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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 an attorney who represents claimants with long-term disability claims. In my practice, I represent individuals who need help navigating the claims and appeals process before insurance companies and third party administrators of self-funded disability plans. I also litigate disability claims subject to ERISA on behalf of individual participants and beneficiaries.

I believe that it is important that the Department implement 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. The regulations as promulgated last year were the result of a reasoned, measured and transparent process. The result of that process, if the regulatory changes are implemented, would be merely clarifying required safeguards that have already been established through the federal courts body of ERISA common law.

The industry's concerns about costs have been addressed by the Department already when it previously concluded, after taking into consideration the industry's comments on the proposed rules, that if there are associated costs to the new regulations the costs simply do not outweigh the tremendous benefits. I agree with the Department's assessment, that the benefits outweigh the costs.

The U.S. Supreme Court has described the purpose of ERISA is to provide a claims determination process that meets "higher-than-marketplace standards" *MetLife v. Glenn*, 554 U.S. 105, 115 (2008). These regulations are a modest step towards ensuring that those standards are achieved.

In particular, one of the new rules requires a Plan to discuss any basis for disagreement with Social Security Decisions. This is a matter of fundamental fairness and can't possibly add to

the cost of providing disability benefits as the industry has argued in its comments to the Department. The fact is that disability plans subject to ERISA, with almost no exceptions, contain provisions that reduce the ERISA disability benefits by any amount of social security disability benefits. Most ERISA disability plans often contain provisions where the ERISA benefits will be reduced by Social Security Disability benefits regardless of whether the Social Security benefits are actually received. For example, below is actual language from a long term disability insurance contract provided by CIGNA:

> **The Insurance Company will assume the employee (and his or her dependents, if applicable) are receiving benefits for which they are eligible from Other Income Benefits. The Insurance Company will reduce the Employee's Disability Benefits by the amount from Other Income Benefits it estimates are payable to the Employee and his or her dependents.**

The industry routinely dedicates resources to determine a claimant's potential eligibility for Social Security Disability benefits. Requiring an explanation as to how a Social Security determination interplays with eligibility for ERISA disability benefits is simply a matter of fundamental fairness that should not add cost to ERISA plans. These Plans take enormous advantage of a system that allows them to reduce employer provided benefits by a claimant's entitlement to Social Security benefits. If these Plans are allowed to assume that a claimant is disabled under Social Security's rules while at the same time denying a claimant disability benefits under an employer based plan, it is a minimal requirement to require the Plan to simply explain why its conclusion differs from that of the Social Security Administration.

In addition, the rule that provides claimants the right to review and respond to new evidence or rationales before a final decision is made is wholly consistent with the goals of ERISA. In fact, Courts routinely hold that ERISA and its accompanying regulations call for a "meaningful dialogue between the plan administrators and their beneficiaries." *Booton v. Lockheed Med. Benefit Plan,* 110 F.3d 1461, 1463 (9th Cir.1997); *Abram v. Cargill, Inc.*, 395 F.3d 882, 886 (8th Cir. 2005).

Unfortunately, since ERISA cases are decided on a closed record, denying claimants the opportunity to respond to new evidence created by an insurance company on appeal means that the record submitted to a reviewing court is incomplete. This is not a meaningful dialogue and is the opposite of a full and fair review. It is essential that this rule is implemented.

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.

In fact, the Department can rely upon information supplied by its own Bureau of Labor Statistics. Employer-based disability insurance has *increased,* not decreased, between 1999 and 2014 according to the Bureau of Labor Statistics. https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm. In that time, new regulations were added in 2000 and numerous states added laws banning discretionary clauses which affected these plans. What this increase shows that regulatory and statutory changes increasing consumer protections for ERISA claimant's increases employers' willingness to provide this benefit to employers. That is

because employers are interested in providing meaningful disability insurance benefits to their employees. The safeguards ensuring a full and fair review of claims that these new rules would put in place through regulation provide value to the employers who purchase this coverage by ensuring that it is not illusory coverage, but provides disabled employees with a fair system that provides actual benefits in an efficient and cost effective way.

It should also be noted that employers continued to buy an increased amount of disability insurance for their workers during a time when two of the largest insurers, UNUM and CIGNA, were fined by state departments of insurance and were parties to Regulatory Settlement Agreements.
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.

These are two instances where States enforced fair claims practices on ERISA disability insurance providers who were found to be violating claimants' rights. What the statistics show are that these type of regulatory enforcements make disability insurance a more valuable product for employers and they are more willing to provide these benefits if the benefits are administered through a fair process governed by strong regulations. The benefits of making sure that there are rules protecting claimants and that those rules are enforced, clearly outweigh any costs associated with complying with these rules.

I would urge the Department to implement the regulations.

Very truly yours,

Matthew R. Davis