



AMERICAN BENEFITS

COUNCIL

TESTIMONY OF

DAVID KRITZ

ON BEHALF OF THE

AMERICAN BENEFITS COUNCIL

FOR THE

ERISA ADVISORY COUNCIL

REDUCING THE BURDEN AND INCREASING THE EFFECTIVENESS
OF MANDATED DISCLOSURES WITH RESPECT TO EMPLOYMENT-
BASED HEALTH BENEFIT PLANS IN THE PRIVATE SECTOR

AND

MANDATED DISCLOSURE FOR RETIREMENT PLANS – ENHANCING
EFFECTIVENESS FOR PARTICIPANTS AND SPONSORS

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My name is David Kritz and I am a General Attorney specializing in employee benefits with Norfolk Southern Corporation (“Norfolk Southern”). I am here today on behalf of the American Benefits Council (“the Council”). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health and welfare plans that cover more than 100 million Americans. Norfolk Southern is a Policy Board member of the Council and actively participates in discussions regarding benefits and public policy issues confronting our country.

Thank you for the opportunity to testify on important communications and disclosure issues affecting both retirement and health and welfare plans. The Council has been pleased to provide input to the ERISA Advisory Council in prior years on making plan communications more effective for ERISA plan participants.

- In 2009 we testified on “Promoting Retirement Literacy and Security by Streamlining Disclosures to Participants and Beneficiaries.” We said that it is essential that the disclosure regime both (a) provide information to participants in a manner they are likely to use/understand and (b) not unduly burden employers by increasing costs or potential litigation risk.
- In 2013, we testified on “Successful Plan Communications for Various Population Segments.” We pointed out that the most effective communications follow three main tenets: (1) They are simple; (2) they recognize that most participants make emotional, rather than logical, decisions with regard to their financial savings; and (3) they employ diagnostic techniques that not only target based on employment status and savings practices, but also create segments or personas based on demographics and behavioral patterns.
- In 2015, we testified on “Model Notices and Disclosure on Risk Transfers.” We pointed out that any new guidance should be prospective only and should provide flexibility for plan sponsors to fulfill their disclosure obligations in a way that fits their circumstances and their workforce.

We continue to believe all of these principles should guide the ERISA Advisory Council in its work to make mandated disclosure more effective – a goal we applaud. In fact, over the years we have developed some key principles for improving disclosure:

- **Flexibility:** Even though many disclosures are required by statute or regulation, the more flexibility that can be provided to plan sponsors the better. This need for flexibility is less about content, and much more regarding form and delivery: e.g., formatting, presentation, and timing. At the same time, plan sponsors also appreciate the option of model language where appropriate to ensure that they have met the regulatory requirements. Plan sponsors and their service providers

will often be better able to figure out how to most effectively communicate with their participants than a government agency administering ERISA.

- **Allow Innovation:** In our members' experience, the best communications are created outside the mandated disclosure regime. While there are certain pieces of information that we want to be sure are provided to all participants, we should encourage innovative voluntary communications that supplement or compliment mandated disclosures. These may include employee emails, educational videos, or in-person seminars, to name a few.
- **Avoid "Pile On" Disclosures:** Unfortunately, it often feels like each new policy issue comes with a new disclosure, and rarely is the new disclosure coordinated with existing disclosures. The Pension Protection Act included dozens of individual disclosures, often addressing the same issue (e.g., automatic enrollment). The goal with mandated disclosure should be to simplify and streamline – not to pile on. In this regard, we strongly recommend that the ERISA Advisory Council *make no recommendations that increase* the number, frequency, or overall length of disclosures. Existing notices should be consolidated and any redundancies eliminated.
- **Avoid Litigation Risks:** Plan sponsors have been besieged by lawsuits regarding their plans. Even meritless lawsuits can be extremely costly to defend, because ERISA class actions often involve factual questions that may not be easy to resolve early in the litigation. Sometimes the disclosure becomes a critical element of the allegations. Accordingly, if changes are made to the disclosure regime, it is critical that plan sponsors have comfort that they can provide disclosures in a way that is not subject to second guessing.
- **Avoid Unnecessary Cost:** It is hard to overstate how much mandated disclosures eat into Americans' retirement savings, because the costs for disclosures are almost always passed on to participants (directly or indirectly). This is compounded by the fact that many of the notices are required to be distributed to individuals who are eligible but who do not have an account balance. It's also important to take into account the cost of *disclosure of changes*. As an example, the 404a-5 disclosure must be updated when even minor changes, like a recent change to the name of an investment manager's target date fund lineup, occur. These changes, which have little impact on participant decision making, can cost plans thousands of dollars.
- **Electronic Disclosure:** Effective electronic disclosure can provide needed information to plan participants and beneficiaries in a form that is easily accessible, searchable, low in cost and available around the clock while still meeting statutory notice requirements. The Council's plan sponsor members tell us that it is incredibly difficult to motivate employees to review required

