



DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2560

RIN 1210-AB39

Claims Procedure for Plans Providing Disability Benefits; 90-Day Delay of Applicability

Date

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule; delay of applicability date.

SUMMARY: This document delays for ninety (90) days – through April 1, 2018 – the applicability of a final rule amending the claims procedure requirements applicable to ERISA-covered employee benefit plans that provide disability benefits (Final Rule). The Final Rule was published in the Federal Register on December 19, 2016, became effective on January 18, 2017, and was scheduled to become applicable on January 1, 2018. The delay announced in this document is necessary to enable the Department of Labor to carefully consider comments and data as part of its effort, pursuant to Executive Order 13777, to examine regulatory alternatives that meet its objectives of ensuring the full and fair review of disability benefit claims while not imposing unnecessary costs and adverse consequences.

DATES: The amendments are effective on January 1, 2018.

FOR FURTHER INFORMATION CONTACT: Frances P. Steen, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 503 of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), requires that every employee benefit plan shall establish and maintain reasonable procedures governing the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. In accordance with its authority under ERISA section 503, and its general regulatory authority under ERISA section 505, the Department of Labor (“Department”) previously established regulations setting forth minimum requirements for employee benefit plan procedures pertaining to claims for benefits by participants and beneficiaries. 29 CFR 2560.503-1.

On December 19, 2016, the Department published a final regulation (“Final Rule”) amending the existing claims procedure regulation; the Final Rule revised the claims procedure rules for ERISA-covered employee benefit plans that provide disability benefits. The Final Rule was made effective January 18, 2017, but the Department delayed its applicability until January 1, 2018, in order to provide adequate time for disability benefit plans and their affected service providers to adjust to it, as well as for consumers and others to understand the changes made.

On February 24, 2017, the President issued Executive Order 13777 (“E.O. 13777”), entitled Enforcing the Regulatory Reform Agenda.¹ E.O. 13777 is intended to reduce the regulatory burdens agencies place on the American people, and directs federal agencies to undertake specified activities to accomplish that objective. As a first step, E.O. 13777 requires the designation of a Regulatory Reform Officer and the establishment of a Regulatory Reform Task Force within each federal agency covered by the Order. The Task Forces were directed to evaluate existing regulations and make recommendations regarding those that can be repealed, replaced, or modified to make them less burdensome. E.O. 13777 also requires that Task Forces

¹ 82 FR 12285 (March 1, 2017).

seek input from entities significantly affected by regulations, including state, local and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations.

Not long thereafter, certain stakeholders asserted in writing that the Final Rule will drive up disability benefit plan costs, cause an increase in litigation, and consequently impair workers' access to disability insurance protections.² In support of these assertions, the stakeholders said, among other things, that the right to review and respond to new information or rationales unnecessarily "complicates the processing of disability benefits by imposing new steps and evidentiary burdens in the adjudication of claims."³ In addition, the stakeholders said that the new deemed exhaustion provision "explicitly tilts the balance in court cases against plans and insurers" and "creates perverse incentives for plaintiff's attorneys to side-step established procedures and clog the courts for resolution of benefit claims."⁴ The stakeholders argued that these provisions (and others) collectively "will delay any final decision for the claimant and will significantly increase the administrative burdens on employers and disability insurance carriers,

² Some of the stakeholders also asserted a comment that was previously provided with respect to the 2015 proposed amendments, specifically that the Department exceeded its authority and acted contrary to Congressional intent by applying certain ACA protections to disability benefit claims, arguing that if Congress had wanted these protections to apply to disability benefit claims, it would have expressly extended the claims and appeals rules in section 2719 of the Public Health Service Act to plans that provide disability benefits. However, the Department did not take the position that the ACA compelled the changes in the Final Rule. Rather, because disability claims commonly involve medical considerations, the Department was of the view that disability benefit claimants should receive procedural protections similar to those that apply to group health plans, and thus it made sense to model the Final Rule on procedural protections and consumer safeguards that Congress established for group health care claimants under the ACA.

