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By E-Mail (e-ORI@DOL.gov) and U.S. 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 to request that the Department does not 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)) that are now scheduled to go into effect on April 1, 2018.

I have represented long-term disability (LTD) claimants for over 20 years. I have helped hundreds of LTD claimants receive disability benefits – both through the administrative claim process and, when necessary, litigation. My clients are individuals who have suffered the double blow of serious illness or injury and the loss of work income. Timely receipt of LTD benefits is often the only thing that stands between my clients and losing their homes because they are unable to pay the mortgage or other financial catastrophes. Indeed, I have had clients who have died while their administrative claims were pending.

LTD claimants often have difficulty obtaining representation in the administrative claim process and lack the resources necessary to gather the evidence necessary to contest a claim denial. The Department needs to make sure the Secretary's claim review regulation protects the interests of disabled workers.

While I appreciate 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 insurance industry's primary objection.

Costs Will Not Increase

The industry claims if the final rules go into effect there will be an increase in costs that will increase LTD premiums resulting in fewer employees being covered by group LTD plans. This assertion is not grounded in fact.

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 current cry of increasing costs is an argument that has already been considered and rejected. An agency is not required to "conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Michigan v. Environmental Protection Agency*, 135 S. Ct. 1699, 2711 (2015).

Nonetheless, the Department has asked for data addressing whether costs increased in response to the last set of rules applying to ERISA disability plans that became effective in 2002. In fact, the Department can rely upon information supplied by its own Bureau of Labor Statistics. <https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm>.

The data shows that access and participation in employer-based disability insurance has *increased*, not decreased, between 1999 and 2014. This increase occurred despite that employment in the service industry has increased, an industry in which employees are the least likely to have access to employer-based disability coverage. This increase also occurred despite the 2000 disability claims regulations and a series of court decisions addressing conflicted decision-making, deemed exhaustion, the need to discuss and explain adverse benefits decisions, and a participant's right to respond to new evidence. The Department should therefore be suspicious of any data supplied by the industry now that suggests employers would abandon disability coverage due to the costs of codifying these principles. The Bureau of Labor Statistics study also demonstrates that the cost of disability insurance is extremely modest. Thus, even if costs did increase, the increase would be so small that it is unlikely to make any difference in coverage.

The Department has also asked for data about whether disability premiums increased in response to the adoption of statutory bans on discretionary language clauses in disability policies by some states. Notably, during the time period of the BLS study, many states enacted discretionary clause bans. This includes but is not limited to: Arkansas Admin. Code 054.00.101-4 (2013); Cal. Ins. Code §10110.6 (2012); Colo. Rev. Stat. §16-3-1116 (2008); 50 Ill. Admin. Codes 2001.3 (2005); Md. Code ann. Ins. §12-211; Mich. Admin. Codes. R. 500.2201-2202 (2007); R.I. Gen. Law §§ 27-18-79; Tex. Admin. Code §3.1202-1203; Tex. Ins. Code §1701.062, §1701.002 (2011); WAC §284-96-012 (2009). Notwithstanding these statutory developments, access and participation in disability plans increased according to the BLS data.

Also, during the period covered by the BLS document, two major insurers with significant market share, UNUM and CIGNA, were examined by the state insurance regulators for poor claims

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handling practices. UNUM and CIGNA had to pay fines and consented to Regulatory Settlement Agreements that raised the standards for their LTD claims administration.
http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_multistate.html:

http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2009/pdf/cigna_mcreport_2009.pdf.

https://www.insurance.ca.gov/0400-news/0100-press_releases/2013/release044-13.cfm.
Nonetheless, during this period LTD participation increased.

Given the above, there is no factual basis to support the industry's claim that modest changes to the Secretary's claim review regulation would result in cost increases or decreased coverage. Accordingly, I urge the Department not to change or delay the final rules.

Sincerely,

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By _____
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