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By U.S. 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: Claims Procedure Regulations for Plans Providing Disability Benefits
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503-1

Dear Assistant Secretary Borzi:

I write to offer comments on the proposed amendments to the claims procedure regulations applicable to disability benefit plans. I am interested in the proposed amendments because my law firm's practice includes representation of claimants in ERISA-governed disability benefit disputes. I have represented disability plan claimants for over twenty years and I have argued two ERISA disability claims in the U.S. Court of Appeals for the Ninth Circuit – *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc), and *Mongeluzo v. Baxter Travenol Long Term Benefit Disability Plan*, 46 F.3d 938 (9th Cir. 1995).

I. Comments on Substantive Matters in the Proposed Regulations

Comment on Notice for Applicable Statute of Limitations

The DOL has invited comment on the statute of limitations issues resulting from the Supreme Court's decision in *Heimeshoff v. Hartford Life & Accid. Ins Co.*, 134 U.S. 604 (2013). The DOL can resolve confusion caused by the *Heimeshoff* decision by creating standards for what is a reasonable plan-based limitations provision in the same way that the DOL used its regulatory power to create deadlines for the claims process in prior versions of the regulations. Since *Heimeshoff* left open the possibility that an internal limitations period could run before the appeals process is complete (even where exhaustion is mandatory), the DOL should clarify that such an approach would violate full and fair review required by 29 U.S.C. §1133.

Additionally, because contractual limitations periods are plan terms, the claimant should receive notice about the limitations period from the plan just as is the case with other material plan terms. As the DOL aptly points out in the preamble to these proposed regulations, plan administrators are in a better position to know the date of the expiration of the limitations period and should not hide the ball from claimants if the plan administrator is functioning as a true fiduciary.

The proposed amendments to the claims procedure regulation should provide that a contractual limitations period cannot begin to run prior to the date of the claimant's receipt of the final benefit determination on review and cannot expire earlier than one year after the date of the claimant's receipt of the final benefit determination. The claim review process is supposed to be non-adversarial and many disability plan participants pursue their administrative claims without representation by counsel. These participants need qualified legal counsel to represent them in court if they decide to litigate a claim denial. Participants often face difficulty in retaining qualified counsel.

Comment on Timing of Right to Respond to New Evidence or Rationales

Plan administrators should not be permitted to sandbag disability claimants with new rationales for denying a claim that are asserted for the first time in denying an administrative appeal or in court. See, e.g., *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620 (8th Cir.1998) (“We will not permit ERISA claimants denied the timely and specific explanation to which the law entitles them to be sandbagged by after-the-fact plan interpretations devised for purposes of litigation.”). Likewise, claimants should be permitted to respond to any new evidence relied upon by the plan administrator in denying an appeal.

Given that plan participants are usually prevented from presenting new evidence of disability in court or supplementing the record to respond to new arguments, the claimant must have an opportunity to supplement the record during the administrative claims process as a matter of basic fairness. Therefore, the proposed amendments to the disability claims regulation should be revised to permit claimants up to 60 days to respond to any new evidence or rationale relied on by the plan administrator in denying a request for review.

Independence and Impartiality - Avoiding Conflicts of Interest

The DOL's proposal seeks to ensure that plans use independent and impartial personnel in deciding disability claims, but the scope of the proposed regulation should be expanded. In my experience, many disability insurers acting as claims fiduciaries hire third-party vendors to supply medical experts. These medical review companies have rosters of doctors who consistently provide opinions supporting claim denials. Many of these doctors do not have active medical practices – they generate most of their income by providing helpful reports to insurance companies. Thus, the proposed regulation should make it clear that the new rules apply to the plan's agents and contractors. In addition, the

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scope of the impartiality rules should also include vocational experts, not just medical experts.

Thank you for giving me the opportunity to comment on the proposed amendments to the disability claim procedures regulation.

Sincerely,

FEINBERG, JACKSON,
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By

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