Outline of Testimony of
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Before the Advisory Council on Employee Welfare and Pension Benefit Plans
June 7, 2017

Regarding Mandated Disclosure for Retirement Plans – Enhancing Effectiveness for Participants and Sponsors

I. Alston & Bird is an AmLaw 100 law firm with approximately 850 lawyers and 27 lawyers who practice in the area of employee benefits. Our employee benefits group has hundreds of clients, including many household names. My testimony is based on feedback from our clients and lawyers who practice in this area.

II. In general, disclosures are too long, too complicated and too frequent.

A. Feedback from clients indicates that the greatest problem with disclosures is the sheer number of documents that employees receive per year. Employees become trained to think of mandated disclosures as "junk mail."

B. Disclosures in general are too long and complicated. Our clients receive indications that very few employees read the disclosures, and those who do read them do not understand them.

C. Because mail related to retirement plans and other employee benefits plans is so frequent and so unhelpful, when employees receive truly important messages about their benefits, they often discard these messages without reading them.

D. Because the information provided is highly technical, there is a natural and logical tendency to want to add enough detail to put the basic message in context. However, rather than providing employees with real context and understanding, the additional detail is overwhelming and drowns out the basic information that is intended to be presented, with no corresponding gain in comprehension.

III. "One and done."

A. Disclosures would be more effective if an employee could receive a single package each year. Instead, they receive multiple disclosures.

B. Defined benefit plans have:

1. Annual funding notice – April 30

2. SPD or SMM due July 29

3. Schedule SB is posted, typically after October 15

4. Annual section 105 notice that the employee may request a benefit statement

C. 401(k) Plans have

1. Quarterly account statements

2. Fee disclosure every 14 months

3. SPD or SMM due July 29

4. SAR due September 30 or December 15

5. QDIA notice due December 1 (but no earlier than October 2)

6. Safe harbor notice due December 1 (but no earlier than October 2)

7. QACA notice due December 1 (but no earlier than October 2)

D. Requested relief.

1. Defined benefit plans – allow all notices to be given at a single date in the year, elected by the plan sponsor, subject to reasonable conditions. For example:

a) Annual Funding Notice (AFN) could be given at a single elected date if the plan is at least 80% funded.

b) SPD or SMM could be provided on the same elected date, provided that it covered all amendments through 2.5 months prior. (This would provide employees with more timely notice than they now have.)

c) Schedule SB and 105 notice posted at the same elected date.

2. Defined contribution plans – allow notices (other than quarterly statements) to be given one time, as elected by the plan sponsor, subject to reasonable conditions. For example:

a) QDIA, QACA and safe harbor notices to be provided on the elected date, provided it is consistent form year to year.

b) QDIA notices should not be required for participants who have made an investment election.

c) QDIA notices should not be required for participants who have previously received a QDIA notice, unless the default fund has changed.

d) Safe harbor notices should not be required annually if the match has not changed since the prior safe harbor notice.

e) SPD / SMM to be provided on elected date, provided that it covered all amendments through 2.5 months prior.

f) SAR for most recent 5500 to be provided on same date, even if more than 2 months after due date for 5500 form.

g) One-time relief to allow fee disclosure to be provided on same time-table, without having to double-up one year.

3. Disclosures should not be duplicative. The following notices contain much information that could be, and often is required to be, included in SPD: AFN, fee disclosure, QDIA notice, safe harbor notice, QACA notice. For such information, it would be sufficient, and more effective, to simply say, “Please review the plan’s Summary Plan Description for additional information about your benefits.”

IV. Annual Funding Notice (AFN)

A. Perhaps the most confusing notice of all, the AFN often contains information that is not only confusing and misleading, but often directly wrong. I will provide examples.

B. With respect to a 2016 AFN, the 12/31/2016 estimate of liabilities is calculated on a different basis than the liabilities shown as of 1/1/2016, 1/1/2015 and 1/1/2014. Consequently, the plan appears to have become more poorly funded even when the funding percentage on any consistent basis has increased.

C. Requested relief.

1. Allow the end of year funding estimate to be calculated on the same basis as the beginning of year liability number.

2. Allow the plan sponsor to use any reasonable basis to compute the liability, as long as it does not understate the liability computed on the basis of the currently-required beginning-of-year assumptions.

3. Do not subtract the pre-funding balance and the carryover balance from plan assets.

4. Do not require disclosure of investment policy.

5. Allow a plan sponsor to shorten the notice by eliminating any information that is provided in the SPD or a different disclosure (other than the funding percentage).

