August 23, 2017 Testimony
J. M. (Jack) Towarnicky, JD, LLM
Executive Director, Plan Sponsor Council of America (PSCA)

I am providing this information to you solely in my capacity as an individual with knowledge and experience in the industry and not as legal advice – based on my thirty-one years of experience in a plan sponsor role at four different Fortune 500 employers, over four years of experience working in a legal research and compliance role with mostly smaller and mid-sized employers, and three years as an independent benefits consultant. The issues presented here may have legal and tax implications. This presentation is not (and you/others should not use it as a substitute for) legal, accounting, actuarial, tax or other professional advice. My comments are my own and do not necessarily reflect those of any employer, educational institution or trade association I have been employed by or affiliated with, past, present or future. This testimony is solely based on my professional experience prior to joining PSCA.

Council Chair, Ms. Jennifer Tretheway, Issue Chair, Ms. Deborah Tully, and Members of the ERISA Advisory Council, thank you for the honor and opportunity to submit a statement of testimony on these important issues.

Summary Plan Description (SPD)

Then:

- Mandated benefits disclosures were primarily intended to make participants aware of their benefits:
  - Because of reports of mismanagement and abuse of pension funds (particularly, multiemployer plans), Congress passed the Welfare and Pension Plans Disclosure Act (WPPDA) in 1959 which required plan sponsors to file plan descriptions and annual financial reports with the Department of Labor (DOL) and to make those materials available to plan participants and beneficiaries. "This legislation was intended to provide employees with enough information regarding plans so that they could monitor their plans to prevent mismanagement and abuse of plan funds."[1]
  - The Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. 93-406, repealed and replaced WPPDA disclosures, adding, among other items, a requirement to provide a Summary Plan Description (SPD): "… One of the most important documents participants are entitled to receive automatically when becoming a participant of an ERISA-covered retirement or health benefit plan or a beneficiary receiving benefits under such a plan, is a summary of the plan, called the summary plan description or SPD. … the SPD … tells participants what the plan provides and how it operates. It provides information on when an employee can begin to participate in the plan, how service and benefits are calculated, when benefits should become vested, when and in what form benefits are paid, and how to file a claim for benefits …."[2]

Today

- So, with ERISA, the primary focus of the mandated disclosures changed from publicizing the existence of a plan and monitoring plan administration to ensuring participants understand the benefits provided by the plan.
- By that standard, the SPD has been a 50 year failure. There are good and valid reasons why the Council is again looking at the effectiveness of mandated disclosures – based on my 38+ years of benefits experience:
  - In discussions with thousands of participants, oftentimes as part of an individual participant's claims or appeals process or during new hire orientation or annual enrollment meetings, I have yet to meet a participant who will confirm that she/he has read an entire SPD. Most confirm they took it home, put it on a shelf for later use. Others confirm it landed in the trash. Some claim to have scanned the SPD.
  - Few participants read SPDs due to their length, and, to a lesser extent, because legal summaries are difficult to read. Many SPD's are 20+ pages in length, often summarizing 80+ page plan documents.
  - Often, the only individuals who consistently read the entire SPD will be members of the plaintiff's bar – looking for inconsistencies between SPDs and plan documents, trust documents or insurance policies.
  - In the past, I have infrequently asked ERISA/benefits attorneys who were not members of the plaintiff's bar how many SPD's they have read cover to cover in their lifetime (other than the ones they wrote). The answer was an unsurprising zero. I include myself in that group.

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[1] Pre-ERISA Legislation, Accessed 20170817 at: https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa
[2] Health Plans and Benefits: Plan Information, Accessed 20170817 at: https://www.dol.gov/general/topic/health-plans/planinformation

