Statement of Peter J. Wiedenbeck
Before the ERISA Advisory Council

Refining Mandated Disclosure

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Part 1: Executive Summary

Good morning. My name is Peter Wiedenbeck. I am the Joseph H. Zumbalen Professor of the Law of Property at Washington University in St. Louis. I teach and write about employee benefit plan regulation under ERISA and the Internal Revenue Code, as well as tax law and related public policy issues.

I appreciate the opportunity to speak with you this morning about improving the effectiveness of ERISA-mandated disclosures reporting the contents and operation of employee benefit plans. My remarks and written statement will primarily address disclosure issues that are common to both pension plans and health and welfare benefit plans. I have written extensively about ERISA disclosure issues, with particular emphasis on judicial decisions analyzing whether inaccurate or incomplete communications by a plan sponsor, administrator, or fiduciary create legally enforceable obligations to plan participants or beneficiaries. My fullest treatment of ERISA disclosure law appears as a chapter of a book published in 2010, and my detailed analysis (comprising Part 2 of this written statement) draws heavily on that work.[a] I am currently revising and updating that book, and working on a law review article devoted to ERISA disclosure law.

My remarks today are organized into four parts. As the Advisory Council evaluates the current state of mandatory disclosure, I believe it is important to keep in mind these four parameters:

1. The function of disclosure rules within ERISA's broader system of employee pension and welfare benefit plan regulation;
2. The tension between understandability of information—which affects the likelihood it will actually be utilized by plan participants and beneficiaries—and the accuracy

[a] PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 57-108 (Oxford Univ. Press 2010). With the permission of the copyright owner, Part 2 quotes liberally from that source.

and completeness of information—which affects whether or to what extent decisions based on the disclosure will actually improve the economic or personal circumstances of workers and their families (enhance their health or finances, for example);

3. The incentives plan administrators face in formulating the contents of mandatory disclosures and the importance of preserving incentives for plan participants to utilize the information provided; and
4. The trouble spots revealed by extended experience with mandated disclosure, which point up issues that warrant the attention of regulators and policy-makers.

The balance of my remarks will briefly elaborate on these four parameters and highlight their implications for effectuating the objectives of mandated disclosure.

* * *

1. **Functions of Disclosure**

Disclosure was not an end goal of Congress in enacting ERISA. Disclosure was adopted as a means to serve broader legislative objectives. First, disclosure was adopted to promote compliance with and enforcement of statutory obligations. Transparency was expected to dissuade plan fiduciaries from breaching their duties (sunlight being the best disinfectant[b]), and to equip participants and beneficiaries with information necessary to recognize defalcations and bring suit to remedy them.

Second, disclosure allows participants and beneficiaries to better plan their affairs and thereby derive the maximum advantage from a pension or welfare plan. That advantage might come in the form of *career planning*. For example, disclosure allows workers to compare the benefit packages associated with alternative employment opportunities; to determine when a job change could be made without forfeiting accrued pension benefits (vesting); or to evaluate the financial consequences of alternative retirement dates. Similarly, access to information can yield better *financial planning*. For example, it can enable pension plan participants to determine the extent of additional individual savings (in an IRA or on an after-tax basis) that may be needed to provide sufficient resources in retirement. And knowledge about welfare benefit plans can assist workers in making good decisions about whether they need to save for health care expenses that are not covered by the employer's plan (out-of-pocket costs), or to secure additional life insurance or disability income protection. This planning function serves the goal of increasing economic efficiency.

[b] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

Disclosure also promotes the exchange of ideas and sharing of experiences within the workforce and between employees and their employer. This third ancillary function (perhaps an unintended consequence) of disclosure offers workers indirect notification of important benefits-related issues. It can also stimulate feedback that alerts the plan sponsor to workers' benefit priorities and shared concerns about existing benefit programs.

It bears emphasis that each of these functions—and hence accomplishment of the real objectives of disclosure—requires that the information disclosed be *both* usable and correct. Economic efficiency, for example, cannot be improved by careful plans founded on invalid data.

2. **Understandable vs. Reliable**

The two essential criteria just mentioned—that information disclosed must be both usable and correct—are embedded in several of ERISA's key disclosure mandates. The premier example, ERISA section 102(a), provides:

> A summary plan description [hereafter SPD] of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C. §1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification [hereafter SMM] in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)].

This section embodies the functional imperative noted above. To achieve ERISA's objectives, disclosures must be both understandable—otherwise they *will not* be used—and sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations—for if incorrect or dangerously incomplete they *should not* be used.

Congress embedded this tension between understandable and reliable information in ERISA, fixing a central paradox at the heart of its disclosure regime. And it was wise to do so, in view of the functions of disclosure. Abridgement and simplified expression make information accessible, but often create the impression that general explanations and illustrations are not subject to qualification or exceptions in special circumstances. In contrast, excessive detail inhibits utilization and obscures the principal features, conditions, and limitations of the benefit plan.

