INCONCEIVABLE?—UNDERSTANDABLE ERISA DISCLOSURES[†]

Peter J. Wiedenbeck

Enhancing economic efficiency by giving workers accessible and reliable information on which to base their career and financial planning is a key goal of federal regulation of pension and welfare benefit plans. To that end, the law requires curated disclosure of plan-related information: it must be presented in a format that is both understandable to the average plan participant and sufficiently complete to empower workers to make good use of the program.

In practice, understandability was jettisoned as plan sponsors resorted to detailed, complex disclosures to protect themselves from litigation. Liability-shield disclosures are incomprehensible to workers, but there was no enforcement of the understandability standard, and sponsors used unregulated informal communications to promote their benefit plans.

Reviving understandability requires giving plan administrators incentives to take effective communication seriously when reporting to workers. Yet simply imposing liability for want of understandability is untenable. Under a regime that also imposes liability in cases of incomplete disclosure, litigation risk and administrative expenses

Peter J. Wiedenbeck is the Joseph H. Zumbalen Professor of the Law of Property, Washington University in St. Louis. Comments should be directed to peter.wiedenbeck@wustl.edu. Professor Colleen Medill and other members of the 2017 Advisory Council on Employee Welfare and Pension Benefit Plans (hereinafter ERISA Advisory Council) deserve special thanks for insightful work on this subject. (They may disagree with the views expressed herein.) The author is grateful for helpful comments on earlier versions of this paper by Sean Anderson, Scott Baker, Jens Frankenreiter, Arthur Laby, Dana Muir, Joel Seligman, Bryce Wiedenbeck, and the organizers and participants in the ERISA at 50 conference held at Catholic University Columbus School of Law September 12-13, 2024.

would dramatically escalate, driving employers away from plan sponsorship.

This Article explores three approaches to making disclosures simultaneously understandable and adequately informative: (1) establishing a zone of security for reasonable albeit imperfect attempts to strike a balance between accessible and reliable information; (2) prescribing standardized reports similar to those required in consumer credit transactions; and (3) harnessing generative artificial intelligence to provide bespoke on-demand automated understandable summaries. Unfortunately, each of these alternatives is shown to entail formidable costs.

Introduction

Enhancement of overall economic efficiency is a central goal of federal regulation of pension and welfare benefit plans.[1] Providing workers with accessible and reliable information on which to base their career and financial planning is one important mechanism for accomplishing that goal.[2] Simple dissemination of plan terms and financial data (full disclosure) cannot achieve that objective because few workers are equipped with the skills needed to evaluate the costs and benefits of complex retirement saving or health care programs. For that reason, the Employee Retirement Income Security Act of 1974 (ERISA)[3] requires curated disclosure of plan-related information: it must be presented a format that is both understandable to the average plan participant and sufficiently complete to empower workers to make good use of the program.[4]

The length and complexity of most employee benefit plans create tension between understandability and completeness. Plan sponsors responded to litigation imposing liability for failing to tell workers

1. Employee benefit plans are regulated to protect "the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce." 29 U.S.C. § 1001(a). Yet, economic efficiency operated as an unstated background objective that was not specifically invoked during the lengthy legislative gestation. *See generally* JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, A POLITICAL HISTORY (2004). Scholarly commentary has brought to light the centrality of the efficiency objective, particularly with respect to disclosure issues. PETER J. WIEDENBECK & BRENDAN S. MAHER, ERISA PRINCIPLES 15-16, 71-72 (2024); Peter J. Wiedenbeck, *Implementing ERISA: Of Policies and "Plans"*, 72 WASH. U. L.Q. 559, 568, 574 (1994).

2. *See infra* notes 27-30 and accompanying text.

3. *See* Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001–1461 and scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., and 42 U.S.C.). In conformity with the common practice among employee benefit law specialists, citations to specific provisions of ERISA point to the section numbers of the original statute followed by a parallel citation to the location of the provisions in the United States Code.

4. *See infra* notes 31, 60–64 and accompanying text.

enough by jettisoning understandability.[5] Required plan "summaries" morphed into detailed, complex, technically worded disclaimer documents, incomprehensible to plan participants.[6] Plan sponsors got away with that, both because there was no administrative or judicial enforcement of the understandability standard,[7] and because they could tout the advantages of their benefit plans to workers by means of unregulated informal communications.[8]

Observers have frequently lamented the disappearance of simple summary explanations,[9] yet most employee benefits specialists seem to accept the loss as inevitable. Indeed, many experts view the dual mandate, that summary exposition of plan terms be both understandable and reasonably accurate and complete, as contradictory and incoherent.[10] While it is true that competing values cannot be simultaneously maximized, it is also true that the abandonment of understandability undermines workers' career and financial planning, putting a drag on economic performance. Thoughtful tradeoffs between comprehensible and reliable communication would better serve the legislative objective.

At this late date, some fifty years after ERISA's enactment, reviving understandability might seem fantastical. Policymakers have not entirely forsaken the project, however. Legislation enacted in 2022 mandates a study of the effectiveness of pension and retirement plan disclosures, to ensure that "participants and beneficiaries timely receive and better understand the information they need to monitor their plans, plan for retirement, and obtain the benefits they have earned."[11] The Department of Labor, the Internal Revenue Service, and the Pension

5. *See infra* notes 81–91 and accompanying text.
6. *See infra* notes 87–91 and accompanying text.
7. *See infra* notes 71–74, 120 and accompanying text.
8. *See infra* notes 114–23 and accompanying text.
9. *See infra* notes 86–91 and accompanying text.
10. *See, e.g.*, David Pratt, *Summary Plan Descriptions After Amara*, 45 J. MARSHALL L. REV. 811, 852–55 (2012) ("Ever since the enactment of ERISA, it has been clear that it is very difficult, if not impossible, to write an SPD that is accurate and understandable and cannot be misunderstood."); ERISA 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/2005-health-and-welfare-benefit-plans-communications ("[The] consensus of the plan administrator[s] . . . was that the DOL's requirement that SPDs be written in a manner calculated to be understood by the average participant has become almost impossible to attain.").
11. SECURE 2.0 Act of 2022, Pub. L. No. 117-328, § 319(b)(1), 136 Stat. 5275, 5353–54.

Benefit Guaranty Corporation (PBGC) are currently conducting that study with the goal of reporting their results and recommendations to Congress by December 29, 2025.[12]

Part I of this Article examines the functions of disclosure and how those functions inform (or should inform) the content of disclosure. Part II chronicles the demise of the requirement that participants and beneficiaries be provided an understandable summary of plan terms. Part III explores whether the understandability norm could be revived, and, if so, at what cost. Although sponsors currently have no incentive to take understandability seriously, that deficiency could be readily corrected. The cost associated with that move is formidable, however: incentivizing simplification without narrowing liability for incomplete disclosures could drive employers away from plan sponsorship. A zone of security for reasonable, albeit imperfect attempts to strike a balance between understandable and reliable information is essential. Part IV outlines one approach to inducing optimal disclosure that could be pursued utilizing the Department of Labor's existing rulemaking authority. Part V surveys a very different strategy: minimum standards mandating standardized and simplified reporting of specified key plan terms, like the disclosures required by the Truth in Lending Act of borrowing costs, fees, service charges and other terms of consumer credit transactions.[13] Part VI briefly discusses the prospect that large language models (LLMs) might eventually be capable of producing accurate simplified summaries of plan information, allowing generative artificial intelligence (GenAI) to replace traditional participant-facing ERISA disclosures. Unfortunately, at this time none of the approaches explored here offers a silver bullet to optimal disclosure.