disclosures, especially lengthy and multiple disclosures provided in hard copy – meaning that precious plan resources are spent on developing, printing and mailing material that employees often discard. Electronic access and delivery often allows employees to access the information at any time in a searchable format, thereby providing a means of locating relevant information quickly in an otherwise cumbersome document or documents. In addition, a workable electronic access and delivery framework is especially critical with the growing number of “digital natives” in the employee populations benefitting from the plans. There are many ways to utilize electronic disclosure (e.g., emails, access to web sites, etc.) and the ERISA Advisory Council’s recommendation should allow for flexibility.

Please be aware that, because we have not vetted these proposals widely with the Council’s membership, this reflects input only from Norfolk Southern, American Benefits Council staff, our outside counsel and a few members who reviewed it.

Although I am here today on behalf of the American Benefits Council, I thought it might be helpful to provide you with some background on my employer, Norfolk Southern, and the benefit programs that it provides.

Norfolk Southern is headquartered in Norfolk, Virginia. Through its Norfolk Southern Railway subsidiary, Norfolk Southern operates approximately 19,500 route miles in 22 states and the District of Columbia, and serves every major container port in the eastern United States. Norfolk Southern’s average number of employees during 2016 was 28,044.

In 2016, approximately 80 percent of Norfolk Southern’s employees were covered by collective bargaining agreements with various railway labor organizations. Norfolk Southern largely bargains over wages and benefits nationally in concert with the other major railroads, and is represented by the National Carriers Conference Committee in that process. For certain of these benefit programs, Norfolk Southern contributes to multiemployer programs that cover its union workforce, such as the Railroad Employees National Health and Welfare Plan.

Norfolk Southern sponsors a number of ERISA-covered benefit programs, primarily for its non-union workforce. These include, among other programs, an open, traditional final average-pay defined benefit pension plan, an automatic enrollment defined contribution 401(k) savings plan, a high-deductible health plan, dental and vision programs, group life insurance benefits, a long-term disability plan, and a severance pay plan. Norfolk Southern also sponsors ERISA programs that apply specifically for its union population, including a 401(k) plan for union employees, and an accidental death and dismemberment program for certain union employees who suffer certain injuries while on the job. Finally, Norfolk Southern has benefit plans that cover its entire workforce, including our Drug and Alcohol Rehabilitation System (DARS) program

which provides confidential employee counseling, and a medical case management plan that offers nurse case-managers for employees who suffer on-the-job injuries.

GENERAL BACKGROUND

Currently, plan participants receive a myriad of mandated disclosures. Simplifying this disclosure “landscape,” with an eye towards increasing the usefulness and efficacy of such disclosures and reducing administrative burden, would benefit all stakeholders, including plans and their sponsors, as well as plan participants and beneficiaries.