To achieve larger legislative objectives—deterring abuse, enabling private monitoring and enforcement, and enhancing economic efficiency—we cannot escape difficult compromises between these characteristics. Full disclosure—simply distributing operative plan documents—would be meaningless to virtually all participants (apart the rare expert in employee benefit law). At the other extreme, unqualified statements like "upon retirement the company's pension plan pays $X per year for life" or "our health care plan covers your family's medical needs," give no notice of crucial exceptions and limitations; instead of facilitating planning, such extreme simplification can lead workers to ruin. The SPD definition demands that plan administrators find a middle ground. A comprehensible warning of broadly applicable conditions, limitations, and exclusions is required because the summary must "be sufficiently accurate and comprehensive to *reasonably* apprise such participants and beneficiaries of their rights and obligations under the plan."[c] But that cannot be taken too far. To convey information that's understandable and can profitably be acted upon by the many, some details must be omitted, even if the result is an unpleasant surprise for the few, who due to unusual circumstances have their applications for benefits denied based on plan terms not reflected in the summary.

Instead of aiming at either full disclosure or streamlined (i.e., oversimplified) disclosure, the SPD seeks to achieve *optimal* disclosure, which requires a sensitive balance between "understandable" and "accurate and comprehensive". The elusive standard, "to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan,"[d] must be applied, in the first instance, by the plan administrator. Hence the incentives under which the plan administrator operates in formulating the SPD should be taken into account when assessing the likelihood that an appropriate balance—*optimal* disclosure—will result.

3. **Incentives**

Pension and welfare benefits are a costly part of the employer's total compensation package, and to maximize the effectiveness of such programs the employer needs workers to put a high value on them. Publicizing the advantages of an employee benefit plan and downplaying its limitations will be the sponsor's natural reaction, absent legal intervention. The SPD, however, was intended to give fair warning of important risks that might defeat entitlement to benefits. The federal courts have endeavored to effectuate that goal by awarding benefits (in

[c] ERISA § 102(a), 29 U.S.C. § 1022(a) (2012) (emphasis added), quoted *supra* text accompanying note c.
[d] *Id.*

effect) to disappointed claimants misled by an SPD that fails to notify of important limits or risks.[e]

Reacting to that legal exposure, many plan sponsors converted the SPD into a liability shield, which, like a merchant's disclaimer of all warranties express or implied, was written by lawyers for lawyers. Purported plan "summaries" ballooned in length and complexity, becoming well-nigh incomprehensible and useless as a guide for workers' career and financial decision-making. The 2005 Advisory Council decried this turn of events and issued two working group reports urging that steps be taken to restore the SPD to its intended role as an understandable summary.[f] While the complaint is valid, frequently the recommended response is simplistic and misguided. Understandability is not sufficient to accomplish ERISA's objectives: disclosures must also be reasonably reliable. Given the sponsor's incentive to tout the plan and soft-pedal its limitations, in extreme cases the courts must impose liability based on apparent benefit promises. Without such countervailing pressure SPDs will become purely promotional material—understandable half-truths that workers cannot safely use to plan their affairs.

The overly detailed technically-worded liability-shield approach to drafting also fails to deliver actionable information that workers can realistically use to improve their lot. Is there a solution to this dilemma? Pervasive administrative or judicial monitoring of the contents of disclosures doesn't look promising. It would be phenomenally costly and error prone. Regulators and courts are too far removed from actual workplace operations to appreciate workforce characteristics or the needs of the business. Such monitoring, especially post-hoc judicial oversight (hindsight being 20/20), will frequently reach the wrong conclusion in the case at hand. Worse still, judicial declarations of essential warnings are likely to be accorded precedential effect and applied to other cases without regard to the context of a different plan and workforce. Case law evolution of a set of bright-line disclosure rules seems more likely to yield a safe-harbor list of ossified incantations than guidance optimized for a particular work environment. What's needed is an incentive for balanced drafting by the plan administrator at the outset.

[e] Because the benefits sought based on the faulty contents of the SPD are not actually authorized by the terms of the plan, the relief granted is not technically a benefit payment. Instead, it represents an award of "appropriate equitable relief" to remedy the violation of ERISA, namely, the provision of defective SPD. *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012). Commonly, the theory of liability is promissory estoppel, which requires showing mistake based on reasonable reliance on the faulty SPD. *See infra* note 20.

[f] See Part 2, Detailed Analysis, *infra* notes 22-25 and accompanying text.

Employers can live with issuing opaque liability-shield disclosures (purported SPDs) for two reasons: (1) they are not generally penalized for such ineffective disclosures; and (2) they can use other informal communications to convey the message that plan offers many advantages that participants should value highly. But consider what would follow if such informal promotional communications were treated as the functional or de facto plan summary for purposes of ERISA. The prospect of liability based on such one-sided informal presentations could create a powerful stimulus to craft a balanced, abbreviated explanation. Countervailing legal exposure, in other words, might encourage *optimal* disclosure. Perhaps the Labor Department could encourage the law to develop in this direction by issuing an interpretive regulation or general statement of policy declaring that an overly complex or lengthy plan explanation is not an SPD. Or in cases where the purported SPD fails as an understandable summary, the Department might participate in litigation by participants seeking to hold the plan sponsor to representations made via informal communications, invoking the theory that such communications operate as the de facto SPD.