6. Emphasize the funding percentage by showing it only as a percentage, without the additional detail of assets and liabilities, perhaps contingent on the plan being at least 80% funded.

V. Fund change notices. Often, fund changes should not require notice to participants. For example, if a fund change merely improves the share class (to reduce fees), there is no reason to require advance disclosure, or any special disclosure. Further, plan sponsors routinely delay such a change to the detriment of plan participants in order to satisfy the 30 day advance notice requirement.

A. Requested relief:

1. Clarify that share class changes and any other changes that merely reduce fees do not require advance notice.

2. Clarify that such changes (fee reductions) may be included in the annual fee disclosure (and no other special notice) unless there is reason to believe such change would likely cause a prudent investor to change her allocation.

Sample Company
Actual Funding Notice

SUPPLEMENT TO ANNUAL FUNDING NOTICE

Sample Company Retirement Plan (“the Plan”)
Plan Year beginning 1/1/2016 and ending 12/31/2016 (“Plan Year”)

This is a temporary supplement to your annual funding notice which is required by the Moving Ahead for Progress in the 21st Century Act, the Highway and Transportation Funding Act of 2014 and the Bipartisan Budget Act of 2015. These federal laws changed how pension plans calculate their liabilities. The purpose of this supplement is to show you the effect of these changes. Prior to 2012, pension plans determined their liabilities using a two-year average of interest rates. Now pension plans also must take into account a 25-year average of interest rates. This means that interest rates likely will be higher and plan liabilities lower than they were under prior law. As a result, your employer may contribute less money to the plan at a time when market interest rates are at or near historical lows.

The “Information Table” compares the impact of using interest rates based on the 25-year average (the “adjusted interest rates”) and interest rates based on a two-year average on the Plan’s: (1) Funding Target Attainment Percentage, (2) Funding Shortfall, and (3) Minimum Required Contribution. The funding target attainment percentage is a measure of how well the plan is funded on a particular date. The funding shortfall is the amount by which liabilities exceed net plan assets. The minimum required contribution is the amount of money an employer is required by law to contribute to a plan in a given year. The following table shows this information determined with and without the adjusted interest rates. The information is provided for the Plan Year and for each of the two preceding plan years, if applicable.

INFORMATION TABLE						
	2016		**2015**		**2014**	
	With Adjusted Interest Rates	**Without Adjusted Interest Rates**	**With Adjusted Interest Rates**	**Without Adjusted Interest Rates**	**With Adjusted Interest Rates**	**Without Adjusted Interest Rates**
Funding Target Attainment Percentage	106.38%	86.40%	105.43%	85.56%	93.92%	75.02%
Funding Shortfall	$0	$13,487,204	$0	$13,621,983	$4,436,899	$22,821,021
Minimum Required Contribution	$0	$8,825,930	$0	$7,649,204	$4,409,488	$8,506,103

ANNUAL FUNDING NOTICE

Sample Company Retirement Plan

Introduction

This notice includes important information about the funding status of your single-employer pension plan (the “Plan”). It also includes general information about the benefit payments guaranteed by the Pension Benefit Guaranty Corporation (“PBGC”), a federal insurance agency. All traditional pension plans (called “defined benefit pension plans”) must provide this notice every year regardless of their funding status. This notice does not mean that the Plan is terminating. It is provided for informational purposes and you are not required to respond in any way. This notice is required by federal law. This notice is for the plan year beginning 1/1/2016 and ending 12/31/2016 (“Plan Year”).

How Well Funded Is Your Plan

The law requires the administrator of the Plan to tell you how well the Plan is funded, using a measure called the “funding target attainment percentage.” The Plan divides its Net Plan Assets by Plan Liabilities to get this percentage. In general, the higher the percentage, the better funded the plan. The Plan's Funding Target Attainment Percentage for the Plan Year and each of the two preceding plan years is shown in the chart below. The chart also shows you how the percentage was calculated.