Under ERISA, administrators of retirement and employee welfare benefit plans are required to provide certain proscribed information to plan participants so they are informed of their rights under the plan. Administrators who fail to comply with ERISA's disclosure requirements may be subject to certain civil sanctions, as well as criminal penalties in the event of certain willful violations. The basic types of disclosure documents and notices that ERISA requires administrators of welfare benefit plans to provide to plan participants include, among others, the following:

- Summary plan descriptions (“SPDs”)
- Summaries of material modification (“SMMs”)
- Summary annual report (“SARs”)
- Summaries of benefits and coverage (“SBCs”)
- Notice of COBRA rights
- Women’s Health and Cancer Rights Act (“WHCRA”) notice
- Newborns’ and Mothers’ Health Protection Act (“NMHPA”) notice
- Description of the plan’s claims procedures
- Michelle’s Law notice
- Notice regarding designation of a primary care provider
- Information regarding plan’s Qualified Medical Child Support Order (“QMCSO”) procedures
- Notice of state Medicaid and child health assistance available to employees and their dependents if they need financial help to pay for employer-sponsored health coverage

With regard to retirement plans, the basic types of disclosure documents and notices that ERISA mandates be provided by administrators to provide to plan participants include, but are not limited to the following:

- SPDs
- SMMs
- SARs
- Description of plan’s claims procedure
- Periodic pension benefit statements (defined benefit plans)

- Quarterly benefit statements (defined contribution plans)
- 404a-5 (participant fee) disclosure
- Annual Funding Notice (defined benefit plans)
- Automatic enrollment notice; • Safe harbor automatic enrollment notice
- 401(k) safe harbor notice
- Qualified Default Investment Alternative (QDIA) notice
- Distribution notice (402(f) notice)
- Decrease in future benefits notice
- Notice of right to defer benefits
- Blackout notice

In general, to the extent permitted under current regulations, plan administrators have sought to comply with these notice requirements by aggregating notices in a single document, very often the related plan SPD. The idea behind this approach is that employees are familiar with the concept of the SPD and its purpose, and that by including these notices in the SPD, the notices are more likely to be read by participants and beneficiaries. Additionally, by locating the disclosures in the SPD, it provides a single reference document for employees to turn to in the event they have questions about their benefits and helps reduce plan administrative costs associated with providing multiple, separate notices.

Notably, certain disclosures, however, may not be suitable for inclusion in the SPD, or otherwise may need to be provided separately because of existing, special rules applicable to a given disclosure. For example, both the SAR (an ERISA-required disclosure) and the Medicare Part D creditable-coverage notice (a non-ERISA notice required for some participants covered under a group health plan) are required to be provided at specific times – by the later of 9 months after the end of the plan year or 2 months after the due date for the Form 5500 for SARs, and no later than October 15th for the Medicare Part D notice. Additionally, and especially with respect to group health and welfare plans, the requirement to distribute the SMM is often complied with by providing an updated SPD on annual basis.

ELIMINATION OF SUMMARY ANNUAL REPORT REQUIREMENT

The Council has long supported the elimination of the Summary Annual Report (SAR) and recommends that it be eliminated for all benefit plans.

The SAR is no longer useful, particularly with respect to defined contribution plans, and should be eliminated. In a defined contribution plan, where the benefits promised always equal the assets held under the plan, the SAR does not provide any information that would be actionable by a participant. Council members report that the only thing the SAR accomplishes is generating questions from participants about why the

disclosure is being provided, confusion about what it is supposed to mean to them as participants and whether the participant needs to do anything with it. Accordingly, we strongly support the ERISA Advisory Council recommendation to DOL to eliminate the SAR.

As we stated in [a January 2016 letter to DOL](#), since the enactment of ERISA, other, more useful, notices have been added have fully replaced the purpose of the SAR. For defined contribution plans, participants now receive much more useful information in the quarterly benefit statement, which provides details on the financial information for their account, and the annual fee and investment notice; routinely Council members make even more updated information available online continuously. Further, no change in the law is needed. ERISA Section 104(b)(3) provides that the administrator of a plan (other than a plan that must provide the annual funding notice) must furnish to participants and beneficiaries the financial information described in ERISA sections 103(b)(3), (b)(4), and (d)(11) “as is necessary to fairly summarize the latest annual report.” This language gives DOL flexibility to require only the information that is actually “necessary” in light of the additional disclosures participants receive and the fact that a plan’s annual report is now posted online and fully searchable for any participant interested in reviewing it.