Plan sponsors will undoubtedly object that this approach puts the administrator in an untenable position. The best compromise between accessibility and reliability demands a nuanced judgement call—the optimum will rarely be indisputable. As explained below (see Part 2, Detailed Analysis), the administrator's determinations on disclosure should, if challenged in court, be subject to the restricted abuse-of-discretion standard of review. Under that relaxed level of judicial oversight, the balance struck by the plan administrator will be upheld if it falls within a range of reasonableness—it need not achieve the theoretically "correct" (optimum) result. As a practical matter, therefore, the plan administrator's good faith resolution of the tension between accessible and reliable information is very likely to withstand attack, which will of course deter challenges in the first place.

Employee incentives matter as well. If participants are given a reliable source of understandable information, they should be expected to make use of it. Consider erroneous informal advice or communications. The participant or beneficiary who is mistakenly told by a staff member in the benefits department that a particular medical procedure is covered by the plan, or who calls the information center of the plan's third-party administrator and gets such advice, may proceed without further inquiry. When a claim for benefits is subsequently denied the participant or beneficiary will complain that she relied on such assurances and may bring suit for equitable relief based on that misleading information. To encourage workers to use the SPD it should be treated as authoritative on matters that it addresses. Therefore, a mistaken oral statement that is clearly at odds with the language of the SPD ordinarily should not bind

the plan.[g] This reciprocal duty to consult the SPD has its limits, of course. Claims based on informal communications that do not contradict the SPD, but which instead are naturally read to clarify or supplement the summary, may deserve more sympathetic treatment.

4. **Lessons from Experience**

Experience with ERISA's disclosure regime over more than four decades—including an explosion of civil enforcement actions premised on allegedly faulty disclosures—reveals some major trouble spots that merit the attention of regulators and policy-makers. I offer several suggestions in the accompanying Detailed Analysis.[h] Most of these address problems with existing legal doctrine. One item speculates on the practical implications of technological advances and may be of general interest, so I repeat it here (omitting footnotes).

Electronic disclosure, combined with the increasing ubiquity of smart mobile devices, pose some intriguing new opportunities and challenges. These include the following:

- Electronic or digital disclosure could allow nesting of information and progressive access on demand to increasingly detailed, specialized information. With thoughtful design, such a progressive disclosure framework might go far toward mitigating the tension between understandability, which calls for simplification and condensation, and accuracy, which counsels in favor of more complete information sharing. In most workforces, however, the average employee is simply not equipped to understand the more complex features of a pension or health care plan even if those features are readily accessible. For that reason my tentative conclusion is that progressive disclosure is not an adequate substitute for optimal summary disclosure: most participants will need to base most of their career and financial planning decisions on simplified general information. Consequently, getting the SPD right—meaning striking the appropriate balance between understandability and reliability—still matters in a digital universe.

- Access to plan coverage information through mobile devices (smartphones, tablets, etc.) could be particularly beneficial for health plan participants and beneficiaries. It

[g] This conclusion is premised on the assumption that the incorrect informal communication was the result of good faith error. In extraordinary situations, such as where the plan sponsor or third-party administrator deliberately or recklessly disseminates false or misleading information, liability should be imposed. *See* Varity Corp. v. Howe, 516 U.S. 489 (1996) (employer executives operated under the circumstances as de facto plan fiduciaries, and their carefully calculated campaign of disinformation held breach of fiduciary obligations).

[h] See Part 2, Section IV.

would allow them to check on covered services, devices, and drugs at the point of decision-making (in the doctor's office, the hospital, or at the pharmacy) and alert them to required out-of-pocket contributions (co-pays, deductibles, and co-insurance obligations).

- Digital disclosure could also be utilized to provide (via hyperlinks) health care plan protocols and "other instruments under which the plan is established or operated." Ready access to such supporting documents would permit quick confirmation of whether a particular health care provider is in the plan's network, or is instead an out-of-network provider the cost of whose services will be reimbursed at a lower rate. Similarly, it would allow a quick check on the status of a particular prescription pharmaceutical on the plan's drug formulary. Ultimately, one might envision a system in which comprehensive health care plan information is accessible by medical/dental providers: the professionals' understanding of technical limitations might be harnessed to expertly assist plan participants and beneficiaries by filtering and interpreting abstruse medical information.

- In order to monitor and enforce the plan administrator's obligation to provide timely, understandable and reliable information, it will be important to require maintenance of an archive of all versions of digital disclosure documents having official status under ERISA (including the SPD, each SMM, and any ERISA § 204(h) pension accrual rate reduction notices).

Conclusion

I applaud the Advisory Council for studying the important but frequently overlooked issues surrounding mandatory disclosures with respect to employee benefit plans. Legal and technological developments make this an opportune time to reconsider the content and format of required disclosures. I am confident that other witnesses will suggest alternatives and provide specifics. The Department of Labor has broad authority to revise or entirely redesign the existing approach to mandatory disclosure under ERISA.[i] A new framework has the potential to materially improve the usefulness of employee benefit plan information flows.

[i] ERISA § 110, 29 U.S.C. § 1030 (2012) (authorizing Secretary of Labor to prescribe alternative methods for pension plans to satisfy statutorily-required reporting and disclosure requirements, provided that any such alternative is "consistent with the purposes of this title"). Similarly, "The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this title, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans." ERISA § 104(a)(3), 29 U.S.C. § 1024(a)(3) (2012).

Thank you for your time and consideration. I would be happy to take your questions.

