



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Improving Consistency in Social Security Disability Adjudications

### Committee on Adjudication

Proposed Recommendation | June 13-14, 2013

#### Proposed Amendments

***This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with the source shown in the margin).***

1           The Administrative Conference of the United States has undertaken many studies over  
2 the years relating to the Social Security disability benefits system.<sup>1</sup> It has issued a number of  
3 recommendations specifically directed at improving SSA's initial application and appeals  
4 processes,<sup>2</sup> as well as other recommendations more generally designed to improve agency  
5 adjudicatory procedures.<sup>3</sup> The Conference last issued a recommendation on the Social Security

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<sup>1</sup> The Social Security Act created two programs—Social Security Disability Insurance and Supplemental Security Income—to provide monetary benefits to persons with disabilities who satisfy these programs' respective requirements. See 42 U.S.C. §§ 401(b), 1381 (2013).

<sup>2</sup> These recommendations include: Recommendation 91-3, *The Social Security Representative Payee Program*, 56 Fed. Reg. 33,847 (July 24, 1991); Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (Aug. 22, 1990); Recommendation 89-10, *Improved Use of Medical Personnel in Social Security Disability*, 55 Fed. Reg. 1665 (Jan. 18, 1990 (as amended)); Recommendation 87-7, *A New Role of the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987) [hereinafter ACUS Recommendation 87-7]; and Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978).

<sup>3</sup> E.g., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,789 (Aug. 9, 2011); Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989); Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986); Recommendation

6 disability benefits system over twenty years ago. The system has grown substantially since that  
7 time. Approximately 3.3 million disability claims are now filed **at the state level** annually,<sup>4</sup>  
8 which represents a 57% increase since 1990.<sup>5</sup> In a program of this size, adjudicating disability  
9 benefits claims in a fair, consistent, and timely manner is a monumental challenge.

10 Those cases flow through a nationwide, multi-step process, by which SSA determines  
11 whether a claimant is disabled and eligible for benefits. State agencies make initial disability  
12 determinations using federal guidelines. Claimants may file (and pursue) their own claims or  
13 they may choose to enlist the assistance of a representative, who may or may not be a lawyer.<sup>6</sup>  
14 If benefits are denied, claimants may request reconsideration (in most states). If benefits are  
15 denied after reconsideration, claimants may request a hearing before an Administrative Law  
16 Judge (ALJ). ALJs adjudicate nearly 800,000 cases a year.<sup>7</sup> In FY 2011, about 56% of disability  
17 benefits claims were allowed at the ALJ hearing stage,<sup>8</sup> though more recent figures show a  
18 decline in this rate.<sup>9</sup> ALJ hearings, which may be in-person or by video teleconferencing, are  
19 conducted using a de novo standard of review, and generally follow the Administrative  
20 Procedure Act's adjudication procedures. Although ALJs preside at the hearings,

**Comment [CMA1]:** Morrison Amendment: Add footnote 6.

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73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973).

<sup>4</sup> SOC. SEC. ADMIN., ANNUAL PERFORMANCE PLAN FOR FY 2013 AND REVISED PERFORMANCE PLAN FOR FY 2012, at 11 (2012).

<sup>5</sup> SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 6 tbls. 1a & 1b (Feb. 2012) [**hereinafter SSAB 2012 Report**].

<sup>6</sup> **The administrative process for adjudication of Social Security disability claims is nonadversarial in nature. See, e.g., 20 C.F.R. §§ 404.900(b), 416.1400(b) (2013) (describing agency's administrative review process as "informal" and "nonadversary"); Mathews v. Eldridge, 424 U.S. 319, 339 (1976) ("The hearing is nonadversary and the SSA is not represented by counsel."); Richardson v. Perales, 402 U.S. 389, 403 (1971) ("We bear in mind that [SSA] operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary.")**

<sup>7</sup> **SSAB 2012 Report, supra note 5, #**—at 13.

