By email only:
Office of Regulations and Interpretations,
Employee Benefits Security Administration
e-ORI@dol.gov

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

Dear Deputy Assistant Secretary Hauser:

I am an attorney practicing law in a three-attorney firm in St. Paul, Minnesota. The majority of the practice of this firm focuses on representing participants or beneficiaries in ERISA-governed employee benefit disputes. We have handled many such cases -- including several that were resolved by judicial action.[1] The vast majority of those ERISA benefit disputes involve claims for disability benefits. As such, the undersigned timely submitted comments during the notice and comment period[2] for the Final Rule amending the claims regulations affecting disability benefit claims. The notice and comment process resulted in a Final Rule that became effective 1/1/17 with a delayed applicable date to 1/1/18.[3]

I write now because the process that resulted in the Final Rule is now facing a challenge of an odd sort. The Department of Labor (DOL), through a proposed rule issued on 10/12/17, seeks comments on extending the applicability date by 90-days[4] and during that 90-day period seeing additional notice and comment on the costs of the Final Rule.[5] In other words, the DOL wants to re-do the process that resulted in a Final Rule after the Final

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[1] *Stover v. Delta Air Lines, Inc.*, 2017 WL 4277144 (D. Minn. 9/25/17)
McGillivray v. Wells Fargo & Co. Salary Continuation Pay Plan, 2017 WL 3037557 (D. Minn. 7/18/17);
Broderick v. Hartford Life & Accid. Ins. Co., 2017 WL 652451 (D. Minn. 2/16/17);
Wenzel v. Blue Cross and Blue Shield of Minnesota, 2015 U.S. Dist. LEXIS 146815 (D. Minn. 10/28/15);
Lanpher v. Metropolitan Life Ins. Co., 50 F. Supp. 3d 1122 (D. Minn. 2014);
UNUM Life Ins. Co. v. Zaun, 2014 U. S. Dist. LEXIS 100425 (D. Minn. 5/29/14);
Brandt v. ALLINA Health Systems LTD Benefits Plan, 2010 U. S. Dist. LEXIS 58967 (D. Minn. 6/15/10);
Gordon v. Northwest Airlines, Inc. LTD Income Plan, 606 F. Supp. 2d 1017 (D. Minn. 2009);
Groska v. Northern States Power Co. Pension Plan, 2007 U.S. Dist. LEXIS 71081 (D. Minn. 2007);
Alliant TechSystems, Inc. v. Marks, 465 F.3d 864 (8th Cir. 2006);
Abram v. Cargill, 395 F.3d 882 (8th Cir. 2005); and
Wolfe v. 3M Short-Term Disability Plan, 176 F. Supp. 2d 911 (D. Minn. 2001).

[2] Those comments appear as comment 63 011816 to the Final Rule.

[3] The Final Rule was published in the Federal Register on 12/19/16 and became effective on 1/1/17 and was supposed to become applicable to all disability claims filed on or after 1/1/18.

[4] From 1/1/18 until 4/1/18.

[5] See Fed. Register vol. 82, no. 196 10/12/17.

Rule was effective but before it applies to claimants. For the reasons that follow I object to this action by the DOL as it is not permitted by Administrative Procedure Act (APA).

Not Compliant with Notice and Comment Requirements of APA

The Final Rule on disability benefits has already gone through the formal notice and comment process required by the APA. That process generated substantial comments from **all** stakeholders—including several insurers. During that process those stakeholders were afforded ample opportunity to raise any and all concerns that they had to the proposed Rule. That was a complete process and it ended with a Final Rule issued 12/19/16.

But now the DOL has taken the unusual step of setting out a new proposed rule whereby the Final Rule's applicability date will be delayed yet another 90-days[6] during which additional notice and comment will be undertaken. In other words, the DOL has effectively undone the Final Rule and asked for a second chance to engage in the same process that was fully embraced before. This proposal is not in compliance with the APA for two reasons.

First, the APA requires that there be at least 30 days for notice and comment as to a proposed rule.[7] In this instance the DOL's proposed rule was published on October 12, 2007 and requires comments to be submitted by October 27, 2017. This permits only 15 days for notice and comment which is too short a time to be in compliance with the APA.