³ Letter from Governor Dirk Kempthorne, President & Chief Executive Officer, American Council of Life Insurers, to The Honorable Alexander Acosta, Secretary, U.S. Department of Labor, "*Department of Labor Disability Claims Regulation*," (July 17, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA's website).

⁴ Letter from American Benefits Council, American Council of Life Insurers, America's Health Insurance Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, Sun Life Financial, Unum Group, Inc., to Gary Cohn, Director, National Economic Council, The White House, Andrew P. Bremberg, Director, Domestic Policy Council, The White House, Edward C. Hugler, Acting Secretary, U.S. Department of Labor, "*Department of Labor Disability Claims Regulation*," (Mar. 14, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA's website).

hurting the very employee the rule was purporting to help.”⁵ Moreover, according to the stakeholders, these new provisions (and others) are unnecessary in any event because “there are already existing robust consumer protections applicable and available to disability claimants that have worked for well over a decade.”⁶ Some members of Congress also presented these same or similar concerns in writing to the Secretary of Labor.⁷

According to the stakeholders, a confidential survey of carriers covering approximately 18 million participants in group long term disability plans (which reflects approximately 45% of the group long-term disability insurance market), conducted by the stakeholders estimated that the Final Rule would cause average premium increases of 5 – 8 % in 2018 (when the Final Rule is scheduled to take effect) for several survey participants.⁸ The stakeholders argued that the demand for disability insurance is highly sensitive to price changes, such that even minor price increases can result in take-up rate reductions. As an example, they reported that when the State of Vermont mandated mental health parity several years ago, there was an approximately 20% increase in premiums, which they asserted resulted in a 20% decrease of covered employees.⁹ From this, they conclude that the cost increases caused by the Final Rule will result in employers reducing and/or eliminating disability income benefits, and that some individuals may elect to drop or forego coverage, with the result that fewer people will have adequate income protection in the event of disability. The stakeholders further asserted that loss of access not only may be

⁵ Letter from Governor Dirk Kempthorne, *supra*, note 3.

⁶ *Id.*

⁷ Letter from David P. Roe, M.D., Member of Congress (and 27 other Members of Congress), to R. Alexander Acosta, Secretary, U.S. Department of Labor, “*Immediate Action Needed on Disability Claims Regulation*,” (July 28, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s website).

⁸ Email from Michael Kreps, Principal, Groom Law Group, to John J. Canary and Jeffrey J. Turner, Office of Regulations and Interpretations, Employee Benefits Security Administration (July 13, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA’s website).

⁹ *Id.*

adverse to individual workers and their families, but also potentially adverse to federal and state public assistance programs more generally.¹⁰

The stakeholders stated that, while the Final Rule's Regulatory Impact Analysis (RIA) addressed the limited data sources that were publicly available at that time, the Department's ability to fully quantify and evaluate costs and benefits was accordingly constrained. But the stakeholders said that such data could be developed by the industry and provided to the Department, and have promised to work with the Department to obtain this data. They asserted that collecting the relevant data is a complex process that will take time and involve an expenditure of resources. For example, because each carrier's data is proprietary and contains sensitive business information, an independent third party must collect the data in a manner that protects this information. This may include, among other things, negotiating specific non-disclosure, security, and data retention agreements. They further observed that such a process must also be carefully designed to ensure that there are no violations of relevant federal or state laws, such as antitrust laws. The stakeholders also asserted that each carrier's existing information technology systems may collect and report data in different ways, so, to be usable, the data must be aggregated into standardized data sets, anonymized to ensure that no data point can be attributed to a single carrier, and reviewed and analyzed to ensure accuracy and reliability (as required for a regulatory impact analysis). The stakeholders made a commitment to provide this data and asked the Department to delay the Final Rule's applicability date.

¹⁰ See, e.g., Letter from Matthew Eyles, Executive Vice President, Policy and Regulatory Affairs, America's Health Insurance Plans, to The Honorable R. Alexander Acosta, Secretary of Labor, U.S. Department of Labor (May 10, 2017) (on file with the Employee Benefits Security Administration, U.S. Department of Labor and posted on EBSA's website). See also Letter from David P. Roe, M.D., Member of Congress (and 27 other Members of Congress), *supra*, note 7.