The ERISA Advisory Council’s proposal dovetails well with our recommendations, although the Council would prefer to just eliminate the SAR. Under the proposal, in lieu of an SAR, participants would be informed by alternative methods of communication that the Form 5500 has been filed, how to obtain a copy (including a plan sponsor contact), and general types of information on the Form 5500. Further, under the proposal, this information can be communicated through email, postcard, or other electronic or paper means as long as the plan sponsor is reasonably confident that the communication will reach all plan participants. We agree with this flexible approach and offer the following suggestions:

- Regarding the method of delivery, the standard that the plan sponsor is “reasonably confident” that the communication will reach all plan participants might be changed to refer to any method “reasonably calculated to result in actual receipt,” which is a clearer standard that has been used before in a variety of e-delivery contexts.
- To permit flexibility, we recommend that the plan sponsor be permitted to include multiple plans and plan numbers on a single Form 5500 notice communication. This would have the benefit of reducing distribution costs to the plan sponsor, and reducing the number of notices received by the employee regarding the Form 5500 filings. If the notice is permissible for multiple plans, then the language of any model notice would necessarily need to be revised to reflect plural (in addition to singular) terms.

- We recommend that any model Form 5500 participant notice clearly state that it is provided as information to the participant and/or that participant action is not mandated as a result of receipt of the notice.
- We recommend that you confirm that this communication can be included in or with other disclosures, such as in a pension benefit statement or 404a-5 disclosures, as long as the timing requirements are met.
- The reference to “point of contact” should be expanded, as applicable, to include the plan administrator or service provider on behalf of the plan sponsor.

Finally, although the current SAR exemptions for unfunded welfare plans and for small insured welfare plans eliminates the SAR requirement for many plans, the SAR requirement still remains for a sizable number of welfare plans, including funded welfare plans and large insured welfare plans. Although the ERISA Advisory Council’s proposal is framed in terms of “health benefit plans,” the rationale for eliminating the SAR applies with equal force to non-health ERISA welfare plans. Accordingly, the Council urges that the elimination of the SAR requirement apply to all health and welfare plans.

DISCLOSURE REGULATION 404A-5 CHANGES

As we understand the changes to the participant fee and investment (404a-5) disclosure, the ERISA Advisory Council is contemplating recommending to the DOL that the 404a-5 disclosure be eliminated, and some parts are moved to other disclosures. In addition, in lieu of a comparative chart, plans would be required to develop fund fact sheets with certain information, some of which overlaps with existing required information.

While we support the goal of making the 404a-5 disclosure more effective, *we are very concerned about this approach*. At this point, Council members that are plan sponsors are largely comfortable with the 404a-5 disclosure. They believe that most participants (especially those already in the plan) ignore it, but it is helpful for new enrollees to see, in a single place, the fees of the plan and the investments available. And for the few participants that are very active in reviewing plan communications, this annual disclosure is now known and familiar to them. In addition, the 404a-5 disclosure is part of a “layered” approach to disclosure that the Council believes is the right approach.

Most investment managers or third parties, such as Morningstar, already produce fund fact sheets, which are available to participants upon request or online. We would be very concerned if plan sponsors, who do not have access to the correct information to complete these fund fact sheets, were required to do so. Under the current 404a-5 rule, plan sponsors are only required to provide fund fact sheets, prospectuses, and similar

documents to the extent they are provided to the plan.¹ The proposed fund fact sheet would require plan sponsors to be directly responsible to, for example, describe the objectives and risks, determine how much riskier the investment is compared to the “hypothetical market portfolio,” calculate the turnover ratio, and report the investment’s asset allocation in a pie chart. While we appreciate that this would be largely performed by the plan’s service provider, if the *plan sponsor* were ultimately responsible, then the plan sponsor must independently ensure that the information is correct. Much of this information is not in SEC mandated disclosures, like mutual fund prospectuses and annual reports, which means plan sponsors would be at the mercy of third party services to create and maintain this information, effectively duplicating the work of the investment professionals who are presently responsible and accountable for meeting these requirements as part of fund fact sheet development.

We do not believe that DOL should be dictating what information is appropriate or required in a fund fact sheet; instead this should be based on the appropriate regulatory scheme and longstanding industry practices and standards. The investment firms managing the assets, and various third parties, will continue to meet these requirements, so the proposal would appear to (a) require that plan sponsors be responsible for producing a partly duplicative product that (b) could be partly at odds with the “official” fact sheets.