Funding Target Attainment Percentage			
	2016	2015	2014
1. Valuation Date	1/1/2016	1/1/2015	1/1/2014
2. Plan Assets			
a. Total Plan Assets	$92,115,700	$82,708,241	$70,313,053
b. Funding Standard Carryover Balance	$0	$0	$0
c. Prefunding Balance	$6,389,568	$1,953,816	$1,741,937
d. Net Plan Assets (a)-(b)-(c)=(d)	$85,726,132	$80,754,425	$68,571,116
3. Plan Liabilities	$80,583,752	$76,589,316	$73,008,015
4. Funding Target Attainment Percentage	106.38%	105.43%	93.92%

Plan Assets and Credit Balances

The chart above shows certain “credit balances” called the Funding Standard Carryover Balance and Prefunding Balance. A plan might have a credit balance, for example, if in a prior year an employer contributed money to the plan above the minimum level required by law. Generally, an employer may credit the excess money toward the minimum level of contributions required by law that it must make in future years. Plans must subtract these credit balances from Total Plan Assets to calculate their Funding Target Attainment Percentage.

Plan Liabilities

Plan Liabilities in line 3 of the chart above is an estimate of the amount of assets the Plan needs on the Valuation Date to pay for promised benefits under the Plan.

Year-End Assets and Liabilities

The asset values in the chart above are measured as of the first day of the Plan Year. They also are “actuarial values.” Actuarial values differ from market values in that they do not fluctuate daily based on changes in the stock or other markets. Actuarial values smooth out those fluctuations and can allow for more predictable levels of future contributions. Despite the fluctuations, market values tend to show a clearer picture of a plan’s funded status at a given point in time. As of 12/31/2016, the fair market value of the Plan's assets was $88,274,850. On this same date, the Plan's liabilities, determined using market rates, were $102,652,805.

Participant Information

The total number of participants and beneficiaries covered by the Plan on the Valuation Date was 741. Of this number, 390 were current employees, 50 were retired and receiving benefits, and 301 were retired or no longer working for the employer and have a right to future benefits.

Funding & Investment Policies

Every pension plan must have a procedure to establish a funding policy for plan objectives. A funding policy relates to how much money is needed to pay promised benefits. The funding policy of the Plan is to make annual contributions that are necessary to maintain the Plan on a sound actuarial basis and to meet the minimum funding standard prescribed by law.

Pension plans also have investment policies. These generally are written guidelines or general instructions for making investment management decisions. The investment policy states that the goal is to pay benefits as promised by the Plan in such a way that the cost and risk are manageable. To ensure that it meets its goal, the Plan seeks to achieve and maintain a fully funded status. The investment strategy for achieving and maintaining fully funded status may vary with the Plan's current funding level.

Under the investment policy, the Plan's assets were allocated among the following categories of investments, as of the end of the Plan Year. These allocations are percentages of total assets:

Asset Allocations	
Cash (interest bearing and non-interest bearing)	0.3%
U.S. Government Securities	0.0%
Corporate debt instruments (other than employer securities):	
Preferred	0.0%
All Other	0.0%
Corporate stocks (other than employer securities):	
Preferred	0.0%
Common	0.0%
Partnership/joint venture interests	0.0%
Real estate (other than employer real property)	0.0%
Loans (other than to participants)	0.0%
Participant loans	0.0%
Value of interest in common/collective trusts	52.2%
Value of interest in pooled separate accounts	0.0%
Value of interest in master trust investment accounts	0.0%
Value of interest in 103-12 investment entities	0.0%
Value of interest in registered investment companies (e.g., mutual funds)	47.5%
Value of funds held in insurance co. general account (unallocated contracts)	0.0%
Employer-related investments:	
Employer securities	0.0%
Employer real property	0.0%
Buildings and other property used in plan operation	0.0%
Other	0.0%

For information about the plan's investment in any of the following types of investments as described in the chart above – common/collective trusts, pooled separate accounts, master trust investment accounts, or 103-12 investment entities – contact:

Name
Sample Company
Xxx address
XXX address
Xxx phone #
Xxx e mail address

Right to Request a Copy of the Annual Report

Pension plans must file annual reports with the US Department of Labor. The report is called the "Form 5500." These reports contain financial and other information. You may obtain an electronic copy of your Plan's annual report by going to *www.efast.dol.gov* and using the search tool. Annual reports also are available from the US Department of Labor, Employee Benefits Security Administration's Public Disclosure Room at 200 Constitution Avenue, NW, Room N1513, Washington, DC 20210, or by calling 202.693.8673. Or you may obtain a copy of the Plan's annual report by making a written request to the plan administrator.

Annual reports do not contain personal information, such as the amount of your accrued benefits. You may contact your plan administrator if you want information about your accrued benefits. Your plan administrator is identified below under "Where To Get More Information."

Summary of Rules Governing Termination of Single-Employer Plans

If a plan terminates, there are specific termination rules that must be followed under federal law. A summary of these rules follows.