<sup>8</sup> HAROLD KRENT & SCOTT MORRIS, STATISTICAL APPENDIX: ANALYSIS OF ADMINISTRATIVE LAW JUDGE DISPOSITION AND FAVORABLE RATES IN FISCAL YEARS 2009 TO 2011 13, 14 tbl. A-8 (2013) [hereinafter STATISTICAL APPENDIX].

<sup>9</sup> HAROLD KRENT & SCOTT MORRIS, ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY: AN EMPIRICAL STUDY AND SUGGESTED REFORMS 8 (2013) (noting a 50% allowance rate in FY 2012).

21 decisionwriters typically write decisions for ALJs based on instructions from them. Usually,  
22 decisionwriters are not assigned to specific ALJs, but serve instead as part of a “pool” in each  
23 hearing office from which writing assignments for decisions are made.

24 Appeals Council review is the final step in the administrative process. The Appeals  
25 Council is comprised of about 125 Administrative Appeals Judges and Appeals Officers appellate  
26 adjudicators who typically take action—without oral argument—individually or in two-member  
27 panels.<sup>10</sup> and The Appeals Council has discretionary authority to grant, deny, or dismiss a  
28 claimant’s request for review, as well as remand the case back to an ALJ or issue a decision.<sup>11</sup> In  
29 FY 2012, the Appeals Council processed over 166,000 requests for review, a 30.7% increase  
30 from FY 2011.<sup>12</sup> In addition to processing requests for review, the Appeals Council has  
31 authority to identify cases for review all types of unappealed decisions (i.e., allowances or  
32 benefit denials) on its “own motion” through use of “random or selective sampling”  
33 techniques.<sup>13</sup> Currently, however, the Appeals Council s “own motion”-only reviews docket

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<sup>10</sup> See 20 C.F.R. § 422.205 (2013) (prescribing Appeals Council review procedures); see also Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Soc. Sec. Admin.’s Appeals Council*, 17 FLA. ST. U. L. REV. 199, 253-54 (1990).

<sup>11</sup> The Conference believes that its 1987 conclusion, that a “principal mandate” of the Appeals Council is “to recommend and, where appropriate, develop and implement adjudicatory principles and decisional standards for the disability determination process” remains valid today. See ACUS Recommendation 87-7, *supra* note 2.

<sup>12</sup> Soc. Sec. Admin., Office of Appellate Operations, Executive Director’s Broadcast, at 1 (Oct. 19, 2012) [hereinafter Exec. Dir. Broadcast]. Of these 166,000 requests for review, the Appeals Council dismissed or denied 78.3% of the requests, remanded 18.6% of the cases back to ALJs, and issued decisions (*i.e.*, fully favorable, partially favorable, or unfavorable) in 2.6% of the cases. *Id.* at 2.

<sup>13</sup> As the name connotes, random sampling involves selection of hearing-level cases for Appeals Council review from a national pool without regard for case characteristics or correctness, other than broad categories designed to assure randomness (e.g., allowances within a given date range). By contrast, selective sampling is specifically designed to identify cases for review that “exhibit problematic issues or fact patterns that increase the likelihood of error.” 20 C.F.R. §§ 404.969 (b)(1), 416.1469 (b)(1) (2013) (detailing the Appeals Council’s “own motion” review authority and procedures); see also Soc. Sec. Admin., Identification and Referral of Cases Under Appeals Council’s Own Motion Review Authority, 63 Fed. Reg. 36,560 (July 7, 1998). These procedures are established pursuant to the Social Security Act’s broad grants broad of authority to the Commissioner to establish hearing procedures and, on his or her own motion, hold hearings or conduct other proceedings as necessary for the proper administration of the program. See, e.g., 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A) (2013).