- Plan sponsors and plan administrators have long accepted the fact that participants do not read the SPD:
    - Plan sponsors and plan administrators accommodate this by deploying other communications, marketing materials, documents, forms, notices, websites, outreach, etc. They offer "just-in-time" information when participants are called upon to make decisions about benefits. I am not aware of any plan that uses the SPD as an integral part of enrollment, investment, loan, or distribution processing.
    - Many plan sponsors and plan administrators attempt good faith compliance with mandated disclosures, - the Summary of Material Modification (SMM) requirements to confirm changes to plan provisions and benefits and issuing Summary Annual Reports (SAR). However, those documents are seldom relied upon by plan sponsors, plan administrators and participants in the benefits decision-making process.
- In my over four years serving in a research and compliance mode, and in discussions with other benefits professionals, it is clear that mandated disclosures and maintenance/updating plan documents, SPDs, SMMs, SARs are not a priority for many firms – if only because no participant asks for them and when distributed, no one reads them – at least, generally, not until a claim or appeal or litigation arises.
- Earlier this year, when I attempted to survey participants of plan sponsors to add to my testimony today, I was rebuffed. There were no takers. I wanted to try to determine who could remember receiving mandated disclosures, who had read them, and who had understood them. The consistent response I received from plan sponsors was that such a survey was a waste of time that would only confirm what is described above.
- As a specific example, in my last plan sponsor role in the 1990's, we invested hundreds of hours and over one hundred thousand dollars to update, publish and distribute all of our SPDs for 35,000+ participants, retirees and beneficiaries - full re-write, simplification, significant improvements in readability and attractiveness. To ensure the SPD's were as readable as possible, we made sure the documents reflected 9th grade readability. We used a "summary preview" technique, introducing each topic when a long description was needed. The SPDs were published in stair-stepped, four color booklets, displayed in a box, shrink-wrapped and personally hand delivered to each associate; with separate versions created, published and mailed to term vested and retired associates and beneficiaries. Nearly a year later, in a tour of two different regional offices (400+ employees in each office), I found that more SPD booklets were still in shrink wrap than not. Over a decade later, at a time when those SPD's were no longer in use, I occasionally found a box of SPDs still in shrink-wrap.
- As with any legal disclosure, readability suffers in inverse proportion to the size of the notice, the difficulty of language, and the number of required elements. However, while readability calculation scores might be improved by further lengthening the SPD (add monosyllabic words, shorten sentence length, avoid jargon, etc.), it may reduce SPD accuracy, and, just as importantly, a longer length would make it more daunting to read.

Proposal – Super-mini SPD as A Safe Harbor Alternative:

- I believe attempts to improve the use and readability of the SPD will suffer the same fate as the Summary of Benefits and Coverage.[3] Others have attempted and failed at simplification.[4] Finally, extensive studies have repeatedly confirmed the ineffectiveness of mandated disclosures, in part because of the "accumulation problem" – the vast, overwhelming use of disclosures where the goal is to inform, educate, etc. [5]
- For your consideration, I crafted a "Super-mini" SPD concept. It was created in the spirit of Executive Order 12866, and Executive Order 13777, issued February 24, 2017 "Enforcing the Regulatory Reform Agenda". It would be an alternative safe harbor for the SPD required disclosure. ***The Super-mini concept meets Executive Order 13777 requirements by cutting the SPD requirements by much more than half while improving disclosure to participants***. Employers could continue existing processes or use the "Super-mini" safe harbor for the SPD required disclosure. The "Super-mini" SPD will confirm the basics, offer participants easy access to a copy of the plan document at no charge (to be delivered electronically via .pdf).
- The goal of the "Super-mini" SPD concept is to increase the number of participants who actually read the SPD and who obtain a plan document. The "Super-mini" SPD accomplishes that result by providing the SPD at the time of hire for those who are or will become eligible to participate. It is also provided annually – linked to the Summary Annual Report – to repeatedly confirm participants can easily and quickly obtain the plan document.

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[3] What Your Employees Think About Your Benefits Communication," a joint report by Harris Poll and Jellyvision, annual survey, 2017 Accessed on 20170818 at: https://www.meetalex.com/blog/the-new-jellyvision-harris-poll-benefits-communication-survey-has-landed/

[4] The Securities and Exchange Commission proposed, attempted then abandoned a four page prospectus summary, 17 C.F.R. § 230, General Rules and Regulations, Securities Act of 1933 (2007).

[5] Omri Ben-Shahar and Carl E. Schneider, The Failure of Mandated Disclosure, University of Pennsylvania Law Review, Vol. 159:647, 705-709. The authors regale us with a vignette concerning Chris Consumer, recounting the hundreds of mandated disclosures Chris might experience in a single day.