In light of the foregoing, and pursuant to E.O. 13777, the Department published in the Federal Register on October 12, 2017, at 82 FR 47409, a document seeking comment on a proposed 90-day delay of the applicability date of the Final Rule through April 1, 2018 (NPRM). The comment period on the proposed delay ended on October 27, 2017. In that same document, the Department sought comments and data germane to the examination of the merits of rescinding, modifying, or retaining the Final Rule. This comment period ends on December 11, 2017.

B. Public Comments and Decision on Delay

The Department received approximately 110 comment letters in response to the proposed delay. As evidenced below, there is no consensus among the commenters regarding whether a delay is appropriate or the length of any such delay. Many commenters strongly support a delay, though much longer than 90 days, but at least as many commenters equally strongly oppose any delay of any length. All of the commenters' letters, and other related submissions made part of the public record, are available for public inspection on EBSA's website. After carefully considering the record, the proposal is adopted without change.

A significant number of commenters representing employers, plans, insurance carriers, and plan service providers strongly support a delay of the applicability date. Many of these commenters repeated prior assertions that the Final Rule, if not revised or repealed, will drive up disability benefit plan costs, cause an increase in litigation, and in doing so impair workers' access to disability benefit insurance.¹¹ In support of these assertions, these commenters say that

¹¹ See, e.g., Comment Letter #105 (America's Health Insurance Plans) ("Because demand by employees for private disability income protection is sensitive to the cost of coverage, the Rule would drive down the number of working Americans with private disability income protection, exposing more American families to the financial risk of disabling illness or injury. As a result, not only would more families face financial hardship, the federal government, states, and taxpayers would also face higher costs because, lacking disability income protection benefits, more disabled workers would be forced to rely on public assistance programs.").

the right to review and respond to new information or rationales unnecessarily “complicates the processing of disability benefits by imposing new steps and evidentiary burdens in the adjudication of claims,” and that some of the new disclosure requirements “forc[e] plans to consider disability standards and definitions different from those in the plan.”¹² In addition, they say that the new deemed exhaustion provision “explicitly tilts the balance in court cases against plans and insurers” and “creates perverse incentives for plaintiff’s attorneys to side-step established procedures and clog the courts for resolution of benefit claims.”¹³ A delay, according to these commenters, will enable the Department to conduct a reexamination of the Final Rule, make changes, and prevent these adverse consequences from ever occurring.

Nearly all of the supporters of a delay requested a delay of longer than 90 days. The majority requested a delay ranging from 6 months to 1 year, with a few commenters requesting an even longer delay. The primary reason offered for a longer delay, according to these commenters, is that a 90-day delay will not provide enough time for the Department to complete a careful review of the public record (including the information and data due on December 11, 2017), to perform a review and analysis of the Final Rule in light of the information and data provided, to propose revisions to the Final Rule and receive comments, to publish a revised final rule, and to provide plans and their service providers sufficient time to comply with a revised

¹² Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America’s Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce).

¹³ *Id.* See also Comment Letter #105 (America’s Health Insurance Plans) (“Of major concern, the Rule’s provisions would greatly increase disability income claim litigation and litigation costs. The Rule provides, at the claimant’s option, for a short-cut to the federal courts and to de novo court review if a plan does not ‘strictly adhere’ to its provisions.”).

rule.¹⁴ One commenter, for example, noted that historically the Department has taken months, if not years, to review existing regulations, propose changes, and issue final rules.¹⁵

By contrast, a significant number of commenters representing disability claimants strongly oppose any delay of the applicability date. These commenters firmly believe that disability claimants are in need of the increased procedural protections provided by the Final Rule, and that such protections are promised by section 503 of ERISA. These commenters argue that the Final Rule is the product of a valid and extensive multi-year rulemaking process, completed in December 2016, and that nothing in the public record has changed since then to warrant a delay. These commenters discount industry assertions that the Final Rule will lead to unwarranted price increases and reduced coverage as mere unsubstantiated and undocumented allegations. These commenters maintain that if such assertions were true, industry stakeholders would have proven their case during the rulemaking process that ended in 2016.