12. Request for Information on the Effectiveness of Reporting and Disclosure Requirements, 89 Fed. Reg. 4215 (Jan. 23, 2024), *extended by* 89 Fed. Reg. 22971 (Apr. 3, 2024).

13. *See* 15 U.S.C. §§ 1601–1667f; Regulation Z, 12 C.F.R. Part 1026 (2024).

I. Disclosure Policy

A. Functions of Disclosure[14]

ERISA demands routine disclosure of three kinds of information: (1) the terms of the plan; (2) the current financial status of the plan; and (3) the participant's current entitlement to benefits under a pension plan.[15] These regular disclosures are supplemented by the right of access to more detailed information: the instruments under which the plan is operated must be available for examination, and a copy must be provided by the administrator upon written request from a participant or beneficiary.[16] Beyond these central information-sharing obligations, ERISA also imposes many highly-granular disclosure requirements, which are specific to particular types of plans or are triggered by specific events.[17]

Disclosure was not an end goal of Congress in enacting ERISA. Disclosure was adopted as a means to serve broader legislative objectives. Promoting compliance with and enforcement of statutory obligations was one objective. Transparency was expected to dissuade plan fiduciaries from breaching their duties[18] and to equip participants and

14. This overview of disclosure policy is drawn from Peter J. Wiedenbeck, *Refining Mandated Disclosure: Statement Presented to the ERISA Advisory Council June 6, 2017* (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper, Paper No. 17-06-01, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982433 [https://perma.cc/3MFF-KBWA].

15. ERISA §§ 102, 104(b)(3), 105, 29 U.S.C. §§ 1022, 1024(b)(3), 1025 (summary plan description, summary annual report, and pension benefit statement, respectively).

16. *Id.* § 1024(b)(2), (4).

17. Since ERISA's enactment, the number of required notifications and reporting obligations has proliferated. The December 2022 edition of a Labor Department guide to information obligations contains a chart, "Overview of ERISA Title I Basic Disclosure Requirements," that runs to fifteen pages and is followed by a four-page chart giving an "Overview of Basic PBGC Reporting and Disclosure Requirements." EMPLOYEE BENEFITS SECURITY ADMINISTRATION, U.S. DEPARTMENT OF LABOR, REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFIT PLANS (2022), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf [https://perma.cc/NTT4-6HGV]. Similarly, an IRS guide of tax reporting obligations fills sixteen pages. IRS, PUB. 5411, RETIREMENT PLAN REPORTING AND DISCLOSURE REQUIREMENTS (2020), https://www.irs.gov/pub/irs-pdf/p5411.pdf [https://perma.cc/A6GT-DKAB].

18. The objective of deterring abuses through disclosure substantially predates ERISA. It was a central goal of ERISA's predecessor statute, the Welfare and Pension

beneficiaries with information necessary to recognize defalcations and bring suit to remedy them.[19] Disclosure would "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

Plans Disclosure Act of 1958, Pub. L. No. 85-836, 72 Stat. 997 (repealed 1974) [hereinafter WPPDA]. *See generally* U.S. Department of Labor, Legislative History of the Welfare and Pension Plans Disclosure Act of 1958 as Amended by Public Law 87-420 of 1962, at 122–65 (1962) [hereinafter WPPDA LEGISLATIVE HISTORY].

> Complete disclosure of the details of welfare and pension plan operations provides the most effective single deterrent against abuses and the many other weaknesses of these plans. It would provide the greatest incentive to good management and investment policies and the best protection to the interests and rights of employees, employers, and the Government alike.

S. REP. NO. 85-1440, at 17 (1958), *reprinted in* WPPDA LEGISLATIVE HISTORY, *supra*, at 135.

> [I]t is the belief of the committee that legislation which will enable the participants and beneficiaries of pension and welfare benefit plans to obtain the facts with respect to their operation will permit self-policing and self-appraisal of these plans by the participants and beneficiaries. With such information [they] will be in a better position to seek relief under existing laws of the various States and the Federal Government against malpractices which may occur in the management and operation of such plans.

H.R. REP. NO. 85-2283, at 9 (1958), *reprinted in* WPPDA LEGISLATIVE HISTORY, *supra*, at 139–40. Despite its goal of deterring mismanagement and abuse, the WPPDA conferred neither fiduciary protections nor other substantive rights on plan participants and beneficiaries, nor did it offer any federal enforcement mechanism. Indeed, as amended in 1962, the WPPDA expressly declared that "[n]othing contained in this Act shall be so construed or applied as to authorize the Secretary [of Labor] to regulate, or interfere in the management of, any employee welfare or pension benefit plan." WPPDA § 9(h), Pub. L. No. 87-420, § 15(b), 76 Stat. 35, 37–38 (1962) (repealed 1974).

A 1965 Cabinet committee report noted that fiduciary accountability depends on information access and recommended strengthening WPPDA disclosure provisions but stopped short of endorsing federal fiduciary obligations or enforcement. PRESIDENT'S COMM. ON CORPORATE PENSION FUNDS AND OTHER PRIVATE RETIREMENT AND WELFARE PROGRAMS, PUBLIC POLICY AND PRIVATE PENSION PROGRAMS xv-xvi, 77–79 (1965). By the mid-1960s, the WPPDA was widely deemed ineffective. *See* Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* STAFF OF THE S. SPECIAL COMM. ON AGING, 98TH CONG., THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE 1, 6–8 (Comm. Print 1984); WOOTEN, *supra* note 1, at 45–50.

19. In contrast to the absence of substantive rights and federal enforcement mechanisms under the WPPDA, ERISA's disclosure regime is coupled with exacting federal fiduciary obligations and a civil enforcement scheme that empowers participants and beneficiaries to bring private suits to vindicate their rights under the terms of the plan and ERISA, including actions to prevent or remedy breaches of fiduciary obligations. ERISA §§ 401–414, 502, 29 U.S.C. §§ 1101–1114, 1132.

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."[20]

Since ERISA's enactment, social science research has cast serious doubt on the efficacy of disclosure in reducing harms caused by conflicts of interest.[21] Sunlight, it seems, may not be the best disinfectant.[22] Experimental studies have repeatedly demonstrated that disclosure of a conflict, instead of inducing appropriate wariness by the person alerted to his vulnerability, may make matters worse.[23] Disclosure can backfire by inducing the conflicted party to give more biased advice which the recipient insufficiently discounts; in some circumstances, disclosure actually increases the likelihood that biased advice will be followed.[24] In explaining the 2024 final rule on investment fiduciaries, the Employee Benefits Security Administration (EBSA) acknowledged that disclosure of a conflict of interest is no cure-all.[25] Conflict disclosure standing alone may be insufficiently protective, or even perverse. Importantly, however, conflict disclosure under ERISA does *not* stand alone: an injury traceable to conflicted action generates civil liability,

20. S. REP. NO. 93-127, at 27 (1973), *reprinted in* 1 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 587, 613 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY]; H.R. REP. NO. 93-533, at 11 (1973), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra*, at 2348, 2358.

21. *See generally* George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 AM. ECON. REV. 423–28 (2011); Daylian M. Cain, George Loewenstein & Don A. Moore, *Coming Clean but Playing Dirtier*, *in* CONFLICTS OF INTEREST 104–25 (Don A. Moore, Daylian M. Cain, George Loewenstein & Max H. Bazerman eds. 2005).

22. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

23. *E.g.*, Loewenstein et al., *supra* note 21, at 423–28; George Loewenstein, Sunita Sah & Daylian M. Cain, *The Unintended Consequences of Conflict of Interest Disclosure*, 307 JAMA 669, 669–70 (2012) (addressing conflicted medical advice); Daylian M. Cain, George Loewenstein & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEG. STUD. 1, 1–22 (2005).

24. Loewenstein et al., *supra* note 21, at 423–26.

25. Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122, 32187 n.392 (Apr. 25, 2024) (citing Loewenstein et al., *supra* note 21).

may trigger prohibited transaction penalty taxes or civil penalties, and, in egregious cases, can result in removal of the defaulting fiduciary.[26]

The wrongheaded disclosure concern is not implicated by ERISA's many disclosure obligations imposed to assist participants and beneficiaries in arranging their affairs so as to derive maximal 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);[27] 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. 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.

26. ERISA §§ 404(a)(1), 406, 409(a), 502(a)(2), (3), (*l*), 29 U.S.C. §§ 1104(a)(1), 1106, 1109(a), 1132(a)(2), (3), (*l*). The penalty tax is imposed on any disqualified person who participates in a prohibited transaction, where "disqualified person" is defined broadly to capture persons related to the plan, the plan sponsor, a union whose members are covered by the plan, and a fiduciary "not acting only as such" (for example, a fiduciary pursuing his own personal interest or that of a third party). I.R.C. § 4975(a), (e)(2).

27. John Erlenborn, Republican House manager of the bill that became ERISA, observed:

> [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.

120 CONG. REC. 4284 (1974), *reprinted in* 2 ERISA LEGISLATIVE HISTORY, *supra* note 20, at 3386–87. Congressman John Dent credited Erlenborn as having "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," and called this "one of the cornerstones of reform." 120 CONG. REC. 29195–96 (1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY, *supra* note 20, at 4665; *accord* S. REP. 92–1150, at 10 (quoted *infra* note 64).

Relatedly, disclosure also promotes the exchange of ideas and sharing of experiences within the workforce and between employees and their employer.[28] Mandated disclosure offers workers indirect notification of important benefits-related issues.[29] It can also stimulate feedback that alerts the plan sponsor to workers' compensation and benefit priorities and shared concerns about existing benefit programs.[30]

The disclosure objectives introduced above will be called the compliance function, the planning function, and the collaboration function. In some circumstances, the form and content of disclosures might be tailored to the principal objective of a particular release of information. Where compliance is the main goal, for example, detailed reporting of financial transactions between related parties or involving a conflicted decision maker might be appropriate, even though the large majority of workers would not understand or attend to the information. If the

28. 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.

This collaborative function of disclosure is perhaps an unforeseen consequence of the statute—a post-enactment judicial construct. Yet, like worker career and financial planning, it too has efficiency implications.

29. At oral argument in *Amara*, Justice Kagan observed:

> Very few people read their SPDs, but you only need one person to read the SPD to come in and say, by the way, folks, 21,000 of us are not getting our retirement benefits for the next few years, and within a day every employee in the workplace is going to know about that.

Transcript of Oral Argument at 55, *CIGNA Corp*., 563 U.S. 421 (2011) (No. 09-804).

30. This feedback (or collaboration function) is facilitated by ERISA § 204(h), 29 U.S.C. § 1054(h), 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.

data is public, one or a few suspicious employees (or union officials) consulting a professional could be all that it takes to trigger enforcement efforts.

In contrast, if better career or financial planning is the goal, disclosures should be geared to the level of education and financial sophistication of the workforce, because each participant needs to integrate the information into his or her own life decisions. Hence, information must be distilled and conveyed in a simplified presentation to derive maximum benefits from disclosure. At least eleven provisions of ERISA demand disclosure of specified information "written in a manner calculated to be understood by the average plan participant."[31] Such understandability requirements impose special challenges and are the focus of this Article.

It bears emphasis that each of these functions—compliance, planning, and collaboration—requires that the information disclosed be reliable. Importantly, planning requires more: the distributed information must be *both* reliable *and understandable*. Careful plans founded on invalid data will not enhance economic efficiency. Nor can lives be improved by conveying accurate information in a way that workers cannot understand and exploit.

B. Disclosure Responsibility

ERISA imposes most disclosure obligations on the plan administrator,[32] which is most commonly the plan sponsor.[33] Despite all the changes in labor markets and benefit programs since the statute was enacted, the choice to impose mandatory disclosure on the sponsor, the person who sets the terms of the plan,[34] still makes sense today.

31. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: CLARITY OF REQUIRED REPORTS AND DISCLOSURES COULD BE IMPROVED 71 (2013), https://www.gao.gov/assets/gao-14-92.pdf [https://perma.cc/B4KZ-H7E7].

32. *E.g.*, ERISA §§ 101(a), (e)(1), (f)(1), (i)(1), (j), (k)(1), (m), 105(a)(1), 113(a)(1), 204(h)(1), 404(c)(4)(C), 29 U.S.C. §§ 1021(a), (e)(1), (f)(1), (i)(1), (j), (k)(1), (m), 1025 (a)(1), 1032(a)(1), 1054(h)(1), 1104(c)(4)(C) (2018); *see also* I.R.C. §§ 402(f), 414(g) (rollover notices).

33. The administrator is the plan sponsor unless the terms of the plan designate another person. ERISA § 3(16), 29 U.S.C. § 1002(16).

34. In the case of a plan established or maintained by a single employer, the employer is the plan sponsor. The sponsor is the union if the plan is established or maintained by the union. In the case of a multiemployer plan, the sponsor is the joint board of trustees or other group that establishes or maintains the plan. *Id.* § 1002(16)(B), (37). In each instance, ERISA designates as sponsor the person or organization empowered to prescribe plan terms.

ERISA disclosure law was originally envisioned as "one of the cornerstones of [pension] reform."[35] The consumer protection impulse of the legislation's proponents—to give "an ordinary employee the assured right to receive what a reasonable person in his boots would have expected in the circumstances"[36]—points toward a system of understandable and readily enforceable benefit commitments. That approach would insist that the deal as advertised to workers fix the benefits workers actually obtain, without regard to obfuscatory disclaimers and undisclosed conditions and limitations.

Congress was not single-mindedly consumer protective, however. Apart from its mandatory minimum standards concerning discrete issues of pension plan content (including vesting, funding, spousal protection, anti-alienation, and defined benefit plan termination insurance), ERISA leaves employers free to set the terms of the pension contract.[37] And in the case of welfare benefit plans, this residual employer autonomy amounts to unalloyed *laissez faire*—virtually complete freedom of contract.[38] Flexibility to design the plan to best serve the employer's objectives, secured by ERISA's broad preemption of state laws, was an acknowledgement that employee benefit plans are voluntary programs.[39] As such, legislated quality controls, if taken too

35. *See supra* note 27; *see also* Daniel Halperin, Stanley S. Surrey Professor of L., Harv. L. Sch., Remarks at Panel 5: Some New Ideas and Some New Bottles: Tax and Minimum Standards in ERISA, *in* 6 DREXEL L. REV. 385, 400 (2014) (observing that greater retirement plan coverage was not the focus of ERISA, instead, "[t]he focus was saying, '[y]ou can promise whatever you want, but if you promise it, you got to deliver it.'").

