February 3, 2006

Jo Anne B. Barnhart
Commissioner of Social Security
Social Security Administration
P.O. Box 17703
Baltimore, MD 21235-7703

Via email: regulations@ssa.gov

Re: Comments on Notice of Proposed Rulemaking on Nonpayment of Benefits to Fugitive Felons and Probation or Parole Violators, 70 Federal Register 72411 (December 5, 2005)

Dear Commissioner Barnhart:

The National Alliance on Mental Illness (NAMI) is writing to submit comments on the Notice of Proposed Rulemaking (NOFA) regarding nonpayment of benefits to fugitive felons and probation or parole violators. As a member of the Consortium for Citizens with Disabilities (CCD), NAMI would like to endorse comments that CCD has previously submitted to SSA on this NOFA.

As you know, the Social Security Protection Act of 2004 (SSPA) bars the payment of Title II benefits to fleeing felons and probation/parole violators. The ban for SSI benefits has existed since 1996 and more than 100,000 SSI beneficiaries have been impacted. It has been estimated that five times as many Title II beneficiaries could be affected, a number that includes people with disabilities, retirees, widows and widowers, and other dependents and survivors.

NAMI is very concerned about the impact of the proposed regulations on vulnerable individuals with disabilities. Since 2000, SSA's implementation of the SSI bar has been overly broad and likely more inclusive in its reach than originally intended. Of the more than 100,000 SSI beneficiaries affected, a disproportionate number of them have serious mental impairments. Also, many are homeless. For people with mental impairments, including severe mental illness, the beneficiary may not be aware of the violation, may not have understood the terms of parole or probation, or may have other misunderstandings about his/her legal status. A significant percentage of these cases involve relatively minor crimes that were committed many years ago and which prosecutors have no intention of pursuing.

In implementing the SSPA provisions, NAMI urges the Commissioner to exercise her discretion as equitably as possible so that the regulations correctly target only those individuals intended to be covered by the statute.

I. The final regulation should include an "intent to flee" requirement.

Both the Title II and SSI statutes state that an individual is ineligible to receive benefits during any month in which he or she is "fleeing to avoid prosecution, or custody or confinement …."[1] All of the courts considering the issue have found that the statute requires an "intent to flee" determination before the individual can be found ineligible to receive benefits.[2]

The *current* SSI regulation for suspension of benefits is consistent with the statute by requiring a court or other appropriate tribunal to have issued a warrant or order that specifically finds that the individual is fleeing to avoid prosecution. 20 C.F.R. § 416.1339(b)(1)(i). In contrast, the *proposed* Title II and SSI rules make the individual ineligible to receive benefits on the mere basis that there is an "outstanding arrest warrant." Proposed 20 C.F.R. §§ 404.401(d)(5(i) and 416.1339(a). The proposed rule deletes the language in the current SSI regulation that is consistent with the statute.

It also is significant that the 2004 SSPA did not change the statutory requirement that the individual was "fleeing to ***avoid*** prosecution …." The legislative history includes a "knowledge" requirement for a "fleeing" determination.[3]

In light of the Second Circuit's decision in *Fowlkes* and the other district court decisions and the SSPA legislative history, the proposed rules are inconsistent with the statute because they permit SSA to conclude simply from the fact that there is an outstanding arrest warrant that the individual is "fleeing to avoid prosecution." Further, they do not require some evidence that the person knows that his apprehension is sought and that he has the specific intent to avoid prosecution.

In addition to the legal issues with the agency's interpretation of the "fleeing" requirement in the statute, there also are equitable reasons why the proposed rules should be withdrawn and reissued. Many affected Title II and SSI beneficiaries, in particular, those with mental impairments, may not be able to request discretionary good cause because the underlying crime is considered "violent" or "drug-related." Meeting the mandatory good cause requirements may be difficult, if not impossible, because of the need to obtain a legal advocate to resolve the outstanding warrant. For them, being screened out of the process by SSA because they are not "fleeing" to "avoid" prosecution is the only avenue available to prevent a disastrous loss of benefits.