- As part of this change, we will need the DOL to introduce some performance metrics for plan sponsors that want to use the "Super-mini" SPD concept:
  - A survey of participants prior to introduction of the "Super-mini" to identify the success, or lack thereof, of the current SPD,
  - The same survey for the same participants after the introduction of the "Super-mini" SPD,
  - A count of plan documents requested in the 90 days prior to introducing the "Super-mini" SPD,
  - A count of plan documents requested in the 90 days after introduction of the Super-mini" SPD, and
  - A count of the number of plan documents requested in the 90 days after the "Super-mini" SPD was distributed as part of the Summary Annual Report.
  - The results will be filed electronically with the DOL as part of Form 5500 reporting.
- Any/all plan communications and marketing materials (eligibility, enrollment, investments, distributions, quarterly statements, etc.) will now be required to reference the specific plan provision from the formal, legal plan document.
- I crafted an example of a "Super mini" to replace a SPD that is 20+ pages long, summarizing a plan document that is nearly 100 pages long. This "Super-mini" SPD reflects the provisions of a 401(k) plan that currently has 65,000 participants with over $5 Billion invested. ***The bottom line here is that this somewhat complicated plan can be effectively summarized in a single page.***
- My experience is that more associates will read a one page document than a 20+ page document.
- My experience is that more associates will notice the availability of the plan document, prominently displayed at the beginning of the notice, and request a .pdf of the plan document – as this process will make it readily accessible, without delay, through a phone call or email request.
- Here is the revised process I envision for the "Super-mini" safe harbor SPD:
  - It includes abbreviated versions of all of the same disclosures and contact information.
  - It would be executed on a similar basis and timing as the I-9; borrowing from COBRA's initial notice process.
  - Resume filing a copy with DOL; but uploaded electronically (similar to other filings), participants can access
  - It would only be delivered to employees who are, or will become (after satisfying age, service requirements) eligible to participate – providing a "head's-up" to look for enrollment materials.
  - Acknowledgement/receipt must have a "wet" signature or meet I-9 electronic signature requirements (71 FR 34510).
  - Evidence of acknowledgement/receipt must be maintained for six years after the earlier of the date participation in the plan ends or the date the plan is terminated.
  - Plan document, SMM, SAR requirements remain unchanged.
  - The "Super-mini" SPD must be updated immediately upon any change.
  - The "as of" dated, current version of the "Super-mini" SPD will be included as part of the Summary Annual Report each year. If the SAR is eliminated or curtailed, the "Super-mini" can be included in a quarterly statement, or an annual funding statement or as part of other required disclosures included in welfare benefit plan annual enrollment materials.
  - Because it is a summary of a legal document, the "Super-mini" SPD would NOT improve readability. I tested the Super-mini offered here and obtained the following scores:
    - Flesch Reading Ease score: 41.9 (text scale) difficult to read.
    - Gunning Fog: 12.7 (text scale) hard to read.
    - Flesch-Kincaid Grade Level: 12.1 Twelfth Grade.
    - Coleman-Liau Index: 11 Eleventh Grade
    - The SMOG Index: 11.4 Eleventh Grade
    - Automated Readability Index: 11.2 Tenth to Eleventh graders
    - Linsear Write Formula: 13.2 College.

____ (the Plan) SUMMARY

As of August 23, 2017

This is a Profit-Sharing plan qualified under Section 401(a) of the Internal Revenue Code ("IRC") of 1986, as amended, with a cash or deferred arrangement under Section 401(k) of the IRC. Plan management:
Plan Sponsor: ____________________________ (EIN: _____________) ___________(Address)__________________________
Plan Administrator: _______________________ ___________(Address)__________________________ _____(e-mail)_______
______(Phone)_________ Service for Legal Process: ____ Plan Number: _______

Legal Documents: The Plan Document governs all benefits, plan administration and includes all details. If there is any error or omission or a conflict between this summary and the Plan Document, the Plan Document governs. **Contact the Plan Administrator if you want a copy of the Plan Document.** Capitalized terms in this summary are defined in the Plan Document.
Your Rights: The Employee Retirement Income Security Act of 1974 (ERISA) provides you certain rights. Plan fiduciaries must provide you plan documents and other materials upon request, they must operate the Plan in Participants' best interests, timely review any claim for benefits, provide a written response and provide for a timely, formal appeals process. You may not be fired or discriminated against to keep you from receiving Plan benefits or exercising your rights. You may bring suit in federal court to enforce your rights. If you have any questions about this statement or your rights under ERISA, contact the Plan Administrator, the nearest area office of the Employee Benefits Security Administration (EBSA), or the Division of Technical Assistance, EBSA, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. You may also obtain information about your rights and responsibilities under ERISA by calling the EBSA's hotline.
Plan Changes/Termination: Plan Sponsor reserves the right to change, alter or terminate any benefit or provision at any time.
Situations That Could Cause a Delay or Loss of Benefit: Benefits may be delayed or forfeited if you terminate employment before you are fully vested, if you fail to properly complete election forms, or if you cannot be located.
Benefits Are Not Guaranteed By The Government: This type of plan is exempt from insurance guarantees because your benefit depends on the amount of contributions you and your employer made and the results of your investments.
Fees: You pay fees to participate in this plan. All fees are disclosed on quarterly statements.