34 | **draws from** a national random sample of ALJ **allowance** decisions as a quality assurance  
35 | mechanism; the Appeals Council has **not yet reviewed unappealed ALJ denial decisions, and has**  
36 | **declined to use** its selective sampling authority **to identify and review unappealed cases with a**  
37 | **high likelihood of error** in recent years.<sup>14</sup> In FY 2012, the Appeals Council completed random  
38 | review of 7,074 **such-ALJ allowance** decisions.<sup>15</sup> The Appeals Council publishes its decisions only  
39 | rarely, in the form of Appeals Council Interpretations (ACIs), and its decisions sometimes serve  
40 | as the basis for Social Security Rulings. Claimants who disagree with the final administrative  
41 | decision may seek **initial** judicial review in federal **district** court.

42 |         Adjudicators and other agency employees at both the ALJ hearing level and Appeals  
43 | Council level use electronic case management systems to help manage their workflow and to  
44 | provide case-related management information. The current system in use at the hearing level  
45 | is the Case Processing Management System (CPMS), while the Appeals Council level uses the  
46 | Appeals Council Review Processing System (ARPS). Not only do adjudicators and other staff use  
47 | CPMS and ARPS in their day-to-day work, but the agency also uses data from these systems to  
48 | identify and address trends and anomalies existing at the various levels of agency adjudication.  
49 | While SSA has endeavored to build effective data reporting systems, limitations still exist that  
50 | relate to data capture and linking the various systems.

51 |         Not only does SSA process an extraordinary number of claims through a national, multi-  
52 | tiered system, but, in doing so, the agency tries to ensure that decisionmaking is consistent and  
53 | accurate at all levels of adjudication, and that legally sufficient decisions are issued that can  
54 | withstand review by federal courts. Consistency and accuracy, however, have suffered under

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<sup>14</sup> This recommendation suggests that, to enhance decisional accuracy and consistency, SSA expand the Appeals Council's use of "own motion" review of unappealed ALJ decisions through selective sampling based on announced, neutral, and objective criteria that identify problematic issues, fact patterns, or case characteristics. Under this recommendation, focused review might be warranted, for example, based on: the subject matter of a claim, the manner in which a hearing was held, or statistical analyses showing a high likelihood of error or significantly anomalous outcomes.

<sup>15</sup> Exec. Dir. Broadcast, *supra* note 102, at 3. The Appeals Council agreed with the decisions of ALJs 82.5% of the time, and either remanded or issued corrective decisions approximately 16% of the time. At the end of the FY 2012, there were 741 "own motion" review cases still pending final action. *Id.*

55 the strain of administering such a sprawling program. To be sure, an ALJ faces an enormous  
56 task in adjudicating hundreds of cases annually.<sup>16</sup> Nonetheless, divergent allowance rates  
57 among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate,  
58 manner.<sup>17</sup> The Appeals Council similarly struggles to fulfill its error-correction and quality-  
59 review roles. That these steps may have room for improvement is evidenced by the 45% rate at  
60 which cases are remanded back to the agency from federal courts in recent years.<sup>18</sup> Bringing  
61 greater consistency and accuracy to the disability claims adjudication process will enhance the  
62 fairness and integrity of the program.

63 One area of particular concern—due to its apparent contribution to a high remand  
64 rate—is SSA’s treating source rule, which generally affords “controlling weight” to the opinions  
65 of a claimant’s treating physician, psychologist, or other acceptable medical source.<sup>19</sup> In the  
66 early 1990s, SSA sought to bring greater clarity and uniformity to the assessment of medical  
67 evidence by establishing regulatory standards for such evaluations. In practice, however, this  
68 evidentiary rule has not delivered on its promise of improving consistency. In recent years,  
69 erroneous application of the treating source rule has been cited as the basis for remand by the  
70 Appeals Council at a 10% frequency rate, and the frequency rate with which it is cited by  
71 federal courts is even higher at 35%.<sup>20</sup> Dramatic changes in the American health care system

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<sup>16</sup> On average, for FY 2009 – FY 2011, ALJs issued 538.9 dispositions per year. See STATISTICAL APPENDIX, *supra* note 78, at 6, 8 tbl. A-2.