Also, the agency's "bright line" approach, i.e., suspending payment of benefits solely on the basis of an outstanding warrant, has been subject to procedural irregularities in many field offices around the country. Under the pre-SSPA implementation, there were many reports

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[1] 42 U.S.C. §§ 402(x)(1)(A)(iv) and 1382(e)(4)(A).

[2] *Fowlkes v. Adamec*, 432 F.3d 90 (2nd Cir. 2005); *Garnes v. Barnhart*, 352 F.Supp.2d 1059 (N.D.Cal. 2004); *Hull v. Barnhart*, 336 F.Supp.2d 1113 (D.Ore. 2004); *Blakely v. Comm'r of Social Security*, 330 F.Supp.2d 910 (W.D.Mich. 2004); *Thomas v. Barnhart*, 2004 U.S. Dist. LEXIS 15536 (D.Me. Aug. 4, 2004).

[3] "If it is reasonable to conclude that the individual **knew or should have known** that criminal charges were pending, or **has been made aware** of such charges by the SSA, then the individual should be considered 'fleeing'…." "Explanation" to the Senate "Manager's Amendment," Congressional Record-Senate, Dec. 9, 2003, p. S16180 (emphasis added).

from advocates that SSI beneficiaries were discouraged from filing appeals or outright denied the right to appeal by field office workers because the beneficiaries were presumptively deemed ineligible because of the mere existence of the outstanding warrant. While we recognize that denying these important due process rights is not consistent with SSA policy, the adoption of the "outstanding warrant" standard did play a role in the improper denial of appeal rights.

NAMI recommends the following changes:

1) We urge the Commissioner to withdraw and reissue the proposed regulations to require an "intent to flee" determination.
2) The proposed rule should be revised so that the "fleeing" standard is consistent with *Fowlkes* decision. Assuming there is no action to change the Second Circuit's decision, SSA will be required to follow it in Second Circuit states (CT, NY, VT). The standard should be adopted so that it is uniform throughout the country.
3) To make the "intent" finding administratively efficient, SSA should retain, rather than eliminate, the current SSI regulation, 20 C.F.R. § 416.1339(b)(1)(i). It requires that before SSA can withhold benefits, a court or other appropriate tribunal must issue an order that specifically finds that the individual is fleeing to avoid prosecution. This regulation also should be included in the Title II Social Security regulation. This approach, in contrast to that taken in the proposed regulations, will be consistent with the *Fowlkes* decision. Also, it will be a clear-cut standard and will not require individualized and subjective determinations by field office workers.

II. <u>The "good cause" exception should include more procedural protections.</u>

The new "good cause" exception is extremely important, in light of the hardships previously caused by the SSI ineligibility provision when no such exception existed. However, SSA has taken a fairly narrow approach in its interpretation of the provision and relevant legislative history. NAMI urges the Commissioner to exercise her discretion more equitably and to adopt the recommendations made below.

▪ **The discretionary good cause requirements should be revised to allow more eligible individuals to benefit from the exception.** The statute says that the Commissioner ***may*** apply good cause if (1) the underlying criminal offense was nonviolent and was not drug-related; and (2) "mitigating factors" exist.[4] The criteria in the proposed regulation are not in the statute but are taken from the "Explanation" accompanying the Senate "Manager's Amendment." Congressional Record-Senate, Dec. 9, 2003, p. S16180. The Commissioner has chosen to interpret this statement as requiring that ***all*** of the criteria must be met. This will result in suspension of benefits in many cases that is unfair. The Commissioner should exercise more broadly her authority to find discretionary good cause.