36. ERISA "was, at its core, a 'reasonable expectations' bill. It gave an ordinary employee the assured right to receive what a reasonable person in his boots would have expected in the circumstances." Frank Cummings, *ERISA: The Reasonable Expectations Bill*, 65 TAX NOTES 880, 881 (1994) ("Primarily, it was a consumer protection bill.").

37. To be more precise, the company ordinarily sets plan terms unilaterally for a nonunionized workforce, but terms are the subject of negotiation in the case of a collectively bargained plan. Allied Chem. Workers, Loc. Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 159 (1971) ("[M]andatory subjects of collective bargaining include pension and insurance benefits for active employees."); *id.* at 180 ("[F]uture retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.").

38. *See* Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1044–51 (2018).

39. Pension plans can be designed to promote different personnel policies according to the needs of the business. Some employers may wish to provide an incentive to increase job tenure, thereby reducing recruitment and training costs,

far, would hinder the growth of benefit programs.[40] Accordingly, employers are allowed to craft workforce-specific eligibility rules, benefit levels, and many other conditions and limitations.[41] The resulting diversity of plan terms complicates communication, employee planning, and judicial enforcement.

In theory, private information intermediaries could perform the translation and filtering needed to render disclosures understandable. In an earlier era, unions were positioned to undertake that task for many workers, but the decline of collectively-bargained plans leaves the large majority of employee benefit plan members without access to that information source.[42] At first glance, it would seem that the enormous wealth accumulated in private pension plans—some $13.2 trillion as of 2021[43]—might support a private market for expert advice, so perhaps certified financial planners could be enlisted. Average plan

while other businesses (especially since the elimination of mandatory retirement) may seek humane means for limiting job tenure, using the pension plan to ease out superannuated workers. Some pension plans are geared to providing a secure source of retirement income by accumulating regular contributions in a diversified investment portfolio for periodic distribution over the employee's retirement years, while others—such as profit-sharing and stock bonus plans—can be geared to provide a productivity incentive by making contributions dependent on firm output or profits, or by investing heavily in employer securities. *See* TERESA GHILARDUCCI, LABOR'S CAPITAL: THE ECONOMICS AND POLITICS OF PRIVATE PENSIONS 15–16, 20, 140–41 (1992) (discussing flexibility as an important attribute of pensions for employers); Nancy J. Altman, *Rethinking Retirement Income Policies: Nondiscrimination, Integration, and the Quest for Worker Security*, 42 TAX L. REV. 433, 503, 506–08 (1987) (explaining that employer flexibility and nontax advantages make private plans superior to expanding Social Security or general savings mandate); WIEDENBECK & MAHER, *supra* note 1, at 423–25; DAN M. MCGILL, KYLE N. BROWN, JOHN J. HALEY, SYLVESTER J. SCHIEBER & MARK J. WARSHAWSKY, FUNDAMENTALS OF PRIVATE PENSIONS 147–53 (9th ed. 2010).

40. *See* WIEDENBECK & MAHER, *supra* note 1, at 19–21.

41. *Id.*

42. The Employee Benefits Security Administration [hereinafter EBSA] reports that in 2021 there were 112 million total participants in noncollectively-bargained private pension plans, compared to 34.1 million in collectively bargained plans. *See* EBSA, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 2021 FORM 5500 ANNUAL REPORTS, at 10 tbl.A6 (2023), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf [https://perma.cc/8LY8-34YJ]. In 1991, there were fifty-eight million total participants in noncollectively-bargained plans with twenty-five million in collectively bargained programs. PENSION & WELFARE BENEFITS ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN: ABSTRACT OF 1991 FORM 5500 ANNUAL REPORTS, at 14 tbl.A8 (1994).

43. EBSA, *supra* note 42, at 2, 3, 9.

accumulations, however, are quite modest,[44] which restricts the amount that could be charged to most participants for advisory services.[45] Variations between the terms of plans of the same type sponsored by different employers elevate the cost offering such guidance. The business feasibility of a private market for individual advisory services pertaining to health or other welfare plans is even more suspect. These considerations indicate that, as a practical matter, only the employer is in a position to provide understandable, actionable information to facilitate employee career and financial planning.

The shift from traditional defined benefit pension plans to defined contribution programs—including 401(k) plans and other varieties of profit-sharing and stock bonus plans—has worked a partial standardization of retirement savings programs. The period since about 1990 has seen a massive transformation of the retirement plan universe. Traditional defined benefit pension plans—the norm when ERISA was enacted—are now much less common.[46] (Many of those that survive are frozen plans, under which workers earn no additional benefits.[47]) In their place, many companies have instituted 401(k) plans, which are far simpler programs that workers intuitively grasp, as they function much

44. Labor Department data indicate that in 2021 the average amount of assets per participant in private single-employer defined benefit plans was $143,122, while the average account balance for private single-employer defined contribution plans was only $84,540. Author's calculation from EBSA. *Id.* at 19–20 tbls. B9, C1.

45. Unlike securities analysts, employee benefits specialists cannot profit from their expertise by trading for their own account. *See* Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 749–50, 81–82 (1997) (showing that capital investors are less vulnerable to misinformation than workers and benefit from private information monitoring devices that do not exist in the labor market).

46. EBSA, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS 1975–2021, 1–2 (2023), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf [https://perma.cc/3K76-Y659] (reporting that from 1975 to 2021 the number of private defined benefit pension plans declined from 103,346 to 46,388, while the number of defined contribution plans increased from 207,748 to 718,736). More importantly, the number of defined benefit plan participants went from 33,004,000 in 1975 to 31,235,000 in 2021, in which time defined contribution plan participation rose from 11,507,000 to 114,931,000. *Id.* at 5-6. Looking to *active* participants (employees earning increased retirement savings based on current service), the change is even more dramatic: there has been a fifty-seven percent decrease in active participation in DB plans and a nearly eight-fold increase for DC plans. *Id.* at 9–10.

47. *See* U.S. Bureau Lab. Stat., *Employee Benefits, Factsheet: What Statistics Does the BLS Provide on Frozen Defined Benefit Plans?* (May 7, 2024), https://www.bls.gov/ebs/factsheets/defined-benefit-frozen-plans.htm [https://perma.cc/27FP-RJ44].

like savings accounts.[48] Not only have 401(k) plans become the overwhelmingly dominant type of pension plan, the variability in features between one employer's program and another's has decreased dramatically. Today, most 401(k) plans provide immediate or very rapid vesting.[49] Typically, participants must select investments from a limited menu of mutual funds,[50] and that menu often designates a suite of target date funds as the default investment choice.[51] Life annuity forms of distribution are typically unavailable,[52] and single sum distribution upon separation from service is almost always allowed.[53] Speaking broadly, the market has converged on 401(k) plans as the principal

48. Elective contribution programs (cash-or-deferred arrangements) were virtually nonexistent when ERISA was enacted. MATTHEW P. FINK, THE RISE OF MUTUAL FUNDS 127–29 (2009); *see* ERISA, Pub. L. No. 93-406, § 2006, 88 Stat. 829, 992–93 (temporary freeze on salary reduction regulations), *superseded by* I.R.C. § 401(k), Pub. L. No. 95-600, § 135, 92 Stat. 2763, 2785 (1978). First authorized by statute in 1978, 401(k) plans became popular by the late-1980s. In 2021, there were 644,671 401(k) plans covering 74,905,000 active participants. EBSA, *supra* note 42, at 31–32.

