October 26, 2017

Submitted via: e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Claims Procedure for Plans Providing Disability Benefits
Re-Examination [RIN 1210-AB39]

Ladies and Gentlemen:

AARP[1] appreciates the opportunity to comment on the Department of Labor's (the Department) proposed regulation re-examining the revised claims procedure for plans providing disability benefits. On behalf of our nearly 38 million members, we have a strong interest in ensuring that participants and beneficiaries receive the benefits to which they are entitled. In order to do so, participants must be able to successfully access and resolve benefits disputes through ERISA's claims procedures. Without meaningful access, participants cannot adequately protect their claims to benefits, which may spell the difference between independence and impoverishment in their old age.[2]

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[1] AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment.

[2] We know that, as workers age, disability rates increase. *Persons With A Disability: Labor Force Characteristics – 2016*, 2 (June 21, 2017), goo.gl/t6X6BW. For example, with $832 as the median weekly earning of a fulltime worker, see *U. S. Dep't of Labor, Labor Force Statistics from the Current Population Survey: Table 37*, Bureau of Labor Statistics (last modified Feb. 8, 2017), goo.gl/MK6AgD, and a replacement percentage of sixty percent, see America's Health Ins. Plans (AHIP), *An Employer's Guide to Disability Income Insurance* 9 (2007), goo.gl/E5mvCy, a disability claimant would receive the modest amount of approximately $499 per week.

For the reasons below, AARP urges that the applicability date of the Final regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016), should not be delayed.

Transparency During The Rulemaking Process Permits The Public To Provide Useful Analysis To The Agency.

Prior to the issuance of the Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016), it had been over fifteen years since the claims procedure was updated for disability plans. During that regulatory process, the Department of Labor requested various information that disability insurers and other stakeholders admitted that they did not possess and did not provide. These stakeholders had many opportunities to provide data and input supporting any issues and concerns on cost and other issues raised by the revised regulations. Indeed, 288 comments were filed with the Department concerning this rule showing extensive participation in the rulemaking process, including from individuals. In accordance with the industry's request to provide it with adequate time to comply, the rule became effective on January 18, 2017, but is not applicable until January 1, 2018.

Subsequently, insurers alleged, without public evidence, that the final disability regulation would add significant costs. Indeed, the insurers have stated that the information "could be developed." Thus, the Department appears to be relying on unsubstantiated assertions and non-public information to consider delaying this due process regulation.

It is difficult to comment substantively on either the delay of the applicability date of the claims regulation or the request for information because the materials upon which the Department is relying are not public. Diligent searches have not found either the letters or the survey cited on the Department's website or the writers' websites. Consequently, by separate letter, AARP has requested these documents. In addition, AARP has filed a FOIA request, although the chances of a response before the due date of December 11, 2017 for the comments are doubtful given that the EBSA has a backlog of 173 requests. The proposed regulation for the delay of the applicability date does not specify the exact nature of the information causing the reconsideration and why the information was not provided to the Department for evaluation during the comment period.

The importance of being able to comment on these letters and surveys cannot be overstated. For example, in 2005, AHIP engaged Milliman, Inc., a consulting firm, to analyze the actuarial impact of the disability income policy language changes that the California Department of Insurance had proposed. See Robert W. Beal, FSA, MAAA & Daniel D. Skwire, FSA, MAAA, Milliman, Inc., Impact of Disability Insurance Policy Mandates Proposed by the California Department of Insurance 1 (Nov. 14, 2005), goo.gl/5WvRgY. One of the changes was to prohibit the use of discretionary clauses in

disability insurance contracts. Milliman estimated that the prohibition would increase premiums between 3% and 4%. Id. at 8. One of the assumptions that Milliman used was that litigation over claims under group insurance policies would be handled in the same way as individual insurance policies. Id. at 9. However, claims brought under ERISA-group policies are not eligible for punitive or other types of compensatory damages. Moreover, claimants are not permitted to obtain a jury trial to adjudicate their claims. These underlying incorrect assumptions clearly resulted in a miscalculation and overestimation of the increased costs. The analysis that AARP performed was essential to the CA DOI's final proposal.

Indeed, the 2005 report estimated that all of the changes that the California Department of Insurance proposed would increase premiums between 28% to 46% for group insurance policies. See Robert W. Beal, FSA, MAAA & Daniel D. Skwire, FSA, MAAA, Milliman, Inc., *Impact of Disability Insurance Policy Mandates Proposed by the California Department of Insurance* 19 (Nov. 14, 2005), goo.gl/5WvRgY. AARP has searched to determine if these increases actually occurred, but has been unable to find any follow-up reports; we note the absence of any news articles after adoption of most of the proposals, indicating the increases were not as great as estimated. The Department can ask AHIP for specific information on any premium increases for California disability insurance policies since 2005 to determine how accurate their estimates were. The difference between the estimates and the actual increases may have implications for the accuracy of any "survey" or information provided to the Department on increased costs. In any event, this example demonstrates the necessity of transparency during the rulemaking process.

The Administrative Procedure Act Requires The Department To Disclose The Documents And Information It Is Relying On When Developing A Regulation To Prevent Prejudice To The Public.

As Secretary Acosta so eloquently noted, the "rule of law" including the Administrative Procedure Act must be followed so all Americans' views can be heard. A. Acosta, Op-Ed, *Deregulators Must Follow the Law, So Regulators Will Too*, WALL ST. J., May 22, 2017, goo.gl/SSBqfH.

Section 553 of the APA requires that an agency give notice of a proposed rule setting forth "either the terms or substance of the proposed rule or a description of the subjects and issues involved," 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation," *id.* § 553(c). Among the information that must be revealed for public evaluation are the "technical studies and data" upon which the agency relies. *See Chamber of Commerce of the United States v. SEC,* 443 F.3d 890, 899 (D.C. Cir. 2006); *Solite Corp. v. EPA,* 952 F.2d 473, 484 (D.C. Cir. 1991).

An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary. *See Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.,* 494 F.3d 188, 199 (D.C. Cir. 2007); *Chamber of Commerce v. SEC*, 443 F.3d at 899; *Solite Corp. v. EPA*, 952 F.2d at 484; *see also Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("'[T]he most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation.'"].

Here, the Department has not explained why these particular "confidential" surveys or letters are trustworthy or confirmed that the "confidential" survey is so reliable or ubiquitous that the procedural requirements for comment should be relaxed when these materials serve as the critical data on which the Department relies to re-assess the costs of implementing the claims regulation. *See Chamber of Commerce of the United States v. SEC,* 443 F.3d at 906 (citations omitted).

Without the transparency required by the APA, AARP will be prejudiced in its ability to review and comment on the letters and "confidential" survey relied upon in the proposed regulation to delay and re-examine the Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016). The ability to comment on these letters and surveys is critical, as the example above establishes.

AARP appreciates this opportunity to state that it opposes any delay in the applicability date of the disability claims regulation. If you have any questions, please feel free to contact Michele Varnhagen of our Government Affairs office at 202-434-3829.

Sincerely,

David Certner
Legislative Counsel and
Legislative Policy Director
Government Affairs