▪ **There should be a third discretionary good cause category that uses a balancing approach for cases with extraordinary and compelling facts.** This additional category would be consistent with the statute's "mitigating circumstances" and would consider the factors in the legislative history. **Additional factors** for this third category would include: (a) the age of the individual when the alleged offense was committed; (b) the individual is

[4] 42 U.S.C. §§ 402(x)(1)(B)(iv) and 1382(e)(4)(C).

currently of advanced age; (c) the individual has a terminal or other serious illness (TERI case criteria could be used); (d) whether the individual is at serious risk of homelessness, a health emergency, or other serious life event ("critical case" processing criteria could be used); and (e) any linguistic and educational limitations of the individual.

▪ **There should be an opportunity to extend the 90-day time period if the individual is acting in good faith to address the charges or warrant.** The proposed regulations, like the existing POMS sections, provide that once good cause is requested, individuals will have 90 days to provide the necessary evidence and/or resolve the warrant. There should be a procedure that allows individuals to extend the 90 days in appropriate circumstances. The statute does not preclude the Commissioner from including such an extension. There are a number of reasons why 90 days will not provide adequate time to resolve the warrant including: delays in the criminal justice system; old warrants in cases that are difficult to access quickly; individuals with mental impairments or other physical or linguistic limitations that make it difficult to obtain assistance in resolving the warrant. For individuals with disabilities, the 90-day time limit may violate § 504 of the Rehabilitation Act of 1973.

▪ **The regulations should include a provision describing that an "Advance Notice of Suspension" will be sent.** The current POMS, GN 02613.960, provides that an "Advance Notice of Suspension" will be sent. Because this Notice is critically important, the regulations should include provisions that describe the purpose of the Notice and the Notice requirements.

▪ **The regulations should include a provision that benefits will not be suspended if a beneficiary requests "good cause" within the requisite time periods.** Under SSA's current practice, as established in the POMS, if good cause is requested within 30 days (Title II) or 10 days (SSI) of receiving the advance notice of suspension, benefits will not be suspended during the 90-day period to provide good cause evidence**.** POMS GN 02613.450C. We recommend that this important due process provision for both Title II and SSI be included in the regulations.

▪ **The regulations should include a provision that the protest period can be extended for good cause.** A "good cause" extension of the 10/30 day protest time limit, incorporating the current SSI regulation for benefits pending appeal, 20 C.F.R. § 416.1336(b) should be included in both the SSI and Title II regulations. Inclusion of this extension also would be consistent with SSA's regulations that allow extension of deadlines to request review if good cause exists. See 20 C.F.R. §§ 404.911 and 416.1411.

▪ **Discretionary good cause factor: "Medical condition impairs … mental capability to resolve the warrant."** Proposed sections 404.471(b)(3)(iv) and 416.1339(b)(3)(iv) address the factor of a medical condition that "impairs your mental capability to resolve the warrant." Under current SSA policy, a list of diagnostic categories that meet this factor appears at POMS GN 02613.910. The regulations, or at least the preamble to the final rules, should state that the factor is met if the individual has a condition that is not on the list but that could nevertheless impair the mental ability to resolve the warrant. The individual should be allowed to present the information and SSA should be required to consider it.

▪ **Individuals should be allowed to request good cause more than one time.** The regulations or the preamble to the final regulations should state that individuals can request good cause more than one time. There have been many reports of workers refusing to take appeals or discouraging appeals under the pre-SSPA law. We believe that a statement of agency policy is important to provide guidance to field office workers.

▪ **Clarify the individual's right to appeal and/or to request good cause.** In the past few years, there have been many reports of SSA field office workers who have improperly refused to take appeals or discouraged individuals from appealing, claiming that the mere existence of the outstanding warrant was sufficient to support the finding of ineligibility. There may be legitimate arguments to make on appeal or to request good cause under the current law. Further, development of the case is important, even if there is suspension of benefits, because Medicare and dependents' benefits will continue. We urge SSA to include a statement in the preamble to the final rules and in implementing instructions that workers must take appeals or good cause requests.

Thank you for considering NAMI's comments on this important rule.

Sincerely,

Andrew Sperling
Director of Legislative Advocacy