Refining Mandated Disclosure

Part 2: Detailed Analysis

Peter J. Wiedenbeck*

> [I]f people do have this sort of meaningful information made available to them, I think some of the unwarranted expectations that gave rise to the horror stories that people were not getting what they anticipated will be a thing of the past, because many of them are based on what people anticipated getting that they never were entitled to, because they did not honestly know what was in their pension plan; they did not honestly know what their rights would be.—John Erlenborn (Republican House manager of the bill that became ERISA)[10]

I. Functions

ERISA's disclosure rules are integral components of a complex statutory system. Although commonly viewed as a side-issue or formality, disclosure serves several principal policies.

A. Compliance and Enforcement: "There is [a clear-cut] functional relationship between disclosure and the other components of ERISA's conduct regulation. Reporting and disclosure of plan [terms and] finances may deter fiduciary misconduct. Should deterrence fail, disclosure provides plan participants and beneficiaries the information they need to monitor the plan's administration to enforce their rights."[11] Disclosure was expected to "enable employees to police their plans" and committee reports explained that "the safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights as well as the obligations owed by the fiduciary to the plan in general."[12]

B. Economic Efficiency: "[D]isclosure also promotes economic efficiency. It gives workers the information they need to evaluate alternative employment opportunities, and it allows workers to accommodate their personal financial affairs to the employer's

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[10] 120 Cong. Rec. 4284 (1974), *reprinted in* 2 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 3386–87 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY]. *See* 120 Cong. Rec. 29,195-96 (1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* at 4665 (remarks of Rep. Dent) (Rep. Erlenborn "insisted from the very beginning that a complete and full disclosure of a pension participant's standing within the pension plan be made available, and that it should be written in such a way that individuals would understand exactly what his position was," calling this "one of the cornerstones of reform").

[11] PETER J. WIEDENBECK, ERISA: PRINCIPLES OF EMPLOYEE BENEFIT LAW 58 (2010) [hereinafter ERISA PRINCIPLES]. (A new version of this work, to be titled "ERISA Principles," is under development for Cambridge University Press, with publication expected in 2018.)

[12] S. Rep. No. 93-127, at 27 (1973), *reprinted in* 1 ERISA LEGISLATIVE HISTORY, *supra* note 10, at 587, 613; H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra* note 10, at 2348, 2358.

program. For instance, disclosure permits participants to more accurately determine their need for additional savings or insurance."[13]

C. Collaboration, Feedback and Interaction: Broad disclosure can stimulate conversation and heightened awareness among participants,[14] and can alert the plan sponsor to workers' priorities and common concerns about benefit programs.[15]

II. Fundamental Tension: The Range of Utility

ERISA requires that participants and beneficiaries be furnished with a summary plan description (SPD) "written in a manner calculated to be understood by the average plan participant [that is] sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[16]

> While ERISA makes certain disclosures mandatory, the level of detail required of the SPD is at best vaguely indicated. Information is costly, and it would be wasteful to induce the employer to provide more than needed. When the benefit of better-informed decision making for some workers (better career and financial planning) is outweighed by the costs of providing particularized information that is relevant to their special circumstances, then inclusion in the SPD would be unwise. Those costs include the costs of drafting, reviewing, and publishing the additional information, and the cost of information overload; other workers will be deterred from making use of the SPD as it becomes more detailed and complex. Hence *optimal disclosure*—not full disclosure—should be the objective of the SPD. That conclusion is consistent with the statutory standard—the SPD need not be comprehensive, only "*sufficiently* . . . comprehensive to *reasonably* apprise . . . participants and beneficiaries of their rights and obligations under the plan." Adjudication is a costly and crude device for identifying this optimum because the accumulation of precedent is likely to sanctify a set of bright-line disclosure rules that are unresponsive to the context of a particular plan and workforce. Instead, the law should seek to provide proper incentives for employers to make optimal disclosure decisions *ex ante*.[17]

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[13] *Id.*

[14] In Cigna Corp. v. Amara, 563 U.S. 421, 444 (2011), the Court observed:

> In the present case, it is not difficult to imagine how the failure to provide proper summary information, in violation of the statute, injured employees even if they did not themselves act in reliance on summary documents—which they might not themselves have seen—for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful.

[15] This feedback (or push-back) function is especially pronounced under ERISA § 204(h), 29 U.S.C. § 1054(h) (2012), which prohibits giving effect to defined benefit pension plan amendments that would significantly reduce the rate of future benefit accruals unless affected individuals have been provided reasonable advance notice. The opportunity for workers to respond and object is also implicated, albeit less conspicuously, in the welfare plan context. Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510 (1997), interpreted ERISA's anti-interference rule, ERISA § 510, 29 U.S.C. § 1140, to prohibit adverse employment action undertaken to prevent accrual of as-yet-unearned welfare benefits. Absent voluntary (contractual) vesting, an employer can shut down a welfare plan at any time, but *Inter-Modal Rail* demands that it do so openly and forthrightly by following the plan amendment process. The plan sponsor cannot by adverse employment action "'informally' amend their plans one participant at a time", 520 U.S. at 516, declared the Court, which forces the plan sponsor to own up to a systemic change and take the heat.

[16] ERISA § 102(a), 29 U.S.C. § 1022(a) (2012).

[17] ERISA PRINCIPLES, *supra* note 11, at 76 (footnotes omitted).