Importantly, many of these same commenters raised serious issues under the Administrative Procedures Act (APA) with respect to process surrounding the proposed delay. They argue that the Department has not clearly articulated its reasons for proposing a delay. They argue that the Department is relying on non-public information, provided exclusively by or on behalf of the industry, as the sole basis for the delay, and that the public has not been given a

¹⁴ See, e.g., Comment Letter #98 (American Council of Life Insurers); Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America's Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce); Comment Letter #105 (America's Health Insurance Plans); Comment Letter #97 (National Business Group on Health); Comment Letter #94 (UNUM Group); Comment Letter #93 (United Healthcare); Comment Letter #96 (Cigna Corporation); Comment Letter #92 (US Chamber of Commerce); Comment Letter #95 (Sun Life Financial).

¹⁵ Comment Letter #104 (American Benefits Council, American Council of Life Insurers, America's Health Plans, Cigna, The ERISA Industry Committee, Financial Services Roundtable, The Guardian Life Insurance Company of America, The Hartford, MetLife, Mutual of Omaha, National Association of Insurance and Financial Advisors, National Business Group on Health, NFL Player Disability and Neurocognitive Benefit Plan, Sun Life Financial, Unum Group, Inc., U.S. Chamber of Commerce).

reasonable opportunity to review and respond to this non-public information. They also argue that the public will not have a reasonable opportunity to review and respond to the data and information, if any, submitted under the December 11, 2017, deadline. Some of these commenters even expressed concern that the delay could result in litigation for violations of the APA.

After carefully considering these comments, the proposal is adopted without change. Pursuant to E.O. 13777, the Department previously determined it was appropriate to seek additional input regarding the regulatory impact analysis in the Final Rule, and to that end publicly solicited comments on October 12, 2017. See 82 FR 47409, 47411-12 (Oct. 12, 2017) (explaining reasoning and recognizing that access to disability benefits depends in part on affordability, which is affected by regulatory burdens). The Department expects that data and information will be submitted by December 11, 2017, and that the Department will be able to consider whether such data and information support the assertions made by the stakeholders and commenters arguing for consideration of regulatory alternatives other than those adopted in the Final Rule and possible revision or rescission of the Final Rule. The Department, however, would not reasonably be able to complete this notice and comment process and a reexamination before January 1, 2018. Rather, extending the applicability date past January 1, 2018, allows the Department to complete this public solicitation process and examine regulatory alternatives prior to the Final Rule becoming applicable. At this point, the Department is not prepared to follow the alternative approach of allowing the Final Rule to become applicable and thereafter completing a reexamination and potential proposal of regulatory alternatives for public comment. While that approach is relatively common with respect to reexaminations of existing regulations, in light of the fact that the Final Rule is not yet applicable, the approach taken by the Department

allows stakeholders interested in changes to the Final Rule a final opportunity to make their case. It also avoids potential unnecessary disruption of the disability insurance market and frictional costs that, if the stakeholders provide data supporting their allegations regarding adverse consequences of the Final Rule on access to disability insurance, may not be offset by commensurate benefits (as explained further below in the regulatory impact analysis section of this document).

At this juncture, the Department continues to think that a 90-day delay will be sufficient for it to complete the comment solicitation process, perform a reexamination of the information and data submitted, and take appropriate next steps. It is premature, in the Department's view, to consider a delay of longer than 90 days pending receipt of reliable data and information that reasonably supports the commenters' assertions that the Final Rule will lead to unwarranted cost increases and related diminution in disability coverage benefits. As discussed in the preamble to the NPRM, various stakeholders made a commitment to provide such data and information to the Department. There is little in the public record to date to support a further delay of the Final Rule or subsequent substantive changes. Thus, without data and information that provides sufficient empirical support for the assertions of the commenters and stakeholders seeking a rescission or revision of the Final Rule, it is not possible for the Department to conduct a meaningful reexamination or articulate a reasoned basis for further delaying the procedural protections for disability benefit claimants provided by the Final Rule. If the Department receives such supporting data and information, the Department will provide interested stakeholders with a reasonable opportunity for notice and comment on that data and information. Only at that point would the Department be in a position to seriously consider any further delay of some or all of the requirements of the Final Rule beyond April 1, 2018. Delaying the

applicability date of the Final Rule beyond the proposed 90-day delay period is, in the Department's view, unwarranted at this point in time.