We appreciate that fund fact sheets provide more information than the comparative chart that is currently required under the 404a-5 regulation, but this proposal would remove the ability to compare investments at a glance, or to easily see which investments fit in a particular asset class, which is the purpose of the 404a-5 disclosure.

Finally, we believe that the new Section 404a-5 regime would be very costly to implement, because even if it eliminated a single 404a-5 disclosure, there is significant work to program for these changes, communicate them to participants, negotiate new contracts with vendors, arrange for counsel review, and finally actually sending out the documents. All of the costs, and the benefits for those costs, spent implementing the 404a-5 disclosure would be lost.

CONSOLIDATION OF ANNUAL NOTICES INTO SINGLE ANNUAL NOTICE

The Council supports the proposal to combine annual notices into a single annual notice issued in a standard format. We recommend the following:

- Employers should be permitted to incorporate non-ERISA mandated disclosures. In addition to the ERISA-mandated disclosures mentioned above, sponsors and administrators of ERISA-governed plans are required by certain other federal

¹ DOL Reg. § 2550.404a-5(d)(2)(4).

laws to provide certain other disclosures, such as those required by HIPAA or ACA Section 1557. Many employers might want to fold into this single annual notice document other required non-ERISA disclosures. We recognize that allowing for the inclusion of non-ERISA notices in a single annual notice could, in some instances, require coordination by the Department with other federal agencies (including, for example, the Departments of Treasury and Health and Human Services). We encourage such coordination to advance the goals of enhancing effective participant communications and reducing administrative burden and costs.

- Employers should be permitted to combine the single annual notice document with the proposed SPD reference tool. As discussed below, one of the ERISA Advisory Council's proposals is to provide for the use of an SPD "reference tool" or short-form document. To help reduce plan administrative costs and to minimize separate mailings/distributions, we recommend that the proposal be modified to permit employers to combine the single annual notice document and the SPD reference tool. Doing so would allow plan administrators to provide all required annual notices in one single notice document, which we believe would enhance their use by participants and beneficiaries.
- Employers should be permitted to provide the single annual notice electronically, as part of broader relief on electronic disclosures. As discussed in more detail below, we urge that any implementing guidance regarding these proposals be made part of broader regulatory relief that includes an updated and workable electronic or "e-delivery" safe harbor rule.

ANNUAL SPD QUICK REFERENCE TOOL/GUIDE

The ERISA Advisory Council's most ambitious recommendation appears to be its "quick reference" guide, which would largely stand in for the SPD and be used in lieu of a requirement to send an updated SPD every five years. Instead, the "quick reference" guide would be an introductory communications piece with the key information. In conjunction with the proposal, the ERISA Advisory Council has provided drafts of proposed "Quick Reference Guides" for both health and 401(k) plans that could meet the guidelines laid out above. The stated purpose of this tool would be to guide participants and beneficiaries to source materials to answer any questions regarding the plan's contents, their rights and additional important information.

We applaud the ERISA Advisory Council for this creative and ambitious step. It is the type of "outside the box" idea that is sorely needed. At a conceptual level, we support the goal of rethinking the SPD level information. Any revision should include the information we believe participants need to make informed decisions (which, in the typical participant-directed defined contribution plan, are many). We think the Q&A

format is generally informative and helps bring more relevant information about the plan to the participant. We should also keep in mind that many participants simply do not open or read large packages of paper unless “Action is Required” or similar language is included.

However, as this idea is further developed, please consider the following:

- **It Is Critical to Utilize Electronic Disclosure:** This Quick Reference Guide will be most effective if it can be provided electronically with “click through” to more information. In fact, we recommend that DOL not move forward with this approach until it addresses the need to make electronic disclosure the default method of delivery of documents, rather than requiring an explicit “opt-in” with paper as the default. We note that the draft model Quick Reference Guide appears to be drafted in anticipation of being provided electronically. It makes frequent reference to online access and, on the first page alone, contains references to clicking on various electronic “tabs.”
- **Optional, Not Mandatory:** This new Quick Reference Guide should be an optional approach for plan sponsors to satisfy mandatory disclosure requirements. Many plan sponsors would likely adopt this approach, but we think it makes the most sense to make it optional, so that some plan sponsors can experiment with the approach to see if it proves successful. Automatic enrollment in ERISA savings plans has developed with larger plan sponsors field testing the approach. There is much evidence of its success as other plan sponsors followed along when appropriate for their employees. Further, for some plan sponsors, the trade-off of a new annual disclosure requirement (particularly those that are not safe harbor plans) may be more costly than the current need to send an SPD every five years (and SMMs when the plan is amended).
- **Flexibility Is Key:** In many cases, the Quick Reference Guide concept may be attractive but the model guide the ERISA Advisory Council put together will not work for a plan sponsor. For example, the example suggests the participant go to Human Resources for the full SPD. In many cases, another group within the plan sponsor (or an external vendor) will be the right contact. One Council member thought that they may wish to have an “Initial Guide” and then any changes labeled as such; and may want to move most of the information labeled “Basic Information about the Plan” to the end of the document. The main point is that the document should be flexible and accommodate multiple approaches.
- **Permit Charts, Tables and Other Graphics to Replace Narrative Disclosure:** Continuing along the line of flexibility, some companies are finding that participants more readily understand information that is presented in concise graphics instead of narrative – and frequently long - disclosures. The guide should permit this type of innovative disclosure.

- **Replace, Not Additional:** This new Quick Reference Guide will meet the goal of streamlining disclosures only if it replaces by consolidating existing mandatory disclosure, not as an addition to existing disclosure. As a result, it should replace all five of the following notices generally provided annually in a 401(k) plan:
 1. the safe harbor notice for qualified automatic contribution arrangements;
 2. the notice for other safe harbor plans;
 3. the notice to all other automatic enrollment plans;
 4. the disclosure required for qualified default investment alternatives under ERISA; and
 5. the annual notices provided for plans with employer securities.

If these other notices can be consolidated into the Quick Reference Guide, true streamlining can occur.

- **Coordinate With, and Do Not Duplicate, the SBC:** The proposed Quick Reference Guide for health plans, on its first page, appears to contemplate that it will be accompanied by the Summary of Benefits and Coverage (SBC). Specifically, it states that “[t]his Guide and the SBC will give you basic information about the Plan and provide general answers to common questions.” Notably, there is some material overlap between the information provided in the Quick Reference Guide and the information provided in the SBC, including the information provided in Section C. of the Quick Reference Guide (entitled “What Coverages Are Available Under the Plan and How Much Do They Cost?”). We recommend that any final version of the Quick Reference Guide be carefully reviewed, and revised as needed, to align with SBC, and to ensure that the two documents do not provide duplicate information. This should help avoid any confusion by participants and beneficiaries.
- **Allow for Compliance with Both Existing SPD and SMM Requirements:** Per 29 C.F.R. § 2520.104b-2, plan administrators generally must provide plan participants with a copy of the SPD within 90 days of their becoming a plan participant, and thereafter generally at least every five years. Notably, many group health plans having been providing updated SPDs annually in lieu of providing SMMs, as is permitted under 29 C.F.R. § 2520.104b-3(b). We therefore recommend that any SPD reference tool operate as a “safe harbor” with respect to both of these obligations – i.e, the obligation to provide a copy of the SPD upon initial eligibility and at least every five years thereafter, as well as the obligation to provide the SMM (either separately or as part of an updated SPD).
- **Allow Customization:** The draft model Quick Reference Guide contains provisions that would apply across all types of group health plans, such as the references on page 2 to WHCRA, newborn rights and mental health. However, other sections of the proposed model Quick Reference Guide contain provisions

that would only apply to specific types of group health plans. For example, page 3 of the draft model Quick Reference Guide contains a detailed provision regarding the eligibility of retired employees, and also contains language regarding spousal eligibility for retired employees. Although some employer sponsored group health plans provide retiree coverage, many do not. Accordingly, we recommend that any model Quick Reference Guide clearly identify “customizable” and/or “optional” sections.

