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Submitted via: e-ORI@dol.gov

Timothy D. Hauser
Deputy Assistant Secretary
Employee Benefits Administration
Department of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Re: Re-Examination of Claims Procedure Regulations (RIN No. 1210-AB39)

Dear Deputy Assistant Hauser:

As a lawyer with over 30 years experience representing employees in benefit claims, I urge the Department ***not*** to further delay or revise the final disability claims regulations on the basis of the disability insurance industry's untimely, unfounded, and transparently self-serving speculations about the "costs" of the final rules. Everyone knows the complaints that employees of all occupations, sexes, and races have voiced for decades about the pro-insurance company biases in disability benefit claim processes. Nationwide class actions against UNUM and LINA for their claim processing practices revealed the disregard for fairness that permeated the disability insurance industry. As every federal judge knows, most of the ERISA litigation in the federal courts is now, not about pension claims or health claims, but about long-term disability claims.

As the Department's December 2016 Fact Sheet on the final rules announces, these regulations simply strengthen protections for workers requesting disability benefits by promoting fairness and accuracy in the claims review process, so that disabled individuals stand a better chance of avoiding financial and emotional hardship by receiving the disability protection their plan's coverage offered (and a better chance of not needing to invoke the federal courts). For the industry to act as though the pendulum has swung too far in favor of the employees with the Department's 2018 regulations is preposterous. The parallels to the financial services industry's efforts to overturn the Department's fiduciary rule are also difficult to overlook, except that here the insurance industry has not offered its arguments in the courts but is only making them in secret backroom meetings where the industry can offer assertions based on "confidential" sources.

As in the fiduciary rule cases, there is no credible evidence here that the direct or indirect costs of the Department's final disability claim regulations are any more significant for the insurance industry than the generous allocations the Department estimated. When the insurance industry commented on the proposed rules, it offered no contrary evidence about greater costs, but argued against the rules on policy grounds. When the insurance industry restyled itself as "stakeholders" after the regulations were made final, it continued to offer no credible evidence of costs any more significant than those the Department had estimated. Instead, the stakeholders have simply held secret meetings with new political appointees after the change of Administrations and made assertions based on a "confidential" survey they have yet to share. Obviously, the assertion that the costs of the regulations exceeds the benefits is a self-serving position to stake out for the aptly self-named "stakeholders." But under the APA, cost assertions must be supported, and these assertions lack any credible data or other substance. The insurance industry's new effort to string out the effective date of the regulations further with the prospect of their redoing a "confidential" survey in a way that could be shared with the Department is belied by the fact that the disability insurance industry has cooperated for decades in surveys conducted by actuarial organizations, including the Society of Actuaries and the American Academy of Actuaries. None of those surveys have found, or even suggest, that the Department's claim regulations have a significant impact on disability insurance costs, much less that those costs outweigh the benefits of regulations designed to protect individuals with claims for disability benefits.

The Society of Actuaries and American Academy of Actuaries surveys indicate that by far the most significant factor for insurance costs is the rising rates of disablement as employees, male and female, grow older. There are also correlations with professions and industries. There is no indication that DOL regulation has any remotely comparable significance as a factor for premiums. The disability regulations the Department adopted in 2000 had no discernable impact on the expansion of disability coverage. Indeed, BLS statistics show that coverage increased after the 2000 regulations. Similarly, there is no indication that the Affordable Care Act's 2011 claims processing regulations, after which most of the final disability regulations were modeled, have had any appreciable impact on costs. Finally, by far the most significant developments in disability claims over the past two decades have been the increase in individual and class action ERISA litigation, including the nationwide UNUM and LINA class action settlements, as well as the burgeoning movement of state-by-state insurance legislation banning discretionary clauses in disability policies. No evidence has been presented that any of these developments has had a significant impact on premiums.

Finally, the tenuous grasp on reality of the stakeholders' case becomes most apparent when the content of the three primary regulations the stakeholders are seeking to rescind or modify is examined. There is no reasonable case to be made that (1) requiring

an insurance company to explain the basis for a disagreement with the Social Security Administration, (2) allowing a claimant the opportunity to respond to new evidence or a new rationale for a denial, or (3) using a "deemed exhaustion" rule when an insurer does not comply with the claims regulations, has any appreciable impact on group costs, much less impacts that outweigh the benefits of fairer and more accurate disability determinations.

I urge the Department not to change the final disability regulations on the basis of never-produced evidence and the raw assertion of backroom deals. The Department of Labor has a responsibility under ERISA Section 503 to ensure a "full and fair review" of a denied benefit claim. In 2015-2016, the Department took long-due steps to carry out that responsibility, by noticing, considering, and finalizing the claims regulations. The Department should not be deterred from making those reforms effective beyond the 90 additional days it has already given. As the Supreme Court has held, ERISA was enacted to ensure "higher-than-marketplace standards." *MetLife v. Glenn*, 554 U.S. 105, 115 (2008). The insurance industry's displeasure with the Department of Labor performing its statutory duty is no basis for overturning duly-authorized and already-final regulations. Moreover, the idea that the insurance industry can comment, and then have a second or a third opportunity to block final rules, still without producing any evidence on costs, betrays not only the values of ERISA but also those of the APA.

If you have any questions or want me to do anything more, please contact me at 202-289-1117. Thank you.

Sincerely,

Stephen R. Bruce