Likewise, the Department declines to extend the 60-day comment period for submitting data and information. As already noted, the proposal established this 60-day deadline (December 11, 2017) for submitting data and information germane to the examination of the merits of rescinding, modifying, or retaining the Final Rule. Many commenters who support a delay asserted that 60 days is an insufficient period of time for them to provide the data needed to support their claims of increased costs and litigation and reduced access to coverage. One reason offered in support of extending this deadline is that it is an unprecedented undertaking for disability carriers to work together to compile data to analyze the impact of rule on anticipated but unknowable consumer behavior.¹⁶ Another reason offered is that data on the disability market, competitive landscape, and employer responses to pricing and new administrative requirements are difficult if not impossible to collect, especially because some plan rates are guaranteed for multiple years.¹⁷ An additional reason offered is that for many plans and service providers fall open enrollment season will interfere with many commenters' ability to gather and analyze the information requested.¹⁸ Those seeking an extension of time to submit data generally requested an additional 60 days (totaling 120 days).

The Department is not persuaded by these comments. The commenters and stakeholders who are arguing for a rescission or revision of the Final Rule made representations, both before the NPRM and again during the NPRM comment period, of unwarranted cost increases and related diminution in disability benefit coverage. Presumably, the commenters and stakeholders

¹⁶ Comment Letter #96 (Cigna Corporation).

¹⁷ *Id.*

¹⁸ Comment Letter #97 (National Business Group on Health).

had a factual basis for making these representations and assertions to the government at the time they made them. Accordingly, the Department believes it is reasonable to expect those stakeholders to provide reasonably convincing factual support for their representations within a 60-day period. Also, on balance, the Department believes more harm than good would be caused by granting an extension of the 60-day comment period. Primarily this is because extending the 60-day comment period necessarily would require a corresponding delay of the 90-day applicability date, an outcome already rejected by the Department, above, as unwarranted at least at this point. While the Department takes note of the potential complexity involved in collecting relevant data and information, and recognizes that time and care is needed in such matters, the Department notes that not all insurance industry commenters requested an extension of the 60-day comment period. A major insurance trade association representing approximately 290 member insurance companies, for example, commented that it will respond with pertinent data and comments by December 11, 2017.¹⁹ In light of the impact on claimants of further delaying the applicability of the Final Rule, and the fact that the overall rulemaking project has been ongoing for many years, and the fact that parties have previously indicated the process for collecting this data and information is well underway, the Department believes that a 60-day period to provide reliable data and information is sufficient.

Nor does the Department agree with the commenters that assert violations of the APA with respect to the rulemaking process for the delay. The NPRM was published in the Federal Register and the public was given 15 days to comment on the proposed delay and 60 days to comment and provide data on matters germane to the examination of the merits of rescinding, modifying or retaining the Final Rule. Although the Department limited the comment period on

¹⁹ See Comment Letter #98 (American Council of Life Insurers).

the proposed delay to 15 days, the delay issue is straightforward and the Department, in fact, received 110 comment letters on the issue. For complete transparency, all comments were, and continue to be, posted on the Department's website promptly after receipt. In addition, other written information (e.g., letters, emails, etc.) relied upon by the Department to issue the NPRM were identified (by name of sender and date) and as explained in the preamble to the NPRM, placed on file with EBSA, and subsequently posted on the Department's website for public access. The primary rationale for the 90-day delay – to solicit data and information and reexamine the decisions and impact of the Final Rule in light of newly received data and information, with the objective of ensuring full and fair reviews of disability claims while not imposing unnecessary costs and adverse consequences – was clearly articulated in the NPRM for public consideration and response and is repeated here as the primary basis for this final rule. Further, many commenters were concerned that they would not have an opportunity to review or respond to information submitted under the 60-day deadline in advance of the Department taking further action. The Department does not intend to take further regulatory action, including rescinding, modifying, or further delaying the Final Rule, without first affording the public another opportunity to review and comment on the data and information received under the 60-day comment period ending on December 11, 2017.