49. *See* Samantha J. Prince, Timothy G. Azizkhan, Cassidy R. Prince & Luke Gorman, *The Effects of 401(k) Vesting Schedules—In Numbers*, 134 YALE L.J. F. 1, 4 (Sept. 2024), https://www.yalelawjournal.org/forum/the-effects-of-401k-vesting-schedulesin-numbers.

50. *See* EBSA, *supra* note 42, at 55 tbl.D5(b) (demonstrating that ninety-two percent of active 401(k) plan participants direct all investments).

51. ERISA Advisory Council, *Report on Spend Down of Defined Contribution Assets at Retirement* (2008), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2008-spend-down-of-defined-contribution-assets-at-retirement [https://perma.cc/F7RJ-8ZJW] ("[T]arget date funds have been popular on the accumulation side since the early 1990s.").

52. The 2008 ERISA Advisory Council observed:

> Based upon 2005 Form 5500 filings, there were 631,000 defined contribution plans covering 75 million participants. It is estimated that only 25% of covered participants are in plans that offer annuity features and utilization of annuities in those plans is extremely low. In fact, recent research conducted by Hewitt Associates LLC showed that over 90% of participants offered a lump sum, take that option over an annuity distribution.

Id. See J. MARK IWRY, WILLIAM GALE, DAVID JOHN & VICTORIA JOHNSON, WHEN INCOME IS THE OUTCOME: REDUCING REGULATORY OBSTACLES TO ANNUITIES IN 401(K) PLANS 4 (2019), https://www.brookings.edu/wp-content/uploads/2019/07/ES_201907_IwryGaleJohnJohnson.pdf [https://perma.cc/3Z3L-8KJJ] (reporting that the market for private annuities is quite small relative to total retirement assets).

53. ERISA Advisory Council, *supra* note 51 (reporting Fidelity Investments' experience that few defined contribution plans offer a life annuity option and "[m]ost retirees withdraw[] their 401(k) plan funds in a lump sum").

retirement savings vehicle, and many features of 401(k) plans have largely become standardized and familiar.[54]

This greatly reduced variability might seem to decrease the incremental value of plan-specific summary disclosure. Yet, the market's embrace of the defined contribution paradigm arguably amplifies the need for straightforward, understandable notice. Substitution of individual account plans for traditional pensions shifts the risk of poor investment performance from plan sponsors to employees; casting responsibility for investment decisions on participants (who are often financially unsophisticated and inexperienced investors) makes them bear the consequences of high-stakes life-altering decisions.[55] Because retirement saving is a long-term endeavor, do-overs are not available, and mistakes compound.[56] Therefore, even if the main features of 401(k) plans feel familiar to many workers, effective disclosure of the potential implications of their action (or inaction) may be even more important now than in the former world dominated by defined benefit pensions.[57] The enormous escalation in health care costs over recent decades,[58] followed by responsive health plan amendments shifting more cost and risk to employees (e.g., introducing or expanding coverage exclusions, co-pays, deductibles, co-insurance requirements, and premium

54. Query whether this herding reflects market convergence or market collapse? Ineffective disclosure might be a contributing cause of the trend toward 401(k) plans with very similar features. If retirement savings plan disclosures are considered untrustworthy or incomprehensible by plan participants, workers would act on the assumption that all such plans offer only some baseline value. If workers do not put a premium on a better plan, it becomes uneconomic for an employer to offer a more costly higher-quality program, and soon only baseline value plans subsist. This collapse, of course, is characteristic of a "lemons" market. *See* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970). Lack of fraud protection in the labor market may trigger such decay. Greenfield, *supra* note 45, at 743–44, 753.

55. *See supra* note 50; *see generally* TERESA GHILARDUCCI, WHEN I'M SIXTY FOUR 58–138 (2008); EDWARD A. ZELINSKY, THE ORIGINS OF THE OWNERSHIP SOCIETY 6 (2007).

56. *See* GHILARDUCCI, *supra* note 55, at 120–30 (explaining risks workers face during the accumulation phase of a defined contribution retirement savings program).

57. *See* ZELINSKY, *supra* note 55, at 6–23.

58. KFF, HEALTH CARE COSTS AND AFFORDABILITY 1–2 (May 28, 2024), https://files.kff.org/attachment/health-policy-101-health-care-costs-and-affordability.pdf (reporting expenditure escalation since 1970); *see also* BOARDS OF TRUSTEES OF THE FEDERAL HOSPITAL INSURANCE AND FEDERAL SUPPLEMENTARY MEDICAL INSURANCE TRUST FUNDS, 2024 ANNUAL REPORT 5–6, https://www.cms.gov/oact/tr/2024 (reporting historical and projected Medicare expenditures as a percentage of gross domestic product).

contributions), exposes workers to similar insecurity with respect to medical costs.[59] Hence, summary disclosure remains important and the plan sponsor alone can efficiently distill the information.

C. Optimal Disclosure

ERISA's key disclosure mandates prescribe two essential criteria: information disclosed must be both reliable and understandable. The premier example, ERISA section 102(a), provides:

> A summary plan description 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 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)].[60]

This directive embodies the functional imperative highlighted earlier. 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 incorrect or dangerously incomplete information *should not* be used.

Congress embedded this tension between understandable and reliable information in ERISA, fixing a central quandary at the heart of its disclosure regime.[61] And it was wise to do so, in view of the planning function of disclosure. Abridgement and simplified expression make information accessible, but often leave the impression that general explanations and illustrations are not subject to qualification or

59. *See* KFF, *supra* note 58, at 3 (reporting out-of-pocket cost increases since 1970); KFF, EMPLOYER HEALTH BENEFITS 2024 ANNUAL SURVEY, at 85 fig.6.3, 98 fig.6.22, 106 fig.7.7, 109 fig.7.10, 111 fig.7.14, 125 fig.7.35, 130 fig.7.43, https://files.kff.org/attachment/Employer-Health-Benefits-Survey-2024-Annual-Survey.pdf; *see also* Michael Chernew, David M. Cutler & Patricia Seliger Keenan, *Increasing Health Insurance Costs and the Decline in Insurance Coverage*, 40 HEALTH SERV. RSCH. 1021, 1029 (2005) (studying decline in health insurance coverage in the 1990s).

60. ERISA § 102(a), 29 U.S.C. § 1022(a).

61. *See* WIEDENBECK & MAHER, *supra* note 1, at 15–16, 71–73.

exceptions in special circumstances.[62] In contrast, excessive detail inhibits its utilization and operates to obscure the principal features, conditions, and limitations of the benefit plan.[63] Full disclosure—a mass data dump, as by distributing all operative plan documents—would be meaningless to virtually all participants.[64]

At the other extreme from full disclosure, overbroad statements like "the company's pension plan generally pays *X*% of your average

62. *Id.* at 94–95, 100; *see generally* Daniel Schwarcz, Brenda J. Cude, Kyle D. Logue & German Marquez Alcala, *Read But Not Understood? An Empirical Analysis of Consumer Comprehension in Homeowners Insurance*, 112 VA. L. REV. (forthcoming 2025) (manuscript at 9–16, 53–57), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5120347 (reporting empirical evidence and distinguishing between disclosures that are not read and those that are not understood, and discussing options to improve consumer understanding).

63. WIEDENBECK & MAHER, *supra* note 1, at 95; Peter J. Wiedenbeck, *Unbelievable: ERISA's Broken Promise* 18 (Wash. Univ. in St. Louis Legal Stud. Rsch. Paper, Paper No. 21-08-01, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3900735.