<sup>17</sup> In recent years, while the distribution of yearly allowance disposition rates has been approximately normal (*i.e.*, a mean of 56%), the distribution covers a wide range of allowance rates, with 95% of the rates falling between 26% and 85%. See STATISTICAL APPENDIX, *supra* note 7, *id.* at 13, 14 fig. A-8 (analyzing allowance rates for FY 2009 – FY 2011). The lowest allowance rate was 4% and the highest allowance rate was 98%. See *id.*

<sup>18</sup> STATISTICAL APPENDIX, *supra* note 7, *See id.* at 54 tbl. A-24. Policy compliance among ALJs has improved in recent years. See Michael J. Astrue, former Comm’r, Soc. Sec. Admin., Address at the Social Security Advisory Board Forum: Straight Talk about “Disability Reform.” (Mar. 8, 2013), available at <http://www.ssab.gov/Portals/0/2013Forum/Presentations/Astrue%20Speech%203-8-13.pdf>.

<sup>19</sup> See 20 C.F.R. §§ 404.1527(c), 416.927(c) (2012).

<sup>20</sup> See OFFICE OF THE CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE, Appendix B, at A-4, A-8 (2013).

72 over the past twenty years also call into question the ongoing efficacy of the special deference  
73 afforded to the opinions of treating sources. Individuals typically visit multiple medical  
74 professionals in a variety of settings for their health care needs and less frequently develop a  
75 sustained relationship with one physician.<sup>21</sup> Moreover, difficulty in determining who among a  
76 wide range of medical professionals should be considered a treating source has bedeviled ALJs  
77 and reviewing courts, contributing to high remand rates.<sup>22</sup>

78 This recommendation finds its genesis in SSA's request that the Conference study the  
79 role of the Appeals Council in reviewing cases to reduce any observed variances among  
80 adjudicative decisions at the hearing level, as well as the efficacy of SSA's treating source rule.  
81 These studies also revealed other areas that appear ripe for recommendation. While SSA has  
82 enacted various initiatives to increase consistency and has issued rulings to clarify its  
83 regulations, the size and complexity of the system leave more work to be done. The following  
84 recommendations reaffirm certain portions of past recommendations that remain valid and  
85 relevant and also identify new approaches to ensure consistency, accuracy, and fairness across  
86 this massive decision system.

## Recommendation

### 87 ALJ Hearing Stage

88 1. *Improving Adjudication Effectiveness and Consistency.* In order to promote  
89 greater decisional consistency, and streamline the adjudication process at the ALJ hearing  
90 stage, SSA should consider:

91 (a) requiring claimant representatives (while also *permitting* claimants without  
92 representation) to submit pre-hearing briefs in a standardized format that, among other

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<sup>21</sup> See *id.* at 25-33.

<sup>22</sup> See *id.* at 23-24, 33-35.

93 things, summarizes the medical evidence and justification for the claimant’s eligibility  
94 for benefits;

95 (b) expanding the use of video hearings in a manner consistent with sound  
96 technological practices, because such hearings promote efficiency and do not lead to a  
97 significant difference in allowance rates from in-person hearings. SSA should continue  
98 to advise claimants that opting for video hearings often results in faster scheduling of  
99 hearings (as compared to in-person hearings) and more convenient hearing locations;  
100 and

101 (c) exploring making the primary assignment of decisionwriters and case technicians  
102 to specific ALJs in a hearing office (with Hearing Office Directors continuing to supervise  
103 such support staff), while maintaining flexibility for changes in technological and to  
104 meet operational needs.