A central trade-off restricts the utility of the traditional generic plan information brochure. Abridgement and simplified expression make information accessible, but often create the impression that general explanations and illustrations are not subject to qualification or exceptions in special circumstances. In contrast, excessive detail inhibits utilization and obscures the principal features, conditions, and limitations of the benefit plan.

New information technology may make this dilemma less pervasive and acute. Progressively more detailed and specialized information can be nested imperceptibly within a brief, high-level overview of the main features of the plan, with hyperlinks in the condensed summary allowing participants and beneficiaries to drill down to access specialized information relevant to unusual personal circumstances.

III. Incentives

A. Employers

> Although ERISA requires the distillation and dissemination of plan terms in an SPD, it offers little in the way of monetary sanctions for noncompliance. Nevertheless, self-interest should keep the employer from simply disregarding the obligation. Employee benefit plans are instituted voluntarily to serve the employer's ends, which may include increasing the firm's attractiveness in relevant labor markets, reducing workforce turnover, or increasing productivity. These objectives cannot be obtained without publicizing the advantages of the program to obtain workers' cooperation.[18]

To garner maximum advantage from employee benefit programs, plan sponsors need workers to place a high value on them. Left unsupervised, some plan sponsors (particularly those facing an uncertain future) would be inclined to tout the program by ignoring or downplaying conditions or limitations on plan benefits. This, of course, explains ERISA's insistence that the SPD contain information concerning "the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits".[19] Failure to adequately warn of the gaps and pitfalls can in some cases trigger liability to the disappointed participant or beneficiary, who is authorized to bring a civil action to obtain "appropriate equitable relief to . . . redress violations" of ERISA title I.[20]

The risk that failure to warn may render undisclosed conditions unenforceable undercuts understandable, effective disclosure.

> Incautious expansion of SPD liability creates a risk that plan sponsors will react by saying too much rather than too little. Absent judicial restraint, the temptation to engage in protective expatiation will obscure plan fundamentals

[18] ERISA PRINCIPLES, *supra* note 11, at 82 (footnotes omitted).

[19] ERISA § 102(b), 29 U.S.C. § 1022(b) (2012).

[20] ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (2012). Such equitable relief would often take the form of a claim of promissory estoppel brought by the misled worker. In addition, the Supreme Court has suggested that relief by surcharge or reformation might sometimes be justified. CIGNA Corp. v. Amara, 563 U.S. 421 (2011). On remand the Court of Appeals concluded that the employer's deliberate misrepresentations (in SPDs, summaries of material modifications, and a notice of significant reduction in the rate of future benefit accrual), when combined with concealment of the plan's actual terms, supported reformation of the plan to match the terms as publicized. Amara v. CIGNA Corp., 775 F.3d 510 (2d Cir. 2014).

> and defeat the purposes of the SPD, because too much information is likely to be ignored rather than sifted and analyzed.[21]

The problem of burgeoning documents written in "legalese" to reduce liability exposure was a central concern of the 2005 Advisory Council's studies of Communications to Retirement Plan Participants[22] and Health and Welfare Benefit Plans' Communications.[23] Indeed, the working group on retirement plan communications concluded that:

> SPDs are not written in plain English because SPDs are written by attorneys for attorneys, not for plan participants, to protect the plan sponsor from legal action.
>
> The Working Group concurs with all of the witnesses that court decisions have changed the nature of the SPD from an understandable summary of the plan provisions to a binding legal description of the plan's benefits. Plan sponsors are reluctant to distribute an SPD that is written in plain English and understandable to the average plan participant because any ambiguity in the SPD may be interpreted by a court as providing a benefit the plan sponsor never intended to provide. Plan sponsors are willing to provide the benefits they intended to provide under the terms of the formal plan document. However, plan sponsors are not willing to provide additional benefits just because the understandable language or the summary nature of the SPD is interpreted by a court as conflicting with the formal plan document and creating new or additional benefits under the plan.
>
> The Working Group sees the judicially-conferred legal status of SPDs as a primary obstacle facing plan sponsors who want to provide understandable and user-friendly SPDs to plan participants. Until SPDs are legally returned to their intended status as plan summaries that do not modify or supersede the actual terms of the formal plan document, plan sponsors can be expected to provide plan participants with SPDs written to protect the plan sponsor from potential liability, not to help the participant understand the terms of the plan.[24]

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[21] ERISA PRINCIPLES, *supra* note 11, at 83.

[22] Advisory Council Report of the Working Group on Communications to Retirement Plan Participants (2005), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/communications-to-retirement-plan-participants

> All of the witnesses stated that SPDs generally are not written in plain English but are written in "legalese." Because courts have frequently held that the provisions of the SPD control any conflicts with the provisions of the formal plan document, SPDs are written to protect plan sponsors from legal action, not to provide plan participants with basic information about their benefits. Several witnesses . . . testified that because courts have given SPDs a legal standing that was not intended under ERISA or the Labor Regulations, SPDs will continue to be written by plan sponsors' attorneys for participants' attorneys rather than by benefit communication specialists for participants until this legal standing is changed.

[23] Advisory Council Report of the Working Group on Health and Welfare Benefit Plans' Communications (2005), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/health-and-welfare-benefit-plans-communications.

