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October 25, 2017

VIA U.S. MAIL & ELECTRONIC MAIL TO: e-ORI@dol.gov

Office of Regulations and Interpretations,
Employee Benefits Security Administration
Room M-5655
U.S. Dept. of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Attn: Claims Procedure for Plans Providing Disability Benefits Examination
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503-1

Dear Deputy Assistant Secretary Hauser,

Our law firm commented on the proposed regulations for amending the claims procedure regulations applicable to disability plans by our letter dated and submitted on January 19, 2016. We felt then and still feel now that the protection of workers who become disabled is an important and worthy concern. As such, we write again to request that the Department of Labor ("the Department") not delay the effective date of the final ERISA claims regulations that were adopted on December 19, 2016 and are set to take effect on January 1, 2018.

Our practice is primarily focused upon the representation of individuals in ERISA-governed benefit disputes, including in large part, disability benefits. Collectively, we have more than fifty years of experience practicing law and over forty years of experience handling these very claims, during which time we have represented hundreds, perhaps thousands of claimants, possibly more than any other firm in North Carolina. We also regularly speak across the country and write articles on various ERISA and benefits topics, including disability.

We strongly believe that the regulations should not be delayed or reconsidered. The process that was undertaken by the Department in 2016 fully complied with the Administrative Procedures Act ("APA") and all other applicable rules and regulations. At this point, the Department's proposed delay of its published final regulations ("Final Rule") raises serious questions regarding transparency in the rule-making process. Indeed, the Department finalized rules requiring plans, plan fiduciaries, and insurance

providers to comply with certain minimum requirements when dealing with disability benefit claimants after an extensive notice and comment period that provided sixty days and yielded numerous comments from nearly one hundred stakeholders. Attorneys representing participants and participants themselves provided their comments and experiences. Insurance companies, ERISA plans, and their advocates and the organizations that represent them also came out in force.

Many of the industry comments suggested that there were cost issues associated with implementing the rules. Those comments were highly speculative and rarely were supported by any relevant data. Nevertheless, the point was made and duly considered. Additionally, a number of the industry comments asked for more time to adjust to the new rules, a request that the Department honored by both taking a lengthy time period to issue its Final Rule and by significantly delaying the final regulations' effective date. Indeed, after the comment period ended, the Department spent nearly a year considering all of the properly submitted comments. It was only after this thorough review that the Department issued the Final Rule. The Department thereafter delayed the effective date for more than another year. There can be no question the industry was heard. The resulting Final Rule is not perfect for claimants, nor apparently for the industry. But it did take the competing interests into account fully, vetted them, and issued a set of reasoned regulations meant to balance the concerns presented by all stakeholders while providing for adequate minimum requirements for employee benefit plan procedures pertaining to participants' and beneficiaries' disability claims. Yet the industry now seeks a do-over.

It appears that other input is now being relied upon – information that could have been contributed during the proper notice and comment period but was not. ERISA participants and their representatives have no way to respond to this input, since it is not being made available. The public is not being told why this post notice and comment information is more valuable than what was collected during the notice and comment period itself. It is clear that there were meetings with industry representatives and that the industry and certain members of Congress sent letters to the Department, but the content of these meetings and letters are not entirely disclosed. The industry apparently referenced a "confidential" study that predicts an increase in premiums. It is likewise curious that the very short 15-day notice and comment period does not even provide time for an individual to make a FOIA request to uncover what is influencing this process. Indeed, the backroom and secretive nature of this entire new process is suspect and strongly calls into question its legitimacy. Given the current political environment, now is certainly not the time to provide *less* transparency in government.

To make matters worse, the industry study that the Department is now proposing seems to allow for this process to slink further into the shadows. The industry will collect data in a way that will be hidden from the public, and based on this, the Department proposes to possibly make a new decision on how to protect participants' rights by reconsidering the enacted reasonable procedures for the adjudication of the

disability benefits. How such an endeavor can be reasonable or equitable defies explanation. Indeed, it seems designed to permit an entirely unscientific massaging of facts to favor one set of interests over another. There is no way that participants can effectively comment or provide their own "study," since they are not in possession of the data and could not muster the resources to process it, even if they were. Never mind that this clandestine "do-over" violates the APA and the Department's procedural rules in the first place.

Furthermore, we do not assume that the industry is correct in estimating that premiums for group disability benefits would increase by 5-8%. Nothing in the Final Rule creates or requires a massive overhaul to the regulatory environment already in place governing these claims. Indeed, the industry has long been required to make certain disclosures and otherwise administer the claim process in accordance with ERISA's regulations. The new regulation changes do not alter the underlying process of how benefit claims are administered or what is already required of the industry, and as such, the supposed cost increase seems to be wildly speculative and surely excessive. In any event, such assertions could have and should have been vetted under the appropriate notice and comment period. Moreover, and as mentioned above, this cost increase issue now raised by the industry *was* raised during the initial comment period. The Department evaluated the purported cost increases and concluded that the additional costs, if any, would be minimal. Even assuming *arguendo* that premiums could increase slightly, to the extent that they are increased to avoid illusory coverage and provide disability claimants with even a modicum of due process, ERISA participants would likely welcome this and it would present no additional burden to public programs. In other words, if the difference in premiums is the difference between paying something for nothing and paying something for something, the argument surrounding the increase rings entirely hollow. To the extent the Department thinks a delay is needed to prevent such an increase, this needs to be reconsidered, as the costs will not outweigh the benefits even in the worst case scenario. Every day, week, and month that the Department delays implementing the Final Rule causes the number of claimants who are deprived of minimum basic requirements to grow larger.

The odds are already desperately stacked against disability claimants, where the right to a jury trial has been stripped away, punitive standards are imposed without exception, evidence and records are controlled entirely by one side, most discovery is limited, and decision-makers with conflicts of interest nevertheless receive judicial deference to their decisions to deny lawfully and contractually-owed benefits. The industry, who already has most of the cards stacked in its favor, had a full notice and comment period to raise its concerns. We are past this. Moreover, the fact that the industry is so vigorously fighting implementation of the Department's Final Rule, which simply provides basic disclosure, communication, and due process requirements that have always been intended in ERISA speaks volumes. After all, we mustn't forget that ERISA was founded upon trust principles and the supposed existence of a fiduciary relationship between the industry and its claimants. Using backroom methods to

attempt to deprive these very claimants of due process seems to fall woefully short of such lofty aspirations.

You must see the irony in the fact that after having full due process to comment on the proposed regulations that are designed to improve the woefully deficient due process that is presently afforded to ERISA claimants, the industry now protests that it needs yet more due process in order to show the Department why the due process rights of claimants should instead be further marginalized.

In conclusion, the regulatory improvements for disabled workers provided by the Department's Final Rule are long overdue. There are no compelling legal or equitable justifications to further postpone these long needed basic disclosure and due process regulatory rules. We therefore ask that the effective date of the regulations not be delayed, since the reason for doing so lacks the necessary transparency and undermines the sense of order, trust, and fairness that should inure to this or any other governmental rule-making process.

We thank you for the opportunity to comment. If you have any questions, please do not hesitate to contact us at (704)377-4300.

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