Eligibility: You are (will become) eligible to participate in this Plan. Once eligible, you will receive enrollment instructions.
Investments: The Plan offers 15 core investment choices, 12 target maturity models and a self-directed brokerage account Plan investments are designed to comply with ERISA §404(c) to relieve Plan fiduciaries of liability for losses resulting from your investment instructions. With a few exceptions, you can prospectively change your investment allocation at any time.
Enrollment and Deferrals: Automatic enrollment processes apply at hire and once each subsequent year. Notices are always provided. You can enroll at any time, change your deferral rate or stop deferrals at any time without retroactive effect.
Covered Compensation: Your Covered Compensation is equal to all wages with certain exceptions.
Your Contributions: Up to 80% of your Covered Compensation (less where limited by tax code or regulations) as Regular Tax Deferred Employee Contributions, Roth 401(k) Employee Contributions, Catch-up Employee Contributions for Participants age 50+ and After-Tax Contributions for Non-Highly Compensated Employees.
Roth 401(k) Conversion: You may convert certain taxable monies to a Roth 401(k) basis through an in-plan election.
Employer Contribution: 50% of your "Regular" or "Roth" 401(k) contribution, to a maximum of 3% of Covered Compensation.
Vesting: Vesting means "ownership." You are always 100% vested in your "Regular", Roth, After-tax and Rollover Contribution Accounts. Vesting provisions, and a vesting schedule based on Months of Vesting Service only applies to Employer Contributions. An active Participant becomes 100% vested upon their death, attainment of Normal Retirement Age, or if actively employed, on or after April 1st of the calendar year following the year you reach age 70-½ .
Disability: Active Participants who receive Social Security disability benefits become 100% vested in all Plan assets.
Loans: You may be eligible to borrow from the Plan. Loan principal and interest are repaid directly to your Plan account
In-Service Withdrawals: You may be eligible to withdraw assets depending on your age and completed service.
Rollovers Into/Out of the Plan: You may be able to transfer or "rollover" taxable and non-taxable monies from a prior employer's plan or an Individual Retirement Account. Monies rolled into this Plan are always eligible to roll out of this Plan.
Post-Termination Withdrawals: You my withdraw some or all vested monies or defer payment. Account balances of less than $1,000 are paid in cash as are certain Minimum Required Distribution payouts after you reach age 70 ½.
Death Benefits: If your vested account balance is $1,000 or less, all assets will be paid to your designated beneficiary as soon as administratively practicable. Otherwise, if your sole beneficiary is a surviving spouse, he/she has most of the same rights you had with regard to the Plan account. If a surviving spouse is not your sole beneficiary, the account can only be continued until December 31st of the calendar year that includes the fifth anniversary of your death. The plan includes an order of payout for those who die without a surviving spouse or a properly designated beneficiary.

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Fee Disclosure – ERISA §404(a)(5)

Excerpted from: J. M. (Jack) Towarnicky, John Marshall Law School, "The Fallacies of Mandated Benefit Disclosures; ERISA §§408(b)(2), 404(a) Disclosures – Large Fiduciary Risks, Little Participant Value, December 17, 2012. The white paper is available upon request – contact me at jack.towarnicky@psca.org.

> "Over the next ten years, let's increase the fees paid by individual account plans, like the 401k, by nearly $4 billion so as to deliver fee and investment mandated disclosures that no participant specifically asked for, few will read, even fewer will understand and still fewer will correctly apply in their investment decision-making. Only one audience is expected to find significant value in these mandated disclosures; the plaintiff's bar. … This paper asserts that the mandated disclosures will achieve neither the stated goals nor the estimated savings. This paper also issues a challenge to the Department of Labor and to employers to invest resources so as to confirm the impact of the regulations – to identify the outcomes, to calculate the net cost, to confirm who shouldered the cost of compliance for these disclosures, to identify and measure any benefits from compliance and to use those results to reshape the mandated disclosures into a useful source of fee and investment performance information – a clearinghouse of valuable, current, accurate data for use by plan fiduciaries and the DOL. "

Recommendations:

- Do not change the mandated fee disclosures at this time. Compliance is in the past. The DOL's only stated, measurable metric to justify this disclosure was to reduce the amount of time individuals expended to identify fees they paid as participants.[6] The incidence of the cost of compliance may have been on service providers and plan sponsors, but the impact from the cost of compliance was generally born by plan participants. Before incurring new expense, and establishing new goals, confirm whether desired results were achieved.
- Prior to issuing any new regulations subject to Executive Order 12866 (including revising fee disclosures, extending fee disclosure requirements to welfare benefit plans, requiring plan sponsors to provide lifetime income projections, etc.), review each regulation issued more than five years ago (prior to December 31, 2012) and recalculate the cost benefit analysis required under Executive Order 12866 based on actual experience. Identify whether those who shouldered the cost burden from compliance received benefits that exceeded those costs. Update or revoke regulations where actual, determinable benefits do not exceed identified compliance costs.
- In the interim, amend the fee regulations to specifically confirm:
  - What plan expenses can be (cannot be) charged against plan assets,
  - Fees can be (cannot be) charged against plan assets when in the form of per capita and transaction fees,
  - Compliance and litigation expenses can be (cannot be) charged against plan assets, and
  - Individual account plan fee disclosure requirements for directed brokerage and non-Core investments.
- Gather all 404(a)(5) required disclosures in a database searchable by sponsors, fiduciaries and participants.

[6] 75 Fed. Reg. 64,929 (Oct. 20, 2010)