C. Regulatory Impact Analysis

The Department expects that the extension of the applicability date of the Final Rule will produce benefits that justify associated costs. The Department requested data from stakeholders that provides evidence to support their assertions that the Final Rule will increase disability benefit plan costs and cause a rise in litigation, thereby impairing workers' access to disability insurance protections, and that the Department's regulatory impact analysis for the Final Rule

was insufficient. The deadline for the Department to receive such data and information is December 11, 2017. Delaying the applicability date will provide the Department with time to carefully consider the data and information as part of its reexamination of the rule to determine whether there are reasonable and feasible alternatives that will allow the Department to meet its objective of ensuring the disability plan claimants receive a full and fair review of their disability benefit plans without imposing unnecessary costs and adverse consequences on plans.

Delaying the applicability date also will avert the possibility of a costly and disorderly transition if the Department subsequently changes the regulatory requirements as a result of its reexamination of the rule. Similarly, it could avert the possibility of unnecessary costs to consumers as a result of an unnecessarily confusing or disruptive transition if the Final Rule, for example, were to become applicable and then subsequently changed. The Department's objective is to complete its review of the Final Rule in conformance with E.O. 13777, analyze data and comments received in response to the proposed delay, determine whether future changes to the Final Rule are necessary, and propose and finalize any changes to the rule. If the Department revises or repeals some aspects of the rule in the future, the delay will allow affected firms to avoid incurring significant implementation costs now which later might turn out to be unnecessary, as well as to avoid unnecessary confusion to claimants from changing standards (should they change).

1. Executive Order 12866 Statement

This extension of the applicability date of the Final Rule is a significant regulatory action within the meaning of section 3(f)(4) of Executive Order 12866, because it raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Therefore, the Department has considered the costs and benefits of the

extension, and the Office of Management and Budget (“OMB”) has reviewed and approved the applicability date extension.

The Department’s regulatory impact analysis of the Final Rule estimated that benefits derived by workers seeking disability benefits justify compliance costs. The 90-day delay of the applicability date would delay these estimated benefits and costs by 90 days.

Data limitations prevented the Department from quantifying benefits the Final Rule would provide to workers and their family members participating in ERISA-covered disability insurance plans. The RIA for the Final Rule includes a qualitative analysis of the benefits. The Department estimated at that time that as a result of the Final Rule:

- Some participants would receive payment for benefits they were entitled to that were improperly denied by the plan;
- There would be greater certainty and consistency in the handling of disability benefit claims and appeals, and improved access to information about the manner in which claims and appeals are adjudicated;
- Fairness and accuracy would increase in the claims adjudication process.

The Department estimated that the requirements of the Final Rule would have modest costs. The Department quantified the costs associated with two provisions of the Final Rule for which it had sufficient data: the requirements to provide: (1) additional information to claimants in the appeals process (\$14.5 million annually); and (2) information in a non-English language (\$1.3 million annually).

Commenters representing employers, plans, insurance carriers, and plan service providers raised concerns that the Department underestimated the costs of the Final Rule and maintain that if the Department had properly estimated costs, it would have found that the costs exceed the