> Case law has held that more favorable interpretation of benefits as described in the SPD prevails over the unambiguous plan document and that ambiguities between the SPD and the plan document be construed in favor of the participant. In response, the SPD language has become legalistic and omissions, limitations, and reservations are all listed to mitigate litigation.

(Endnotes omitted.)

[24] *Supra* note 22.

Similarly, the 2005 working group on health and welfare plan communications "concluded that that the SPD is no longer accomplishing its original goals (i.e., to be a summary of the plan and to be easily understood by the participant)."[25]

These complaints are valid, but they fail to grapple with, nor even acknowledge, an inconvenient reality. The function of the SPD is not simply to provide an easily understood summary of the plan. Rather, ERISA's goal of promoting economic efficiency—facilitating workers' career and financial planning—demands that the SPD provide an *accurate* easily understood summary of the plan. A participant cannot correctly evaluate competing job opportunities nor determine her need for additional savings or supplementary insurance if she cannot count on the information conveyed by the SPD. To achieve ERISA's objectives, the SPD must give participants *accessible and reliable* information about the plan. Reliability requires that the language of the SPD must in some situations legally "supersede the actual terms of the formal plan document."[26] To be actionable, the SPD must be reasonably reliable, and therefore the pressure toward excessive detail is inescapable. To preserve understandability, the pressure must be counterbalanced, not ignored.

Aiming at optimal disclosure, plan sponsors might reasonably object, puts the administrator in an untenable position. The best compromise between accessibility and reliability demands a nuanced judgement call—the optimum will rarely be indisputable. Exposure to potential liability for missing the mark in either direction, as suggested here, will drive sponsors away from the extremes (discouraging the detailed, incomprehensible liability-shield SPD, for example) toward the middle ground. Yet countervailing incentives cannot ensure that the plan administrator will identify some theoretically perfect solution. In response, it's important to recognize that the perfect solution need not be attained to defeat damage claims. The proper balance between "understandable" and "sufficiently accurate and comprehensive" information entails an exercise of judgement by the plan administrator, and such discretionary decision-making is therefore a fiduciary act under ERISA.[27] If the plan document includes an express grant of discretionary authority to implement the plan (as virtually all plan documents now do), then the administrator's determinations on disclosure should, if challenged in court, be subject to the restricted abuse-of-discretion standard of review.[28] Under that relaxed level of judicial oversight, the balance struck by the plan administrator will be upheld if it falls within a range of reasonableness—it need not be the "correct" result (meaning, as a practical matter, the outcome that seems best to a judge in hindsight). As a practical matter, therefore, the plan administrator's good faith resolution of the tension between accessible and reliable information is very likely to withstand attack, which will of course deter challenges in the first place.

Current law provides no explicit mechanism for reining in an overly detailed technically-worded SPD. Yet a subtle indirect strategy might achieve results. Participants won't use a bloated legalistic SPD, but the plan sponsor cannot afford to have its workers undervalue the benefits provided. Consequently, the employer will resort to other methods of publicizing the advantages of the plan, either written or oral. Courts might be persuaded to rule that an overly

[25] *Supra* note 23. The report observed that "To the extent that the SPD is simply a reiteration of the plan document, it is not accomplishing ERISA's goals," and recommended that "if necessary, [DOL] propose legislation to amend ERISA to restore the original purpose and status of SPDs". *Id.* Observe that the "goals" and "original purpose" of the SPD were not directly specified. The report's emphasis was on promoting "understandable and user-friendly SPDs". That emphasis neglects ERISA's economic efficiency objective, which requires that disclosures be both understandable *and* accurate; to facilitate workers' career and financial planning the disclosure of plan terms must be reliable.

[26] See quotation accompanying note 24, *supra*.

[27] ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (2012).

[28] *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008).

detailed formal description is not an SPD within the meaning of ERISA, and correspondingly hold that the employer's informal promotional explanations serve, alone or in combination, as a de facto SPD. The prospect of liability based on such informal (and frequently incautious) presentations could create a powerful stimulus to craft a balanced, abbreviated explanation.[29] Countervailing legal exposure, in other words, might encourage *optimal* disclosure. Perhaps the Labor Department could encourage the law to develop in this direction by issuing an interpretive regulation or general statement of policy declaring that an overly complex or lengthy plan explanation is not an SPD. Or in cases where the purported SPD fails as an understandable summary, the Department might participate in litigation by participants seeking to hold the plan sponsor to representations made via informal communications (on the theory that such communications function as de facto SPDs).

B. Employees

"[T]he employer is held to exacting standards in formulating the SPD to ensure that employees have on hand a reliable source of understandable information about the plan, which suggests that employees should have a reciprocal duty to use it."[30] This principle is especially salient in determining whether informal advice or communications should bind the plan. The participant or beneficiary who is mistakenly told by a staff member in the benefits department that a particular medical procedure is covered by the plan, or who calls the information center of the plan's third-party administrator and gets such advice, may proceed without further inquiry. When a claim for benefits is subsequently denied the participant or beneficiary will complain that she relied on such assurances and may bring suit for equitable relief based on that misleading information (promissory estoppel). A long line of cases refuses to apply estoppel to permit oral modifications of employee benefit plans.[31] That resolution is surely correct where a claim for benefits is founded on an oral statement that is clearly inconsistent with the SPD.[32]

