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Via US Mail and E-mail 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

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

Dear Deputy Assistant Secretary Hauser:

I am writing to discourage the Department from modifying or further delaying the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) that are now scheduled to go into effect on April 1, 2018.

In 1974, Congress enacted, and President Ford signed into law the Employee Retirement Income Security Act. ("ERISA"). At the time the law was enacted, I was in high school. If as a high school student, I was asked to explain the purpose of the bill based solely on its title, I would have reasonably expected Congress had intended to EXPAND protections afforded Employees regarding their retirement.

I graduated from law school in 1983, and found myself at a firm whose focus was the defense of life and disability insurance carriers from bad faith law suits brought under California insurance law. In 1987, when the Supreme Court issued its decision in ***Pilot Life v. Dedeaux***, 1(987) 481 U.S. 4110, the bulk of my work shifted from defending cases under California insurance law, to defending cases governed by ERISA. I, along with other attorneys practicing in this area of law, was shocked to discover the extent to which the interpretation of ERISA contracted, rather than expanded employee protections and rights. While California law provided insureds denied life or disability benefits the right to a jury trial, the right to have witnesses testify on their behalf, and the right to recover compensatory damages if the denial was made in bad faith, ERISA, a law enacted to provide "security" to employees, eviscerated these protections.

As a defense attorney, I was not shocked to see my insurance company clients take full advantages of ERISA. Claims which would never have been denied due to the insurers concerns for the resulting damage awards, were denied with impunity by the disability carriers. While I make this observation from what is now over 30 years of experience litigating ERISA cases, some Courts have recognized the problem. (See, *United States of America, v. Aegerion Pharmaceuticals, Inc.*, 2017 WL 5586728, at *7 (D. Mass. Nov. 20, 2017):

> Coupled with today's expansive preemption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts."). They have been enormously successful. **The insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ("ERISA").**

(emphasis added)

After several years of having to defend what I found to be indefensible conduct, I left the defense firm where I was employed and opened a firm whose clients would be limited to insureds seeking to recover employee benefits. In 95% of the cases, the claims were governed by ERISA.

For the past 25 years, I have practiced solely in this area of law. My firm employs 12 full time attorneys whose cases are almost exclusively on behalf of individuals whose claims are governed by ERISA, and are significantly impacted by the claims handling regulations put in place by the Department of Labor which place some responsibility on insurers to take seriously their fiduciary duties to ERISA beneficiaries and claimants.

While I am grateful for the opportunity to comment on the Department's re-examination of the costs of the final rules governing disability claims, the concerns raised by the industry are not new. Rather, these objections appear to be simply re-argument of the merits of the final rules. Where those rules are based on policy choices that have been made by Congress, by this Department, and by the federal courts interpreting ERISA, another argument about the merits is unnecessary.

Nevertheless, I will address the objections that have been raised that I feel are most in need of a response

The industry claims if the final rules go into effect there will be an increase in costs that will increase premiums resulting in less access to disability benefits. These assertions do not ring true. First, the claim that the regulations would significantly increase costs is unproven. I have yet to see any actuarial study that would support such a claim; and I sincerely doubt that any such study could be produced. But even if the costs may modestly increase, the specter that fewer employers would offer benefits is sheer nonsense. Employers provide benefits to their employers for reasons that go well beyond altruism. Employee benefits are valuable tool employers use to both recruit and retain outstanding employees. Moreover, the cost of disability benefits is often passed on to the employee, which, in turn, would make the benefits non-taxable under the Internal Revenue Code. The IRS has repeatedly issued Revenue Rulings explaining that if disability insurance premiums are paid with after-tax dollars, the resulting benefits are non-taxable.

Second, given the nature of litigation of disability benefit claims, a more robust and fairer claim process may be the only means a claimant has to achieve due process. The federal courts treat ERISA claims as quasi-administrative ("review of a record." See, Perlman v. Swiss Bank Corp., 195 F.3d 975 (7th Cir. 1999)). That means there is no trial (and obviously no jury trial), no discovery permitted, and no further evidence allowed. As a result, the reality of our law practice is that we often have to turn down potential clients who have already gone through the claim process even though their claims would be meritorious if only we could submit additional evidence

or be permitted to submit testimony from a treating doctor. The most critical of the proposed regulations is the one that gives the claimant the last word in the claim process. Without a regulation permitting claimants the opportunity to comment on adverse evidence obtained by the benefit plan administrator/insurer during the claim process, claimants can be sandbagged since meaningful challenges to such adverse evidence are precluded.

Third, the importance of a Social Security determination cannot be overstated. As part of their settlements of regulatory charges resulting from market conduct investigations, both Unum and CIGNA agreed to give deference to favorable Social Security determinations. Every disability insurer and plan administrator should be subjected to the same standard. The definition of "disabled" under the Social Security Act (42 U.SC. Sec. 423) is far more stringent than the definitions in disability insurance policies; and a favorable outcome of a Social Security claim represents an objective process by a neutral administrative agency. While the rules may be somewhat different, Social Security no longer gives deference to a treating doctor's opinion just because that doctor is a treating doctor. Moreover, the Social Security Medical-Vocational Rules that take into consideration a claimant's age, education, and work experience have been recognized as "well-developed, relatively efficient and by no means overly generous to claimants—by which a plan may show adequate consideration of a claimant's vocational characteristics. **Demirovic v. Bldg. Serv. 32 B-J Pension Fund**, 467 F.3d 208, 216 (2d Cir. 2006). Hence, requiring disability plans to meaningfully explain a differing outcome from the Social Security Determination would enhance the claim process and its fairness.

Fourth, the Regulations promote the use of impartial consultants. Especially in view of a litigation regime that effectively precludes discovery, the rule promotes the use of practitioners who bring more objectivity and fairness into the evaluation of claims instead of using doctors and other consultants who appear to earn the bulk, if not all of their income, reviewing disability claims and thus are influenced by the notion of regulatory capture into being biased to favor benefit denials.

Fifth, the requirement of disclosure of the time limit for filing suits is simply a tool to prevent confusion and unnecessary premature adjudication of claims. Likewise, the disclosure of internal guidelines utilized by plans insures consistent treatment of similarly situated claimants.

In summary, the regulations have already gone through an extended comment period and the comments presented were all taken into consideration before the final rules were issued in December 2016. There is no reason whatsoever to delay the implementation of the rules, especially since insurers and benefit plan administrators have already been given more than adequate time to institute procedures and measures to comply with the rules.

Very Truly Yours,

GRK

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