Final Rule's benefits. Specifically, these commenters assert that among other things: (1) requiring benefit denial notices to include a discussion of the basis for disagreeing with a disability determination made by the SSA will increase costs because SSA's definitions, policies, and procedures may be different from those of private disability plans; (2) providing that claimants are deemed to have exhausted the administrative remedies available if plans do not adhere to all claims processing rules, unless the violation was the result of a minor error and other specified conditions are met, will result in increased litigation and administrative costs to the detriment of plan participants; and (3) prohibiting plans from denying benefits on appeal based on new or additional evidence or rationales that were not included when the benefit was denied at the claims stage, unless the claimant is provided notice and an opportunity to respond to the new or additional information or rationales, will lead to protracted exchanges between plans and claimants that will cause delays, lead to higher costs, and have an adverse impact on plan participants. They also argue that participants in disability plans are very sensitive to price increases and predict that the cost increases associated with the Final Rule will cause some individuals to elect to drop or forego coverage, meaning that fewer people will have adequate income protection in the event of disability.

Other commenters on the 90-day proposed delay asserted that claims that the Final Rule would increase premiums 5 percent to 9 percent were excessive, and another commenter said that disability benefit plans with which it is associated had not experienced any cost increase due to the Final Rule. Commenters also asserted that an increase in litigation would be the result, not of excessive litigation, but of valid challenges to wrongly denied claims as the result of fairer claims processes that are implemented in response to the requirements of the Final Rule.

During the 90-day delay, the Department will reassess the impacts of the Final Rule. To ensure a robust assessment, the Department will closely analyze and utilize the information and data received in response to the Department's NPRM to help appropriately quantify the payments for plan benefits that plan participants would receive and any cost increases, or reductions in access to coverage that could result if the existing provisions of the Final Rule take effect. As the Department stated in the proposed rule, if any data submitted by stakeholders is not publicly available, the Department will work with stakeholders to ensure that any trade secrets and proprietary business information are protected from public disclosure and that the data collection process is designed to ensure that no violations of antitrust or other federal or state laws occur. This will help ensure that the Department reaches an optimal outcome and that full transparency is provided to the public.

2. *Alternatives Considered*

While the Department considered several alternatives, the Department's chosen alternative in this final rule is likely to yield the most desirable outcome including avoidance of market disruptions. In weighing different alternatives, the Department's objective was to avoid unnecessary confusion and uncertainty in the disability claims market and avoid unnecessary costs and adverse consequences, such as reduced access to disability insurance for America's workers and retirees.

The Department considered having certain provisions of the Final Rule go into effect on January 1, 2018, while delaying others. The Department, however, ultimately decided not to adopt this approach because it has not yet received sufficient provision-specific data from commenters with respect to any aspect of the Final Rule, which would enable the Department to single out particular provisions for special treatment. The Department considered extending the

delay by more than 90 days, but as discussed in the response to public comments above, it is premature, in the Department's view, even to consider a delay of longer than 90 days pending receipt of reliable data and information supporting the commenters' assertions that the Final Rule will lead to unwarranted cost increases and related diminution in disability coverage benefits. The Department also considered not extending the applicability date, which would have meant that the rule would become applicable on January 1, 2018. The Department rejected this alternative, because it would not provide sufficient time for the Department to receive and review data submitted in response to the request in the proposal, complete its ongoing review of the rule, and propose and finalize any changes to the rule. Moreover, absent the extended applicability date, disability plans would feel compelled to come into full compliance with the rule despite the possibility that the Department might identify and adopt more efficient alternatives. This could lead to unnecessary compliance costs to industry that are also passed on to consumers and market disruptions that could reduce consumer access to these products.

3. *Paperwork Reduction Act*

The Paperwork Reduction Act ("PRA") prohibits federal agencies from conducting or sponsoring a collection of information from the public without first obtaining approval from OMB. See 44 U.S.C. 3507. Additionally, members of the public are not required to respond to a collection of information, nor be subject to a penalty for failing to respond, unless such collection displays a valid OMB control number. See 44 U.S.C. 3512.

OMB approved information collections contained in the Final Rule under OMB Control Number 1210-0053. The Department is not modifying the substance of the Information Collection Requests at this time; therefore, no action under the PRA is required. The

information collections will become applicable at the same time the rule becomes applicable. The information collection requirements contained in the Final Rule are discussed below.