Comment [CMA2]: Morrison Amendment

Comment [CMA3]: Morrison Amendment

105 **Appeals Council**

106 2. *Balancing Error-Correction and Systemic Review Functions.* SSA should continue  
107 to promote the consistent application of policy to the adjudication of disability benefits claims  
108 across a nationwide program. SSA should ensure that the Appeals Council strikes an  
109 appropriate balance between its error-correction function as to both allowances and denials  
110 when exercising discretionary review of individual claimants’ requests for review, and its  
111 mandate to improve organizational effectiveness, decisional consistency, and communication  
112 of agency policy through use of “own motion” review and other types of systemic quality  
113 assurance measures.

Comment [CMA4]: Morrison Amendment

114 3. *Enhancing Communication.* SSA should make clear that an essential function of  
115 the Appeals Council is both to focus on consistent application of Social Security regulations and  
116 policies on a systemic basis, and to disseminate advice and guidance to SSA policymakers, ALJs,  
117 and other lower-level decisionmakers. The Appeals Council should advise and assist  
118 policymakers and ALJs decisionmakers by:

119 (a) issuing Appeals Council Interpretations (ACIs), with greater frequency, in order  
120 to: address policy gaps; promote greater consistency and uniformity throughout the  
121 adjudicatory process; and, establish precedents upon which claimants and their  
122 representatives may rely. Such ACIs should be circulated within the agency and made  
123 publicly available through posting on SSA's website or other similar means of public  
124 dissemination;

125 (b) considering the publication of selected ALJ or Appeals Council decisions to serve  
126 as model decisions (e.g., they are well ~~(or badly)-~~ reasoned and clear), or to provide  
127 needed policy clarifications. Consistent with statutory obligations to maintain the  
128 privacy of sensitive information, such publications should not include personally  
129 identifiable information;

130 (c) continuing, to the greatest extent feasible, to send cases that have been  
131 remanded from the Appeals Council or federal courts back to the same ALJs who initially  
132 adjudicated such claims for additional proceedings as required. If an ALJ who initially  
133 decided a claim will not be presiding over a case post-remand, SSA should nonetheless  
134 ensure that he or she still receives notification of the remand decision. Decisionwriters  
135 who were involved in drafting a remanded decision should also receive notification of  
136 remand decisions; and

137 (d) developing a program for ALJs to serve extended voluntary details on the  
138 Appeals Council in order to introduce a measure of peer review, enrich ALJ  
139 understanding of the appeals process, and benefit the Appeals Council by introducing  
140 the perspectives and insights of ALJs. In support of that effort, SSA should seek a waiver  
141 from the Office of Personnel Management (OPM) of its durational (120-day) limit on  
142 details, which, if granted, would enable detailed ALJs to gain a deeper knowledge of the  
143 Appeals Council than is possible under a shorter detail period. OPM should give  
144 favorable consideration to such a request.

Comment [CMA5]: Morrison Amendment



145           4.     *Expanding Focused "Own Motion" Review.* In order to focus attention on the  
146 unappealed decisions that most warrant review, thereby enhancing both accuracy and  
147 consistency, SSA should expand the Appeals Council's use of its "own motion" review by using  
148 selective review in a manner consistent with ALJ decisional independence. The Appeals Council  
149 should use announced, neutral, and objective criteria, including statistical assessments, to  
150 identify problematic issues or fact patterns that increase the likelihood of error and, thereby,  
151 warrant focused review. In addition, SSA should review unappealed decisions that raise issues  
152 whose resolution likely would provide guidance to ALJs and adjudicators. In expanding its "own  
153 motion" review, SSA must ensure that (i) selection-of-review criteria are developed in a neutral  
154 fashion without targeting particular ALJs or other decisionmakers, and that (ii) inclusion of  
155 cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary,  
156 SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand  
157 the Appeals Council's use of selective sampling to identify for review decisions that:

158           (a)     raise issues for which resolution by the Appeals Council would provide policy  
159 clarifications to agency adjudicators or the public;

160           (b)     appear, based on statistical or predictive analysis of case characteristics, to have  
161 a likelihood of error or lack of policy compliance; or

162           (c)     otherwise raise challenging issues of fact or law, or have case characteristics,  
163 that increase the likelihood of error.