> Parol variance claims are properly rejected for two reasons. The first is that the conditions of promissory estoppel cannot be satisfied. Because the SPD gives participants ready access to trustworthy plan information, reliance on oral representations that contradict the summary cannot be either reasonable or justifiable. Even oral representations that purport to reflect plan amendments (thereby explaining away the SPD inconsistency) should be dismissed because ERISA requires authentic plan changes to be reported to participants in *writing*, via a summary of material modifications ([SMM]). In formulating the SPD, an employer is held to exacting standards of draftsmanship. But a meticulously crafted document is only a means of fostering better employee career and financial planning. To achieve that objective, workers should be given incentives to use its contents. Enforcement of contradictory oral statements is undesirable because it would diminish that impetus.
>
> The second reason parol variance claims are properly rejected is that ERISA's writing requirement stands as a barrier to oral modifications.[33]

[29] *See* ERISA PRINCIPLES, *supra* note 11, at 82-83.

[30] *Id.*

[31] *See*, e.g., Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986).

[32] The qualification "clearly inconsistent" is meant to invoke the standard governing the SPD, "calculated to be understood by the average plan participant". Where the inconsistency is not reasonably discernable by the average plan participant, the problem should be analyzed as an instance of an incomplete or ambiguous SPD, and different principles should apply. *See* ERISA PRINCIPLES, *supra* note 11, at 74-83, 84.

[33] ERISA PRINCIPLES, *supra* note 11, at 84-85 (footnotes omitted). ERISA's writing requirement operates to "guarantee the authenticity of the alleged promise (an evidentiary function), preventing opportunistic plan revisions based on malleable words and fallible memories." *Id.* at 85. Preventing proliferation of variances based

> Holding the sponsor to statements that interpret or apply the provisions of the plan is much less problematic than enforcing statements that are inconsistent with the summary description. Statements that interpret ambiguities or reflect an exercise of discretion merely clarify the plan, without in any way contradicting the SPD. Consequently, such statements can be given effect without undermining the special role of the SPD as the principal and authoritative source of plan information. If written, such clarifying statements are obviously compatible with ERISA's writing requirement. But even oral clarifications involve no real conflict with the writing requirement because only the "plan" must be documented, not its application to every set of facts.[34]

IV. Experience and Implications

Experience with ERISA's disclosure regime over more than four decades—including an explosion of civil enforcement actions premised on allegedly faulty disclosures—reveals some major trouble spots that merit the attention of regulators and policy-makers. Listed below are some of the most important lessons, with a brief indication of the opportunities or challenges they present.

1. Tension between reliable and understandable communication is inevitable. To be utilized complex information must be distilled and summarized. A simplified summary presentation necessarily omits details that will prove important or even determinative in unusual circumstances. My study of litigation based on SPD disclosures reveals that information failures fall into three distinct categories, and suggests that they should be treated differently, as follows:

   - Inaccurate SPD—Where the language of the SPD conflicts with the terms of the plan the SPD should govern, even if the SPD contains a "disclaimer clause" asserting that in the event of conflict or ambiguity the terms of the plan document will control. "Any other rule would be . . . grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary."[35]

   - Self-Contradictory SPD—

     > If, instead of contradicting the underlying plan documents, the SPD contradicts itself, the courts generally refuse to impose liability, on the view that reliance is unjustified. If a reasonable participant's careful reading of the SPD alone reveals an inconsistency, further investigation would seem to be the prudent response. Accordingly, where the SPD is obviously defective, the participant arguably has a duty to consult the terms of the underlying plan documents and fails to do so at his peril.[36]

     This analysis is necessarily limited to contradictions that would be apparent to an average plan participant. It is unfair to impose a duty to inquire where the participant could not reasonably discern the contradiction and so is not on notice

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upon informal communications allows the plan sponsor to control costs and thereby promotes plan sponsorship by preserving employer autonomy.

[34] ERISA PRINCIPLES, *supra* note 11, at 86.

[35] Hansen v. Cont'l Ins. Co. 940 F.2d 971, 981-82 (5th Cir. 1991). *See generally* ERISA PRINCIPLES, *supra* note 11, at 65-67.

[36] ERISA PRINCIPLES, *supra* note 11, at 70.

of a problem. Some appellate decisions, however, refuse to impose liability on the plan sponsor in circumstances where the asserted contradiction is highly technical and legalistic, and very likely to be invisible to the plan participants.[37]

- Incomplete SPD—Where the SPD is silent on an issue that the plan documents address ERISA offers no clear guidance. The courts have generally ruled that, absent a direct contraction between the SPD and the plan documents, the terms of the plan control. That categorical approach is oversimplified and often does a disservice to ERISA policies. To be useful to its intended audience, an SPD must summarize by simplifying and omitting detail, but a simplified description will often appear to announce a general rule that admits of no exceptions or qualifications. To achieve optimal disclosure, focus should be on whether the SPD omission was material. Under this material omissions approach the plan sponsor would be bound by the terms of the SPD and reasonable inferences based thereon "*unless*: (1) the SPD contained a particularized warning that additional information should be consulted in special circumstances; (2) the omission would not have been material to a person in the claimant's position; or (3) its importance was not known or foreseeable to the plan sponsor."[38]

Guidance from the Department of Labor, perhaps in the form of an Interpretive Bulletin or general statement of policy, would assist both plan administrators and the courts in recognizing the salience, policy relevance, and potentially different legal consequences of the foregoing three categories of disclosure defects. In the long run, such a regulatory clarification seems likely to yield more useful disclosures and better-informed career and financial planning.