Second, the proposed rule is not in compliance with the APA because it is based on undisclosed information provided by unnamed persons. Section 553 of the APA requires that an agency give notice of a proposed rule setting forth: "*either the terms or substance of the proposed rule or a description of the subjects and issues involved,*"[8], and "*give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.*"[9]

Significantly the information that must be revealed for public evaluation is the "*'technical studies and data' upon which the agency relies.*"[10] As the courts have recognized:

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[6] The Final Rule already allowed for more than a one-year delayed applicability.

[7] (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--
(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.
5 U.S.C. §553(d) (emphasis added).

[8] 5 U.S.C. § 553(b).

[9] 5 U.S.C. §553(c).

[10] *See Chamber of Commerce of U.S. v. SEC*, 4443 F.3d 890, 899(D.C. Cir. 2006)(*citing Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir.1991)).

"[i]n essence, the question is whether 'at least the most critical factual material that is used to support the agency's position on review... [has] been made public in the proceeding and exposed to refutation'".[11]

In this case, the DOL's proposed rule was triggered by assertions by unnamed stakeholders that the Final Rule would be too costly. These stakeholders are anonymous and the "data" which they provided to the DOL is undisclosed. This is unpermitted.

> *[T]he public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented.*[12]

Moreover, given the abbreviated 15-day period for commentary, interested persons cannot reasonably obtain a response to a Freedom of Information Act (FOIA) request for this "data" in order to provide relevant and helpful comments.[13] In other words, interested persons are prevented from providing a meaningful response because they are called to respond to data that is unknown.

No Rationale for Good Cause Exception to Notice and Comment Obligation

Even if the DOL were to assert that it was not obliged to comply with the notice and comment standards of the APA because this proposed ruling was exempt from those requirements for good cause; the DOL cannot meet the requirements to show "good cause."

The APA requires that notice and comment standards be followed unless the proposed agency action is exempt. The exempt agency actions are for: "*interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or [for] good cause.*"[14] The only exemption that is arguably applicable here is the "good cause" exemption. But in order for the good cause exemption to apply, the agency must find that there is good cause and must expressly set forth that finding along with "*a brief statement of reasons therefor.*"[15] Moreover, generally, courts will only uphold the exemption for good

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[11] *Id.* at 900 *(citing Association of Data Processing Serv. Org. Inc. v. Board of Governors of the Federal Reserve,* 745 F.3d 677, 684-85 (D.C. Cir. 1984)). *See also National Black Media v. FCC,* 791 F.2d 1016, 1021-1022 (2d Cir. 1986); *Lloyd Noland Hospital v. Heckler,* 762 F.2d 1561, 1565 (11th Cir. 1985).

[12] *Home Box Office, Inc. v. F.C.C.,* 567 F.2d 9, 55 (D.C. Cir. (1977), *cert. denied* 434 U.S. 829.

[13] *See e.g.* 5 U.S.C. §552(a)(6)(A)(i)(allowing agency 20 days to determine how it will respond to FOIA request).

[14] 5 U.S.C. §553(b)(A) and (B).

[15] 5 U.S.C. §553(b)(B).

cause if the agency shows that compliance with notice and comment is "*impractical, unnecessary, or contrary to the public interest.*"[16]

The text of the DOL's proposal dated 10/12/17 does not contain any statement that the agency has found "good cause" to allow a do-over of the rule-making at issue. At best, the text sets out an unarticulated argument, based upon undisclosed statements given *ex parte* to the DOL, that the Final Rule was not sufficiently cost neutral. But this unarticulated argument does not satisfy the requirements for good cause to ignore the notice and comment rules. It does not explain why notice and comment standards should be ignored because compliance would be impractical, unnecessary or contrary to the public interest.

In the end, this proposed rule is a chance to re-do rule-making that was properly and comprehensively executed already. It is unfair and wasteful to ask for additional time in order to allow this caboose rule-making when the Final Rule has been adopted; is now in effect; and the time for application of the rule-making is imminent. I respectfully ask, on behalf of the clients I represent, that this effort be abandoned and that the Final Rules be permitted to apply as originally adopted on 1/1/18.

Sincerely,

Katherine L. MacKinnon
Attorney at Law

[16] *U.S. v. Garner,* 767 F.2d 104, 120 (5th Cir. 1985).