64. The WPPDA had called for full disclosure of a sort. It required the administrator of a welfare or pension plan to prepare a "description of the plan" which was required to include "copies of the plan or of the bargaining agreement, trust agreement, contract, or other instrument, if any, under which the plan was established and is operated." WPPDA §§ 5(a), 6(b), 29 U.S.C. §§ 304(a), 305(b) (repealed 1974). This plan description was required to be filed with the Labor Department, and any participant or beneficiary who submitted a written request was entitled to receive a copy. *Id.* § 307 (repealed 1974). Thus, under the WPPDA the complete terms of the plan were available, but they were not routinely distributed to workers covered by the plan.

Experience proved the WPPDA's approach to informing participants ineffective. By 1972, comprehensive pension reform legislation introduced by Senators Harrison Williams and Jacob Javits called for furnishing understandable summaries to participants as a matter of course. Retirement Income Security for Employees Act of 1972, S. 3598, 92d Cong. §§ 505, 507(b), 118 CONG. REC. 16,908, 16,915, 16,916 ("[A]dministrator shall furnish to every participant upon his enrollment in the plan . . . a summary of the plan's important provisions . . . written in a manner calculated to be understood by the average participant."). The report of the Senate Committee on Labor and Public Welfare explained:

> An important issue relates to the effectiveness of communication of plan contents to employees. Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets. Subcommittee findings were abundant in establishing that an average plan participant, even where [he] has been furnished an explanation of his plan provisions, often cannot comprehend them because of the technicalities and complexities of the language used.

S. REP. NO. 92-1150, at 10 (1972). *Accord id.* at 37–38.

compensation each year following retirement," or "our health care plan fully covers a typical family's medical needs," give no notice of crucial exceptions and limitations. Instead of facilitating planning, such extreme simplification can lead workers to ruin. Clearly, the planning function demands compromise between readily accessible (understandable) and reasonably reliable (accurate and complete) information.

The level of detail required of a Summary Plan Description (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 most importantly, the cost of information overload—other workers will be deterred from making use of the SPD as it becomes more detailed, lengthy, and complex.[65] The SPD definition directs 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."[66] But if that is taken too far, an explanation larded with detailed admonitions becomes unintelligible, and workers' career and financial planning suffers. To convey information that can be understood and profitably acted upon by the many,

65. WIEDENBECK & MAHER, *supra* note 1, at 95, 114. This tradeoff troubled the Court in *CIGNA Corp. v. Amara*, 563 U.S. 421, 437–38 (2011):

> To make the language of a plan summary legally binding could well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers. Consider the difference between a will and the summary of a will or between a property deed and its summary. Consider, too, the length of Part I of this opinion, and then consider how much longer Part I would have to be if we had to include all the qualifications and nuances that a plan drafter might have found important and feared to omit lest they lose all legal significance. The District Court's opinions take up 109 pages of the Federal Supplement. None of this is to say that plan administrators can avoid providing complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations. But we fear that the Solicitor General's rule might bring about complexity that would defeat the fundamental purpose of the summaries.

66. *See* ERISA § 102(a), 29 U.S.C. § 1022(a) (emphasis added).

some details must be omitted, even if occasional unpleasant surprises crop up for the few, who due to unusual circumstances have their applications for benefits denied based on plan terms not reflected in the summary.[67]

Rather than demanding full disclosure, the SPD aims to achieve *optimal* disclosure, which requires a sensitive balance between "understandable" and "accurate and comprehensive" (i.e., reliable). The governing principle, "to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan,"[68] is acutely sensitive to context, including the specific terms of the plan and the experience and capabilities of participants. The SPD obligation prescribes a standard, not a rule. It's a standard which is applied, in the first instance, by the plan administrator, who is tasked with curating plan information.[69] Hence, the incentives under which the plan administrator operates in formulating the SPD should be considered when assessing the likelihood that an appropriate balance—*optimal* disclosure—will result.

II. Understandability's Demise

Tension between employee planning and employer autonomy was baked into ERISA. Soon after passage, SPD understandability was sacrificed. The understandability norm died of neglect, which can partly be laid at the feet of the Labor Department. The Department had its hands full gearing up to implement the new comprehensive pension reform law.[70] The substantive pension content requirements (particularly vesting, funding, and the termination insurance regime) clearly constituted the main events—the primary concerns of both ERISA's proponents and regulated industry (plan sponsors). In 1976, shortly after ERISA went into effect, the Labor Department announced that it would not prospectively rule on questions of SPD understandability.[71]

67. WIEDENBECK & MAHER, *supra* note 1, at 94–95, 100.
68. *See* ERISA § 102(a), 29 U.S.C. § 1022(a).
69. *See id.* § 1024(b)(1).
70. *See infra* note 73.
71. U.S. DEP'T OF LAB., *Filing Requests For ERISA Advisory Opinions: ERISA Procedure* 76-1, § 5.02(d), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/filing-requests-for-erisa-aos [https://perma.cc/ES39-MEB3] (last visited Mar. 4, 2025) (noting the Department refuses to issue advisory opinions "relating to whether a summary plan description is written in a

The Labor Department was simply not equipped to provide advance review of proposed disclosures.[72] Regulatory triage left disclosure issues to another day, and workers to their own devices.[73] In that era, pension coverage was dominated by collectively-bargained defined benefit plans of large manufacturers, and the Department—whose primary constituency was organized labor—might have presumed that unions would step up to fill the gap, acting as information intermediaries by providing their members with useful distillations and translations of plan features.

Since then, the Department has rejected the request to amend its SPD regulations "to prohibit conflicts between provisions of the SPD and the plan document by requiring the use of clear terminology and definitions, prohibiting the use of disclaimers in SPDs, and providing that ambiguous SPD provisions will be interpreted against the drafter."[74]

Administrative neglect is only part of the story. Plan participants and beneficiaries are empowered to pursue certain civil enforcement actions under ERISA.[75] Initially, the stumbling block to private enforcement was the absence of any obvious correspondence between violations of the understandability standard and ERISA's limited array of

manner calculated to be understood by the average participant"). This limitation likely proceeds from concern about "the inherently factual nature of the problem involved" (*see id.* § 5.01), and the limited role that legal interpretation and analysis would play in such a determination.

72. The Department has never developed the staffing or budget that would be required to provide advance expert evaluation. With approximately 765,100 private pension plans in operation in 2021, and about 81,805 private sector employer-sponsored group health plans—to say nothing of the many plans providing life insurance, disability insurance, or other welfare benefits—comprehensive advance review would be phenomenally costly. EBSA, *supra* note 42, at 1; EBSA, GROUP HEALTH PLANS REPORT: ABSTRACT OF 2021 FORM 5500 ANNUAL REPORTS 1 (2023), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2024-appendix-a.pdf.

73. *See Supplemental Appropriations for Fiscal Year 1976: Hearing Before the Subcomm. on the Departments of Labor, Health, Education, and Welfare and Related Agencies of the S. Comm. on Appropriations*, 94th Cong., 131, 134 (1975) (statement of William J. Kilberg, Solicitor of Labor) ("For the first few months [after ERISA's enactment] our very limited resources were mostly devoted to putting out fires—dealing with the most immediate and critical problems.").