There are two ways an employer can terminate its pension plan. First, the employer can end a plan in a "standard termination" but only after showing the PBGC that such plan has enough money to pay all benefits owed to participants. Under a standard termination, a plan must either purchase an annuity from an insurance company (which will provide you with periodic retirement benefits, such as monthly for life or for a set period of time when you retire) or, if the plan allows, issue one lump-sum payment that covers your entire benefit. Your plan administrator must give you advance notice that identifies the insurance company (or companies) selected to provide the annuity. The PBGC's guarantee ends upon the purchase of an annuity or payment of the lump-sum. If the plan purchases an annuity for you from an insurance company and that company becomes unable to pay, the applicable state guaranty association guarantees the annuity to the extent authorized by that state's law.

Second, if the plan is not fully-funded, the employer may apply for a distress termination. To do so, however, the employer must be in financial distress and prove to a bankruptcy court or to the PBGC that the employer cannot remain in business unless the plan is terminated. If the application is granted, the PBGC will take over the plan as trustee and pay plan benefits, up to the legal limits, using plan assets and PBGC guarantee funds.

Under certain circumstances, the PBGC may take action on its own to end a pension plan. Most terminations initiated by the PBGC occur when the PBGC determines that plan termination is needed to protect the interests of plan participants or of the PBGC insurance program. The PBGC can do so if, for example, a plan does not have enough money to pay benefits currently due.

Benefit Payments Guaranteed by the PBGC

When the PBGC takes over a plan, it pays pension benefits through its insurance program. Only benefits that you have earned a right to receive and that cannot be forfeited (called vested benefits) are guaranteed. Most participants and beneficiaries receive all of the pension benefits they would have received under their plan, but some people may lose certain benefits that are not guaranteed.

The amount of benefits that PBGC guarantees is determined as of the plan termination date. However, if a plan terminates during a plan sponsor's bankruptcy, then the amount guaranteed is determined as of the date the sponsor entered bankruptcy.

The PBGC maximum benefit guarantee is set by law and is updated each calendar year. For a plan with a termination date or sponsor bankruptcy date, as applicable in 2017, the maximum guarantee is $5,369.32 per month, or $64,431.84 per year, for a benefit paid to a 65-year-old retiree with no survivor benefit. If a plan terminates during a plan sponsor's bankruptcy, the maximum guarantee is fixed as of the calendar year in which the sponsor entered bankruptcy. The maximum guarantee is lower for an individual who begins receiving benefits from PBGC before age 65 reflecting the fact that younger retirees are expected to receive more monthly pension checks over their lifetimes. Similarly, the maximum guarantee is higher for an individual who starts receiving benefits from PBGC after age 65. The maximum guarantee by age can be found on PBGC's website, www.pbgc.gov. The guaranteed amount is also reduced if a benefit will be provided to a survivor of the plan participant.

The PBGC guarantees "basic benefits" earned before a plan is terminated, which include:

- pension benefits at normal retirement age;
- most early retirement benefits;
- annuity benefits for survivors of plan participants; and
- disability benefits for a disability that occurred before the date the plan terminated or the date the sponsor entered bankruptcy, as applicable.

The PBGC does not guarantee certain types of benefits:

- The PBGC does not guarantee benefits for which you do not have a vested right, usually because you have not worked enough years for the company.
- The PBGC does not guarantee benefits for which you have not met all age, service, or other requirements.
- Benefit increases and new benefits that have been in place for less than one year are not guaranteed. Those that have been in place for less than five years are only partly guaranteed.
- Early retirement payments that are greater than payments at normal retirement age may not be guaranteed. For example, a supplemental benefit that stops when you become eligible for Social Security may not be guaranteed.
- Benefits other than pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay, are not guaranteed.
- The PBGC generally does not pay lump sums exceeding $5,000.

In some circumstances, participants and beneficiaries still may receive some benefits that are not guaranteed. This depends on how much money the terminated plan has and how much the PBGC recovers from employers for plan underfunding.

For additional general information about the PBGC and the pension insurance program guarantees, go to the "General FAQs about PBGC" on PBGC's website at www.pbgc.gov/generalfaqs. Please contact your employer or plan administrator for specific information about your pension plan or pension benefit. PBGC does not have that information. See "Where to Get More Information About Your Plan," below.

