excluded from the statutory discretionary spending caps and any other artificial spending limits, and instead be set in reference only to the Medicare ALJ Office's workforce, office space, and other resource needs in order for it to provide timely, high quality service to the public. Appropriations for administrative expenses of the Medicare ALJ Office shall be

allocated and administered by the Chief Judge, and should be authorized to be provided on a biennial basis.

Some of these provisions may require legislation. Suggestions (a)-(h) are identical to the provisions of the Administrative Law Process Enhancement Act of 2002, H.R. 4932, which was introduced during the 107th Congress by former Representative George Gekas to strengthen the Chief ALJ position in SSA. (Many of the provisions in H.R. 4932 had their origin in a detailed proposal for an adjudication agency for Social Security benefits claims that I drafted originally as a policy position paper for the Association of Administrative Law Judges and currently as a law review article, Robin J. Arzt, "*Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*," 23 J. Nat'l Ass'n Admin. L. Judges 267-386 (Fall 2003). A copy of the article is available upon request.

The degree of independence that an agency or agency unit has is affected by the degree of control that it has in preparing and submitting its budget requests to Congress. Budget requests usually are changed by the Office of Management and Budget ("OMB"), but Congress can permit agencies to submit their budgets without revision, so that the Appropriations Committees can compare the agency budget with the OMB revisions. The Medicare ALJ Office administrative budget should be set in reference only to the Medicare ALJ Office's workforce, office space, and other resource needs in order for it to provide timely, high quality service to the public. Appropriations for administrative expenses of the Medicare ALJ Office should be allocated and administered by the Chief Judge. Suggestion (i) would ensure that the Medicare ALJ Office controls its budget.

2. Reaffirming that ALJs are bound only by the applicable statutes and published regulations and rulings: An additional step to assure ALJ independence that DHHS may want to consider is including a statement in the Medicare appeals regulations affirming that the ALJs are bound in deciding Medicare appeals only by the applicable statutes and the regulations and rulings issued by DHHS in accordance with subchapter II of chapter 5, and chapter 7, of title 5, United States Code, known as the Administrative Procedures Act ("APA"). This already is the law under the APA, but such a statement in the DHHS regulations regarding the Medicare appeals process would affirm the DHHS' commitment to keeping the Medicare ALJs and the appeals process independent for the beneficiaries

and providers. (DHHS currently has many Medicare policy statements in unpublished form. DHHS can make its policies binding simply by publishing them through the Federal Register process.) ALJ training should make clear distinctions between the policies and standards set forth in the binding statutory and regulatory provisions and agency rulings and those set forth in other materials.

3. Procedural rules for the Medicare appeals process: DHHS may want to consider including procedural rules for the Medicare appeals hearing process in the regulations to be issued for the appeals process under § 931(a)(2)(D) of the transition statute for the orderly and efficient hearing and decision of cases. Significant input from ALJs in drafting the procedural rules is valuable to ensure practical rules that preserve due process for the beneficiaries and providers and ALJ decisional independence. The Medicare ALJs could draft procedural rules based upon their experience and needs of the process, rather than expediency and other policy concerns. There now is no coherent set of procedural regulations and rules for the Medicare appellate administrative process.

A draft set of such rules recently was produced by a joint SSA/AALJ rules committee that SSA now is considering. The rules are based upon the Department of Labor Office of ALJs rules, with adaptations for the Social Security disability process. The draft may be a useful tool for DHHS to consider as a departure point for the Medicare appeals process, especially given the time constraints. Copies of the SSA/AALJ draft rules and its table of contents are available upon request. If you wish to contact Judge Thomas Snook, the member of the AALJ Board who is the AALJ co-chair of the committee that drafted the procedural rules, his office telephone number is 305-536-5761, ext. 3011.

4. Appropriateness of timeline performance standards for ALJs: In reference to § 931(a)(2)(K), timeline performance standards for the issuance of Medicare case decisions by the ALJs are not compatible with the ALJs' decisional independence under the APA. The specification of a uniform deadline actually, or at least appears to, interfere with an ALJ's discretion in setting his or her hearing schedule, determining what evidence and testimony is necessary for a complete hearing, and determining the case. Each case is not the same. The need to develop the record, factual complexity, legal complexity including the need to research multiple issues, witness availability, case load, and other articulatable reasons may result in

some cases taking longer than others to be ready for hearing and decision and be decided. All of these factors, and doubtless others, would need to be cited in a statute or regulation that would set deadlines as reasons that are acceptable for not meeting the deadlines, since these are factors that affect the outcome and quality of decisions. Timelines put an undue emphasis on efficiency that at times will be at the expense of providing an accurate, high quality decision, which will foster an atmosphere of unfairness to the beneficiaries and providers. The dual goals of efficiency and high quality can be met without specific deadlines. The need to allow for many exceptions to any specific timeline requirement in order to uphold ALJ independence and impartiality will make the time limits meaningless. ALJs are subject to disciplinary action pursuant to the APA, including removal from office, which is an adequate mechanism for holding ALJs accountable. 5 U.S.C. § 7521.

There is no statutory or historical support for performance standards for ALJ. None of the recent reports regarding the Medicare appeals process recommend performance standards for ALJs. Instead, the reports essentially state that the primary cause of delays in deciding Medicare appeals has been the administrative processing of cases at SSA OHA even before the cases can be prepared for a hearing, which has been a driving reason for the transfer of the Medicare hearing function to DHHS. *Medicare Appeals, Disparity between Requirements and Responsible Agencies' Capabilities* (GAO-03-841, Sept. 2003); *Report of the Inspector General: Medicare Administrative Appeals: The Potential Impact of BIPA* (OEI-04-01-00290, Jan. 2002); *Medicare Administrative Appeals: ALJ Hearing Process* (OEI-04-97-00160, Sept. 1999)

5. Watchdog group of independent organizations to monitor Medicare ALJ independence. DHHS may want to consider using non-governmental entities with an interest in the integrity of the federal ALJ system to assist with monitoring and preserving Medicare ALJs' decisional independence. Such entities include the ABA Judicial Division's National Conference of Administrative Law Judiciary ("NCALJ"), National Association of Administrative Law Judges ("NAALJ"), American Bar Association's Administrative Law Section, the Association of Administrative Law Judges, and the Federal Administrative Law Judge Conference. Representatives of these groups could be appointed to a committee within DHHS that acts as a watchdog over the independence of the Medicare ALJs. The committee also could establish guidelines for the

Medical appeals operation that focus on measures that assure Medicare ALJs' independence.

6. Support staff levels to handle caseload: The decision writing staff should be attorneys, since Medicare is a highly technical area and an ability to deal with volume is necessary. While there are highly skilled, program-knowledgeable people with demonstrated high quality writing skills who can be successful writers without being lawyers, such staff members do not exist in abundance, as has been demonstrated by the SSA OHA experience. For improved accountability, the decision writers should be assigned to specific hearing offices, rather than centralized writing units.

Thank you for the opportunity to offer these comments, which I am happy to discuss.

Sincerely,

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