74. Amendments to Summary Plan Description Regulations, 65 Fed. Reg. 70226, 70229 (2000) ("To the extent these comments concern the understandability of SPDs to plan participants and beneficiaries, the Department believes that its current general standards on style and format of SPDs in 29 CFR 2520.102-2 are appropriate and further regulatory guidance is not necessary.").

75. ERISA § 502, 29 U.S.C. § 1132.

civil enforcement actions. No civil penalty is directly geared to understandability defects.[76] Hence, bounty hunting cases were not brought by participants, and ERISA does not generally authorize compensatory damages as relief for statutory violations.[77] In principle, an injunction mandating issuance of a comprehensible explanation is available as a prospective remedy,[78] but the natural response to impenetrable gobbledygook is to ask someone knowledgeable for an informal translation. That person is likely to be a supervisor or staff in the benefits department.

Even absent Labor Department oversight and participant lawsuits, employers need to make sure workers grasp basic information about the plan. Providing retirement or health benefits is a costly undertaking, making it important to impress upon workers the value of resources committed to these forms of in-kind compensation. Simplified presentation serves the plan sponsor's interest regardless of legal exposure. The danger here lies in one-sided simplified presentation—left unmonitored, some employers will overhype the plan, downplaying conditions and limitations on coverage and benefits to induce workers to overvalue the company's benefit programs. Here, the reliability standard comes into play: the SPD must be both understandable and "sufficiently accurate and comprehensive to reasonably apprise such

76. *See infra* note 99. A determined plan participant might send the administrator a written request for the latest updated SPD then, once the document arrives, follow up with a written demand for a "true" SPD, meaning one that's understandable. That challenge to the adequacy of the purported SPD would undoubtedly be ignored, which in theory could give rise to claim for a discretionary civil penalty of up to $110 per day for failure to timely supply a legally satisfactory SPD. *See* ERISA §§ 502(c)(1)(B), 104(b)(4), 29 U.S.C. §§ 1132(c)(1)(B), 1024(b)(4); 29 C.F.R. § 2570.502c-1 (2018) (inflation adjustment). Conceivably, a union might orchestrate a concerted campaign by arranging to have multiple member-participants submit demands for understandable SPDs. Amplifying penalty exposure in that way might produce results, but otherwise it is hard to see how there is enough money at stake for the civil penalty to serve as a realistic compliance tool.

77. ERISA § 502(a), 29 U.S.C. § 1132(a); *see* Mertens v. Hewitt Assoc., 508 U.S. 248, 256 (1993) (holding that in an action against a nonfiduciary, appropriate equitable relief under § 502(a)(3) does not include money damages). Sections 502(a)(2) and 409 provide that a fiduciary may be forced to pay compensation for breaching a fiduciary obligation, but this remedy makes good losses incurred by the plan, not injuries sustained by an individual participant or beneficiary. Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 137 (1985).

78. ERISA § 502(a)(3), (5), 29 U.S.C. § 1132(a)(3), (5) (providing that plan participants, beneficiaries, fiduciaries, and the Secretary of Labor authorized to bring civil action for appropriate equitable relief to enforce and provision of ERISA Title I).

participants and beneficiaries of their rights and obligations under the plan."[79]

In contrast to understandability, the courts concluded that liability could attach to transgressions of ERISA's reliability norm.[80] That exposure is one of the two conditions that spelled the end of understandable SPDs. The other necessary condition is the availability of unregulated alternative means of simplified disclosure. Each of these developments is chronicled below.

A. Reliability Enforcement

Judicial enforcement of the reliability norm led to the demise of understandability. By the mid-1980s, complaints that disclosures were inaccurate or incomplete were coming before the courts, and plan members were starting to win monetary recoveries based on an SPD's failure to warn of circumstances causing disqualification, ineligibility, denial or loss of benefits, or where the plan summary promised benefits that the language of the plan did not support.[81] That unexpected liability triggered defensive moves that undercut understandable, effective disclosure.[82] Reacting to the prospect that failure to warn might render

79. *Id.* § 1022(a).

80. *See infra* note 81.

81. *See* Zittrouer v. Uarco Inc. Ben. Plan, 582 F. Supp. 1471, 1474 (N.D. Ga. 1984) (involving failure to warn of convalescent care exclusion); Hillis v. Waukesha Title Co., 576 F. Supp. 1103, 1109 (E.D. Wis. 1983) (involving failure to warn of forfeiture for competition); McKnight v. S. Life & Health Ins., 758 F.2d 1566 (11th Cir. 1985) (holding, in the alternative, that participant was entitled to benefit accrual under SPD's version of break-in-service rules even if the underlying plan document denied service credit). *McKnight* appears to be the case that brought the risk of liability for disclosure violations to the attention of a broad group of pension and benefits law practitioners. It seems to have been the first appellate holding to impose liability. Its conclusion that, in cases of conflict between the plan and the SPD, the purpose of the summary required protection of an employee who reasonably relied on the summary, received coverage in the leading specialty news service. BNA, *Breaks in Service Do Not Cancel Employee's Past Service Credits*, 12 BNA PENS. REP. 672 (1985). These three cases, *Zittrouer*, *Hillis*, and *McKnight*, were highlighted in an influential treatise's discussion of equitable relief for misstatements and omissions in an SPD, STEPHEN R. BRUCE, PENSION CLAIMS 391 (1988), which seems to have stimulated or at least contributed to the explosion of disclosure litigation. The author, Stephen Bruce, represented the employees before the Supreme Court in *CICGA Corp. v. Amara*, 563 U.S. 421, 424 (2011). And by 1988, *Hillis* and *McKnight* were also being cited by the leading treatise on qualified retirement plans. MICHAEL J. CANAN, QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS § 11.2 at 382–83 (1988 ed.).

82. *See infra* notes 87–91 and accompanying text.

undisclosed conditions unenforceable, 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 practical guides for workers' career and financial decision-making.

To take one example, Washington University in St. Louis offers its faculty and staff a choice between five self-insured health care plans, each administered by United Healthcare, each with its own SPD "designed to meet your information needs and the disclosure requirements of [ERISA]."[83] The SPDs range in length from 156 to 167 pages, single-spaced, and each is introduced with the admonitions, "Read the entire SPD" and "Many of the sections of this SPD are related to other sections. You may not have all the information you need by reading just one section."[84]

Protective expatiation of this sort obscures plan fundamentals and defeats the purpose of the SPD, because too much information will be ignored rather than sifted and analyzed.[85] The overly detailed and technically worded liability-shield approach to drafting fails to deliver actionable information that workers can exploit to improve their lot. Thus, as courts moved to enforce reliability, plan sponsors responded by sacrificing understandability. With that development ERISA's planning function was fundamentally compromised.

Experts have repeatedly decried this turn of events. Even before defensive liability-shield SPDs became ubiquitous, studies found that benefit explanations were written at a level substantially above the

83. *E.g.*, Summary Plan Description, Washington University Choice Plus Basic Plan, Effective Jan. 1., 2024, Group Number 702111, at 1. The SPD starts by disavowing efficacy as the operative plan document: "If there should be an inconsistency between the contents of this summary and the contents of the Plan, your rights shall be determined under the Plan and not under this summary." *Id.* But compare the following additional admonition: "If there is a conflict between this SPD and any benefit summaries (other than Summaries of Material Modifications) provided to you, this SPD will control." *Id.* at 2.

84. *Id.* at 2. By way of comparison, the Washington University Retirement Savings Plan, an ERISA pension plan which holds more than $7 billion in assets and receives favorable tax treatment under I.R.C. § 403(b), has an SPD presented in a question-and-answer format that is twenty-seven pages long. Washington University Retirement Savings Plan Summary Plan Description (rev. July 1, 2021).