2. As the preceding analysis suggests, SPD disclaimer clauses present thorny issues in some situations. Disclaimer clauses, which assert that the terms of the plan will control in cases where the SPD conflicts with the plan document or is found to be ambiguous or incomplete, cannot be effective in all events because that would defeat the informational objectives of ERISA, particularly undermining the planning/economic efficiency goal.

3. Reservation-of-rights clauses (ordinarily contained the plan but also often appearing in the SPD), which declare that the sponsor has continuing authority to amend or terminate the plan, are quite generally effective.[39] But combined with representations about the future of the benefit program (e.g., that it will remain in force, or that benefit levels will not be reduced), these warnings create an ambiguity which may be imperceptible to the average plan participant, creating a trap for the unwary. The Department might consider issuing guidance to plan administrators reminding them that durational representations (e.g., statements that the current program will continue as is for the remainder of the participant's life, or until the expiration of the current collective bargaining agreement) are risky. They can create binding legal obligations

[37] The leading examples involve SPD promises of free retiree health care coverage for life, allegedly contradicted by boilerplate assertions of the sponsor's continuing authority to amend the plan. Typically, such "reservation of rights" clauses appear as an inconspicuous statement at the end of the booklet, far removed from the prominent representation of lifelong no-cost health care. *See*, *e.g.*, In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 907 (3d Cir. 1995); Sprague v. Gen. Motors Corp., 133 F.3d 388, 400-01 (6th Cir. 1998) (en banc). *See generally* ERISA PRINCIPLES, *supra* note 11, at 70-74.

[38] ERISA PRINCIPLES, *supra* note 11, at 77 (emphasis in original); *see generally id.* at 74-81.

[39] *See* ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) (2012) (employee benefit plans must provide a mechanism for amendment). *But see* ERISA §§ 204(g), 4041, 29 U.S.C. §§ 1054(g), 1341 (2012) (amendments reducing accrued pension benefits prohibited; limitation on termination of underfunded single-employer defined benefit pension plans).

under ERISA (so-called vesting by contract). Such guidance might indicate that in the Department's view durational commitments should in appropriate circumstances be interpreted to impose limits on a reservation-of-rights clause (rather than vice versa).

4. The current summary annual report (SAR) disclosures[40] do not provide useful financial information to plan participants. The 2005 Advisory Council recognized the irrelevance of the SAR to retirement plan participants.[41] The observation applies with equal or greater force to welfare plans.

5. Electronic disclosure, combined with the increasing ubiquity of smart mobile devices, pose some intriguing new opportunities and challenges.
    - As observed in Part II above, electronic or digital disclosure could allow nesting of information and progressive access on demand to increasingly detailed, specialized information. With thoughtful design, such a progressive disclosure framework might go far toward mitigating the tension between understandability, which calls for simplification and condensation, and accuracy, which counsels in favor of more complete information sharing. In most workforces, however, the average employee is simply not equipped to understand the more complex features of a pension or health care plan even if those features are readily accessible. For that reason my tentative conclusion is that progressive disclosure is not an adequate substitute for optimal summary disclosure: most participants will need to base most of their career and financial planning decisions on simplified general information. Consequently, getting the SPD right—meaning striking the appropriate balance between understandability and reliability—still matters in a digital universe.

    - Access to plan coverage information through mobile devices (smartphones, tablets, etc.) could be particularly beneficial for health plan participants and beneficiaries. It would allow them to check on covered services, devices, and drugs at the point of decision-making (in the doctor's office, the hospital, or at the pharmacy) and alert them to required out-of-pocket contributions (co-pays, deductibles, and co-insurance obligations).

    - Digital disclosure could also be utilized to provide (via hyperlinks) health care plan protocols and "other instruments under which the plan is established or operated."[42] Ready access to such supporting documents would permit quick confirmation of whether a particular health care provider is in the plan's network, or is instead an out-of-network provider the cost of whose services will be reimbursed at a lower rate. Similarly, it would allow a quick check on the status of a particular prescription pharmaceutical on the plan's drug formulary. Ultimately, one might envision a system in which comprehensive health care plan information is accessible by medical/dental providers: the professionals' understanding of technical limitations might be harnessed to expertly assist plan participants and beneficiaries by filtering and interpreting abstruse medical information.

    - In order to monitor and enforce the plan administrator's obligation to provide timely, understandable and reliable information, it will be important to require

[40] *See* 29 C.F.R. § 2520.104b-10.

[41] *Supra* note 22.

[42] ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4) (2012) (requiring that such instruments be furnished to any plan participant or beneficiary upon written request).

maintenance of an archive of all versions of digital disclosure documents having official status under ERISA (including the SPD, each SMM, and any ERISA § 204(h) pension accrual rate reduction notices).[43]

[43] *See* ERISA § 107, 29 U.S.C. § 1007 (2012) (requiring retention of records from which the accuracy and completeness of required reports can be verified for a minimum of six years after filing of the report).