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Via 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: Re-Examination of Claims Procedure Regulations for Plans Providing Disability Benefits
RINNo.: 1210-AB39
Regulation: 29 C.F.R. §2560.503

Dear Deputy Assistant Secretary Hauser:

I am writing to comment on the 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 am writing to address what I understand to be the principal objections to the regulations and to oppose any efforts to amend or derail the regulations.

First, the claim that the regulations would significantly increase costs is unproven. We have yet to see any actuarial study that would support such a claim; and we sincerely doubt that any such study could be produced. But even if the costs may modestly increase, the specter that fewer employers would offer benefits is sheer nonsense. Employers provide benefits to their employers for reasons that go well beyond altruism. Employee benefits are a valuable tool employers use to both recruit and retain outstanding employees.

Second, given the nature of litigation of disability benefit claims, a more robust and fairer claim process may be the only means a claimant has to achieve due process. The

federal courts treat ERISA claims as quasi-administrative. *See Perlman v. Swiss Bank Corp.,* 195 F.3d 975 (7th Cir. 1999)). That means there is no trial (and obviously no jury trial), no discovery permitted, and no further evidence allowed. The most critical of the proposed regulations is the one that gives the claimant the last word in the claim process. Without a regulation permitting claimants the opportunity to comment on adverse evidence obtained by the benefit plan administrator/insurer during the claim process, claimants can be sandbagged since meaningful challenges to such adverse evidence are precluded.

Third, the importance of a Social Security determination cannot be overstated. As part of their settlements of regulatory charges resulting from market conduct investigations, both Unum and CIGNA agreed to give deference to favorable Social Security determinations. Every disability insurer and plan administrator should be subjected to the same standard. The definition of "disabled" under the Social Security Act (42 U.SC. § 423) is far more stringent than the definitions in disability insurance policies; and a favorable outcome of a Social Security claim represents an objective process by a neutral administrative agency. The Social Security Medical-Vocational Rules that take into consideration a claimant's age, education, and work experience have been recognized as "well-developed, relatively efficient and by no means overly generous to claimants-by which a plan may show adequate consideration of a claimant's vocational characteristics." *Demirovic v. Bldg. Serv. 32 B-J Pension Fund*, 467 F.3d 208, 216 (2d Cir. 2006). Hence, requiring disability plans to meaningfully explain a differing outcome from the Social Security determination would enhance the claim process and its fairness.

Fourth, the regulations promote the use of impartial consultants. Especially in view of a litigation regime that effectively precludes discovery, the rule promotes the use of practitioners who bring more objectivity and fairness into the evaluation of claims instead of using doctors and other consultants who appear to earn the bulk, if not all of their

income, reviewing disability claims and thus are influenced by the notion of regulatory capture into being biased to favor benefit denials.

Fifth, the requirement of disclosure of the time limit for filing suits is simply a tool to prevent confusion and unnecessary premature adjudication of claims. Likewise, the disclosure of internal guidelines utilized by plans insures consistent treatment of similarly situated claimants.

In summary, the regulations have already gone through an extended comment period and the comments presented were all taken into consideration before the final rules were issued in December 2016. There is no reason whatsoever to delay the implementation of the rules, especially since insurers and benefit plan administrators have already been given more than adequate time to institute procedures and measures to comply with the rules.

/s J. David Oswalt