- **Permit Use for All Health and Welfare Plans:** The draft model Quick Reference Guide appears to be focused on employer-sponsored major medical coverage. While major medical coverage tends to be one of the more complex coverages offered by employers, all ERISA health and welfare plans are subject to the SPD requirements. Employers commonly offer a variety of health and welfare plans in addition to major medical coverage, including dental, vision, and group life and disability plans. We recommend that any proposed Quick Reference Guide incorporate the most common health and welfare plans, or, as part of any final proposal, permit employers to customize the Quick Reference Guide for other health and welfare benefits, so that the resulting Quick Reference Guide can be a single, comprehensive guide for employees with respect to a given plan or arrangement.
- **Permit Use for All Retirement Plans:** Similarly, the draft model Quick Reference Guide is focused on 401(k) plans and other types of retirement plans are subject to the SPD requirements. We recommend that any proposed Quick Reference Guide provide optional sections for other types of plans, or, as part of any final proposal, permit employers to customize the Quick Reference Guide for other retirement plans.
- **Avoid Legal Jargon:** The ERISA Advisory Council should try to eliminate any legal jargon in this and other draft documents.
- **Avoid a Toll-Free Number and Website Mandates:** It is not clear whether or not the ERISA Advisory Council is recommending that it be mandatory that the plan sponsor maintain a toll-free answer line and/or a website. While we strongly encourage the use of electronic disclosure, we do not think it appropriate to mandate the creation and maintenance of a web site or a requirement to offer a toll-free hotline. These might be appropriate for larger plan sponsors, but would not be appropriate for all plan sponsors. In addition, our members would be very concerned about a requirement to maintain documents, including the full SPD, outside a firewall. Rather, the key should be the Quick Reference Guide disclosures on how the participant can obtain more information, and provide flexibility to plan sponsors regarding the method that best suits their workforce and resources.

- **Cannot Be Used for Litigation:** Any guide, like the SPD itself, will be, by necessity, a summary of the plan's terms. It cannot be a complete statement of the plan's terms or the participant's rights. But to be understandable, it must deviate from the legalistic language in the plan document. We recommend that any summary include a prominent statement that it cannot be relied upon. Even more important, this will not be used by plan sponsors unless the rules prevent lawsuits because of a difference between the guide and the SPD or plan document.
- **Any Model Quick Reference Guide or Reference Tool Should be Subject to Public Notice and Comment:** Some of the language of the draft model Quick Reference Guide could be confusing to participants and beneficiaries. For example, on page 4 of the proposed model Quick Reference Guide, there is language that states that "when you contact the Plan administrator to learn about enrolling in the Plan, you will receive information about the public health care exchanges that are available to you." This appears to be a reference to the ACA marketplace notice, but may be read by some participants to mean that enrollment in an employer-sponsored plan is somehow connected to the marketplace plans. We would suggest that any model language first be made available for notice and public comment. This will help ensure that any resulting model language is the product of considered comment by all interested parties.

SINGLE EMPLOYER DB PLAN ANNUAL FUNDING NOTICE

We have also reviewed the suggested changes to the single employer defined benefit plan annual funding notice (AFN). We agree with the proposal to split the AFN into two sections, with the more detailed information in an appendix. The other changes, including simplifying the credit balance information, removing information on the PBGC, and eliminating information that is contained in the Form 5500, will further help to streamline the notice.

The Council continues to believe that the annual funding notice, even with these suggested changes, is too complex. At Norfolk Southern, we have found that the annual funding notice does not generate any questions from participants, and appears to be largely too complex to be understood.

We would recommend that, at least as a transition measure, this new approach be an optional method of satisfying the annual funding notice. Some plan sponsors may decide that their participants are better served by a single notice, rather than one with two parts, or may conclude that a change in the way the notice is presented may cause more confusion than it solves. Alternatively, the "simplified" information could be provided, with a click through (as electronic is preferred) to the Appendix or available in paper upon request. But as an option, we support the ERISA Advisory Council's approach.

CONCLUSION

We commend the ERISA Advisory Council for addressing these important issues related to mandated disclosures. We support the goal of identifying workable solutions that will result both meaningful relief to plans and employer plan sponsors and improve the utility and access of such disclosures for plan participants. We look forward to working with the ERISA Advisory Council and the Department in addressing these challenges.