Where to Get More Information

For more information about this notice, you may contact:

name
Sample Company
Xxx address
Xxx address
Xxx phone #
Xxx e mail address

For identification purposes, the official plan number is 001 and the plan sponsor's name and employer identification number or "EIN" are Sample Company and xx-xxxxxxx.

Sample Company
Proposed
Funding Notice
Version 1

ANNUAL FUNDING NOTICE

Sample Company Retirement Plan

This notice is to tell you the “funding target attainment percentage” of the Sample Company Retirement Plan and how that percentage has changed over the last 3 years. This is a measure of the value assets that have been set aside in a trust fund for payment of plan benefits, as a percentage of the estimated cost of providing all benefits that have been earned in the plan to-date.

Funding Target Attainment Percentage			
1/1/2017	1/1/2016	1/1/2015	1/1/2014
106%	106%	105%	94%

You can obtain more information about the funding status of the plan and other important information about the plan, such as the plan’s “Summary Plan Description” at www.samplecompany.xxx/xxxxx or contact:

Name
Sample Company
Xxx address
XXX address
Xxx phone #
Xxx e mail address

You can also get a copy of the plan’s annual report, called a “Form 5500” from the US Department of Labor at *www.efast.dol.gov* and using the search tool, or by contacting the Employee Benefits Security Administration's Public Disclosure Room at 200 Constitution Avenue, NW, Room N1513, Washington, DC 20210, or by calling 202.693.8673. Or you may obtain a copy of the Form 5500 by contacting Sample Company at the address above.

For identification purposes, the official plan number is 0xx and the plan sponsor's name and employer identification number or “EIN” are Sample Company and xx-xxxxxxx.

Sample Company
Proposed
Funding Notice
Version 2

ANNUAL FUNDING NOTICE

Sample Company Retirement Plan

This notice is to tell you the “funding target attainment percentage” of the Sample Company Retirement Plan and how that percentage has changed over the last 3 years. This is a measure of the value assets that have been set aside in a trust fund for payment of plan benefits, as a percentage of the estimated cost of providing all benefits that have been earned in the plan to-date.

Funding Target Attainment Percentage			
1/1/2017	1/1/2016	1/1/2015	1/1/2014
86%	86%	86%	75%

You can obtain more information about the funding status of the plan and other important information about the plan, such as the plan’s “Summary Plan Description” at www.samplecompany.xxx/xxxxx or contact:

Name
Sample Company
Xxx address
XXX address
Xxx phone #
Xxx e mail address

You can also get a copy of the plan’s annual report, called a “Form 5500” from the US Department of Labor at *www.efast.dol.gov* and using the search tool, or by contacting the Employee Benefits Security Administration's Public Disclosure Room at 200 Constitution Avenue, NW, Room N1513, Washington, DC 20210, or by calling 202.693.8673. Or you may obtain a copy of the Form 5500 by contacting Sample Company at the address above.

For identification purposes, the official plan number is 0xx and the plan sponsor's name and employer identification number or “EIN” are Sample Company and xx-xxxxxxx.

Supplement

Supplement to ERISA Advisory Council Statement of June 7, 2017

In my written submission I mentioned the Fund change notice, and in particular, that I believe the fund change notice should not be required in cases where the only change is that the plan has moved to a better (that is, lower fee) share class of what is otherwise the same mutual fund. This came up in Mike Hadley's testimony and he said he did not think plan sponsors were holding off on making such a change due to the notice requirement. I have reason to believe that 401(k) plan sponsors are indeed delaying such changes, to the detriment of plan participants, because of the notice provision.

Obviously I cannot name the clients, but I can tell you that I have three separate clients that have delayed changing funds to a better share class because of the notice requirement. They all did make the change, but in each case, they were advised by their recordkeeper (three different ones) that the change required 30 days advance notice to participants. The notices take about 30 days to be drafted and then approved by legal and HR. So in each of these cases, the fund change happened about 60 days (give or take) from when the change was approved. Had there been no advance notice requirement, the fund changes would have happened immediately. So, for about 60 days, plan participants were being charged unnecessarily high fees so that they could be notified 30 days in advance. I have to think that if it has happened three times (that I know of) within my own clientele, it has happened a fair amount elsewhere as well, and certainly more than it should.

I think there ought to be an exemption that allows, at a minimum, after the fact reporting of such changes, or perhaps an exemption from any notification, where the only practical change is a reduction in fees, with a share class change being specifically mentioned as such a case.

Once again, I'd like to thank the Council for the opportunity to testify.

Regards,

David R. Godofsky

Alston & Bird LLP

June 7, 2017