This rule delays the applicability date of the Department's amendments to the disability claims procedure rule for 90 days, through April 1, 2018. The Final Rule revised the rules applicable to ERISA-covered plans providing disability benefits. Some of these amendments revise disclosure requirements under the claims procedure rule that are information collections covered by the PRA. For example, benefit denial notices must contain a full discussion of why the plan denied the claim, and to the extent the plan did not follow or agree with the views presented by the claimant to the plan or health care professional treating the claimant or vocational professionals who evaluated the claimant, or a disability determination regarding the claimant presented by the claimant to the plan made by the SSA, the discussion must include an explanation of the basis for disagreeing with the views or disability determination. The notices also must include either: (1) the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in making the adverse determination or, alternatively, (2) a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist. Plan administrators also must provide (1) claimants with any new or additional evidence considered free of charge, and (2) notices of adverse benefit determination potentially in a non-English language.

The burdens associated with the disability claims procedure revisions are summarized below and discussed in detail in the regulatory impact analysis contained in the preamble to the Final Rule (81 FR 92317, 92340 (Dec. 19, 2016)). It should be noted that this rule only affects the requirements applicable to disability benefit claims, which are a small subset of the total burden associated with the ERISA claims procedure information collection.

Type of Review: Revised collection.

Agencies: Employee Benefits Security Administration, Department of Labor.

Title: ERISA Claims Procedures.

OMB Number: 1210–0053.

Affected Public: Business or other for-profit; not-for-profit institutions.

Total Respondents: 5,808,000. Total Responses: 311,790,000.

Frequency of Response: Occasionally.

Estimated Total Annual Burden Hours: 516,000.

Estimated Total Annual Burden Cost: \$814,450,000.

4. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 et seq.) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present an final regulatory flexibility analysis (FRFA) of the rule describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities. Pursuant to section 605(b) of the RFA, the Department certified that the Final Rule did not have a significant economic impact on a substantial number of small entities and provided an analysis of the rationale for that certification. Similarly, the Department hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities because it merely delays the applicability date of the Final Rule.

5. *Congressional Review Act*

The final rule is subject to the Congressional Review Act (CRA) provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, upon publication, will be transmitted to Congress and the Comptroller General for review.

6. *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this final rule does not include any federal mandate that we expect would result in such expenditures by state, local, or tribal governments, or the private sector. The Department also does not expect that the final rule will have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment.

7. *Federalism Statement*

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have “substantial direct effects” on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the Final Rule.

This final rule does not have federalism implications because it merely delays the applicability date of the rule. Therefore, the final rule has no substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Department welcomes input from States regarding this assessment.

8. *Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs*

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. Section 2(a) of E.O. 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment, or otherwise promulgates, a new regulation. In furtherance of this requirement, section 2(c) of E.O. 13771 requires that the new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. This final rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in the rule's economic analysis. The action is deregulatory as it merely delays the effective date, hence stakeholders do not have to comply with the regulation until April 1, 2018.

List of Subjects in 29 CFR Part 2560

Claims, Employee benefit plans.

For the reasons stated above, the Department amends 29 CFR part 2560 as follows:

PART 2560--RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for part 2560 continues to read as follows:

Authority: 29 U.S.C. 1132, 1135, and Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Section 2560.503-1 also issued under 29 U.S.C. 1133. Section 2560.502c-7 also issued under 29 U.S.C. 1132(c)(7). Section 2560.502c-4 also issued under 29 U.S.C. 1132(c)(4). Section 2560.502c-8 also issued under 29 U.S.C. 1132(c)(8).

§ 2560.503–1 [Amended]

2. Section 2560.503-1 is amended by removing “on or after January 1, 2018” and adding in its place “after April 1, 2018” in paragraph (p)(3) and by removing the date “December 31, 2017” and adding in its place “April 1, 2018” in paragraph (p)(4).

Signed at Washington, DC, this 22nd day of November, 2017.

Jeanne Klinefelter Wilson,

Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

BILLING CODE 4510-29-P

[FR Doc. 2017-25729 Filed: 11/24/2017 11:15 am; Publication Date: 11/29/2017]