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December 11, 2017
Via E-Mail

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 out of concern over the Department's consideration that it may modify or further delay the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) which are presently scheduled to go into effect on April 1, 2018.

I have worked with and for participants in ERISA disability plans for fourteen years, and I have seen firsthand the abuses and inconsistencies that occur in the absence of clear directives to ERISA administrators – who in the disability arena typically are insurance companies – concerning the most basic due process and fiduciary protections. In no area of law is there a greater imbalance of power than in the ERISA disability context. To delay or roll back basic procedural protections for claimants, many of which have developed through years of experience by hundreds of federal judges throughout the country over the past 15 years, is to tell the thousands of families forced into using their Plan disability safety net (or who will be forced to use it in the future) that the protections ERISA was meant to establish are illusory when it comes to this type of plan benefit.

To be sure, I am thankful the Department has given me and others the opportunity to comment on the Department's re-examination of the costs of the final rules governing disability claims. However, the concerns raised by the insurance industry are not new, but rather a re-argument of the merits of the final rules and frankly in many instances a re-litigation of many of those modified rules that are simply in recognition of federal common

law developed through years of litigation before learned federal judges of many stripes and backgrounds. In summary, 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.

I will now 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. To be clear, this costs argument was made in various industry comments to the proposed rules before final adoption. The Department concluded that costs would not outweigh the benefits. The fundamental facts of that conclusion have not changed. Bureau of Labor statistics already before the Department show the cost of disability insurance to be modest, and my experience with hundreds of plans bears this out. But even if costs were to increase, the increase would be so small that it is unlikely to make any difference in the marketplace. Presently without the benefit of these amended rules, many plans offered are essentially illusory and offer no benefit or value to participants who are asked for parts of their wages to pay part of the premium in many instances, especially as to those working-class persons whose benefits are so small that they are otherwise powerless to contest any adverse treatment by an ERISA insurer. Workers are better served by obtaining private plans that without any regulations governing them offer far better protection than ones to which ERISA attaches. That is how bad the landscape is currently. ERISA plans are *worse* than non-ERISA plans.

This is because ERISA perversely incentivizes insurers to be aggressive in the denial or termination of claims regardless of merit. This is mostly because ERISA disability claimants who are denied their benefits face a process that is far below the standard for regular civil disputes because courts often apply an unfavorable standard of review, and at the same time ERISA provides no remedies to discourage unfair and self-serving behavior by ERISA insurers or other Plan actors. Even with the final rules in place, plan participants will not have achieved the "higher-than-marketplace standards" that the Supreme Court insists are required in processing ERISA claims. *MetLife v. Glenn*, 554 U.S. 105, 115 (2008). Such is the imbalance when it comes to ERISA disability claims.

From the perspective of plan participants, an inexpensive but illusory disability plan is worse than no plan at all. Disabled claimants are often shocked when they are told about ERISA's procedural hurdles. So, to the extent that increased protections bring disability claims administration in line with the reasonable expectations of the employee-participants, the costs are outweighed by the benefits. The alternative is that such persons will have to resort to seeking forms of public assistance, which will put a larger financial strain on public resources as well come with a social cost when a part of a nation's population, even if a small part, is economically marginalized not because of their personal choices, but the choices of their government in its enactment and execution of their nation's laws. If there are costs associated with the final regulations, these costs could and should be tolerated in the name of supplying a modicum of protection for plan participants.

Next, I want to address the fantastical industry "concern" about the new rules somehow encouraging plaintiffs and their attorneys to race to court, increasing the volume of ERISA litigation and hence the overall costs of administering disability claims. In other words, the industry is concerned that plaintiffs' attorneys like me actually *want* to face the unlevel playing field set forth above and file as many suits as they can as fast as they can. First, let me assure you Plaintiff's attorneys are ever mindful of building a record on which the court will make its decision and therefore would rather engage in the appeal process and exhaust internal remedies. This serves the dual purpose of possibly resolving the dispute and creating a record for the court to review in case the dispute cannot be resolved internally. Under the final rule, the plaintiff will mostly obtain a remand with instructions for the plan (or rather the insurance company as the appointed ERISA administrator) to do its job. Because plaintiff's attorneys usually work on a contingent fee basis, it does not make sense to undertake litigation that is not absolutely necessary and that will not result in resolving the case on the merits. No plaintiff's attorney anywhere ever stayed in business very long pushing ERISA disability cases into court with the incredibly strong procedural headwinds such cases face. Not only is there no incentive to conduct business that way, but there is also immediate punishment and cleansing from the marketplace of any attorney who thinks filing unnecessary ERISA litigation is a good strategy.

Finally, I wish to address the industry's assault on the Department's new rule that would allow claimants to respond to new information used to support claim denials during the administrative process, especially when the new information is introduced during the appeal phase. This rule is fundamental to full and fair review. But, the industry complains that providing the claimant with new evidence or rationales before making a final decision is costly.

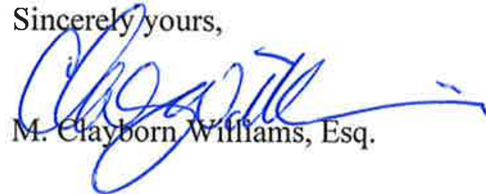
It is important to note what this rule does. It permits a claimant to respond to a disability claims administrator's assertion in a way that will make the response a part of the record if the claimant must go to court to vindicate his/her rights. This is because most ERISA cases are decided on a closed record. Without this rule, the claims administrator's new evidence or rationale will be included in the record that the court reviews, but the claimant's rebuttal will not. Perhaps what the industry is really chafing about is the loss of its ability to strategically withhold information that would help the claimant achieve reversal or win his/her case in court. Sandbagging – which bluntly is what the insurance industry is seeking to protect – is antiethical to basic concepts of fundamental fairness. In every other judicial proceeding, there is a right of response to new information or argument. So too should there be in an ERISA disability matter, especially given the reasons behind ERISA's enactment in 1974 after years and years of concerns about the protection of this country's most valuable resource – its workers.

The other rule changes likewise should be preserved because of the basic right they protect and define. Rules ensure uniformity, and in the end, that is in everyone's best interests, including ERISA insurers. Rules also encourage openness and disabuse participants, who once having been though an ERISA claims "administrative process," almost always come away with the view they have been subjected to a "star chamber" kind

of process, even when their claims are honored. At bottom, people need to have faith in the system, and the new rules (not just the ones I address above) do that.

For these reasons, as someone who is intimately familiar with how these claims are actually litigated and administered on a daily basis, I urge the Department not to revisit the work it has already done based on industry commentary already considered and incorporated into the regulations scheduled to go into effect in 2018.

Sincerely yours,



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