#### 164 **Use of Opinion Evidence from Medical Professionals (Treating Source Rule)**

165           5.     *Evaluating Medical Source Opinions.* SSA should revise its regulations **through**  
166 **notice-and-comment rulemaking** to eliminate the controlling weight aspect of the treating  
167 source rule in favor of a more flexible approach based on specific regulatory factors. SSA  
168 should give ALJs greater discretion and flexibility when determining the appropriate weight to  
169 afford opinions from treating sources (which may or may not be determinative), consistent with  
170 the factors enumerated in the current regulatory scheme for evaluation of opinions of

171 acceptable medical sources who are not deemed “treating” sources. Such factors should  
172 include: (i) length of the treatment relationship and frequency of examination; (ii) nature and  
173 extent of the treatment relationship; (iii) supportability of the medical source’s opinion; (iv)  
174 consistency of the medical source’s opinion; (v) specialization of the medical source; and (vi)  
175 any other factors that may support or contradict a medical source’s opinion. In all cases, ALJs  
176 should articulate the bases for the weight given to opinions from medical sources.

177         6.     *Recognizing the Value of Other Medical Sources.* SSA’s existing regulatory  
178 scheme, which assigns second-tier evidentiary value to the opinions of nurse practitioners  
179 | (NPs), physician assistants (PAs), and licensed clinical social workers (LCSWs) **professionals**  
180 because they are not considered “acceptable medical sources,” should be reconsidered to  
181 reflect the realities of the current health care system. For many Social Security disability  
182 claimants, these medical professionals are the de facto “treating source” of medical care for  
183 physical and mental illnesses. SSA should consider:

184 |         (a)     revising its regulations **through notice-and-comment rulemaking** to add NPs,  
185 PAs, and LCSWs as “acceptable medical sources,” consistent with their respective state-  
186 law based licensure and scopes of practice; or

187         (b)     issuing a new Social Security ruling or other interpretive policy statement that  
188 makes clear, for agency adjudicators, federal courts, and the public, the value of, as well  
189 as the weight to be afforded, the opinions of these three types of medical professionals.

## 190 **Statistical Quality Assurance Measures**

191         7.     *Enhancing Data Reporting Systems.* SSA should consider enhancing its current  
192 | data reporting systems in order to **enable-develop** a more robust statistical quality assurance  
193 program. To enhance its current data reporting systems, such as the Case Processing  
194 Management System (CPMS) and the Appeals Council Review Processing System (ARPS), or any  
195 respective follow-on systems, SSA should consider how to associate types of cases and issues,  
196 regions, hearing offices, adjudicators, procedural elements and benchmarks, and decisional

197 outcomes together. The goal of such systems should not only be objective evaluation of the  
198 agency's case processing operation, but also the effective utilization of data to inform policy  
199 formation and operational consistency.

200 8. *Capturing Additional Data.* SSA should specifically consider addressing the  
201 limitations of CPMS, ARPS, and any respective follow-on systems by ensuring that these data  
202 reporting systems capture (as appropriate):

- 203 (a) information related to any prior hearings;
- 204 (b) whether a decision involved a hearing or on-the-record decision;
- 205 (c) whether new evidence was submitted by a claimant after his or her hearing to  
206 the ALJ or to the Appeals Council; and
- 207 (d) data or other tracking mechanisms enabling ARPS and CPMS data to be related  
208 to a single claim through all case processing stages, including hearings, Appeals Council  
209 review, and remand by the Appeals Council or federal courts.

210 9. *Encouraging Employee Feedback.* SSA should encourage feedback from SSA  
211 employees to identify other types of case-related data that should be captured, ~~and to~~  
212 suggest ways to facilitate the linking of SSA's multiple data reporting systems in order to  
213 improve overall data quality and quality assurance capabilities.