85. *See* CIGNA Corp. v. Amara, 563 U.S. 421, 438 (2011) ("[W]e fear that the Solicitor General's rule [that the language of the SPD should be treated as contractually binding] might bring about complexity that would defeat the fundamental purpose of the summaries.").

reading ability of the average worker.[86] Once defensive drafting rose to prominence, the situation dramatically worsened. The 2005 ERISA Advisory Council 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."[87] That state of affairs was attributed to court decisions which

> 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.[88]

86. Jerry Haar & Sharon Kossack, *Employee Benefit Packages: How Understandable Are They?*, 27 J. BUS. COMMC'N. 185, 193–95 (1990); BNA, *Benefit Eligibility is Misunderstood by Plan Participants, GAO Report Says*, 14 BNA PENSION REP. 1287, 1288 (1987) ("GAO report [issued in 1987] suggested that many SPDs may be too technical for workers to fully comprehend."); *see also* James F. Stratman, *Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice?*, 10 INDUS. REL. L.J. 350, 364 (1988) (finding that eighty-five percent of the subjects in an experiment on SPD comprehension did not even notice an SPD disclaimer clause printed in a smaller typeface near the end of the document). A more recent empirical study of health plan SPDs found that important information was often difficult to identify, concluding that "the language used to convey important information in the [SPD] may be written at a level that is too high for its intended audience—the '*average* plan participant'—to understand." Colleen E. Medill, Richard L. Wiener, Brian H. Bornstein & E. Kiernan McGorty, *How Readable Are Summary Plan Descriptions for Health Care Plans?*, 27 EBRI NOTES 1, 8 (2006).

87. ERISA 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 [https://perma.cc/4FH8-ZY86] [hereinafter RETIREMENT PLAN COMMUNICATIONS 2005 REPORT].

88. The report further observed:

> 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.

Id. Health and welfare benefit plan SPDs suffered from the same dynamic. ERISA ADVISORY COUNCIL, REPORT OF THE WORKING GROUP ON HEALTH AND WELFARE BENEFIT PLANS' COMMUNICATIONS (2005), https://www.dol.gov/agencies/ebsa/

With respect to health care plans, the 2017 Council observed:

> The witness consensus was that the SPD's summary information function has been largely eliminated and that, in practice, plan administrators are distributing plan documents rather than SPDs to their group health participants. Instead of having a comprehensive plan with a brief, understandable summary document, as originally intended; the SPD typically serves as the plan document.[89]

"As a result, over time, the SPD's language has become more technical and the SPD longer."[90] Consequently, "the SPD has developed into a behemoth document that does not serve participant interests because it is so detailed that it discourages participants from reading it at all."[91]

Diagnosing the problem falls short of charting a pragmatic path to optimal disclosure. Complaints that the liability-shield SPD is uninformative fail to grapple with, and often fail to even acknowledge, the unavoidable dilemma. The function of the SPD is not simply to provide participants an easily understood plan summary. Rather, ERISA's goal of promoting economic efficiency—facilitating workers' career and financial planning—demands that the SPD provide an *accurate* easily-understood summary. A participant cannot *correctly* evaluate competing

about-ebsa/about-us/erisa-advisory-council/health-and-welfare-benefit-plans-communications [https://perma.cc/G8ZW-2RW7].

89. 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 13 (2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-reducing-the-burden-and-increasing-the-effectiveness-of-mandated-disclosures.pdf [https://perma.cc/CR68-NJCW] [hereinafter HEALTH PLAN COMMUNICATIONS 2017 REPORT]; *see*, *e.g.*, Koehler v. Aetna Health Inc., 683 F.3d 182, 185 (5th Cir. 2012) ("[I]n this case the summary's text is simply a verbatim copy of the underlying plan provisions."); E. Thomas Veal, *Chiseled in Stone or Written on Water?: The Status and Effect of ERISA Plan Documents*, 2013 NYU REV. OF EMPLOYEE BENEFITS § 9.03 ch. 9, 1, 2 ("In many instances the SPD serves dual duty as the primary plan document *and* summary of plan terms or is explicitly incorporated into the plan." (footnotes omitted)).

90. HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 14.

91. ERISA ADVISORY COUNCIL, MANDATED DISCLOSURE FOR RETIREMENT PLANS—ENHANCING EFFECTIVENESS FOR PARTICIPANTS AND SPONSORS 14 (2017), https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-mandated-disclosure-for-retirement-plans.pdf [https://perma.cc/7JCJ-7BXD] [hereinafter RETIREMENT PLAN COMMUNICATIONS 2017 REPORT]; *see* ERISA ADVISORY COUNCIL, ADVISORY COUNCIL REPORT ON PROMOTING RETIREMENT LITERACY AND SECURITY BY STREAMLINING DISCLOSURES TO PARTICIPANTS AND BENEFICIARIES (2009), https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/2009-promoting-retirement-literacy-and-security-by-streamlining-disclosures-to-participants-and-beneficiaries [https://perma.cc/F9B7-XEPT] ("Participants may not read or understand the notices they receive, and the notices are often not designed to enhance retirement literacy and security.").

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 understandable and *reasonably 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, as the federal courts came to demand.[92] 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.[93] Without such liability, SPDs would devolve into purely promotional material—understandable half-truths that workers could not safely use to plan their affairs. So long as economic efficiency is a goal, reliability is a necessary condition, and hence pressure toward excessive detail is inescapable.

B. Unregulated Plan Promotion

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.[94] These objectives cannot be obtained without publicizing the advantages of the program to obtain workers' cooperation.[95] To garner maximum advantage from employee benefit programs, plan sponsors need workers to place a high value on them.[96]

Originally, the plan summary was the vehicle used to tout benefit programs. Emergence of detail-encrusted defensive SPDs changed that. Participants will not use a bloated legalistic SPD, but the plan sponsor cannot afford to have workers undervalue the benefits provided.[97] Employers issue opaque liability-shield disclosures because they are able to use other methods of publicizing the advantages of the plan via non-SPD communications, and in doing so, they face minimal risk of liability for inaccurate or misleading representations.[98]

92. *See, e.g.*, CIGNA Corp. v. Amara, 563 U.S. 421, 438 (2011).
93. Wiedenbeck, *supra* note 14, at 5.
94. *See* WIEDENBECK & MAHER, *supra* note 1, at 20 & n.74, 423–25.
95. *See id.* at 89; Wiedenbeck, *supra* note 63, at 17.
96. Wiedenbeck, *supra* note 14, at 4, 12.
97. *Id.* at 14.
98. WIEDENBECK & MAHER, *supra* note 1, at 72–73.

ERISA grants participants and beneficiaries the right to sue for certain civil penalties,[99] for benefits due, to redress breaches of fiduciary obligations, and for appropriate equitable relief to enforce ERISA's requirements or the terms of the plan.[100] The statutory enforcement mechanism is exclusive—ERISA preempts state law causes of action, including tort claims for fraud, deceit, or misrepresentation.[101] Therefore, workers harmed by deficient communications must fashion their claim to fit within one of ERISA's limited grounds for judicial intervention. Representations giving rise to an erroneous expectation of benefit entitlement, being unsupported by the terms of the plan, cannot be enforced as a claim for benefits. Nevertheless, two theories might plausibly support a cause of action. First, a worker harmed by a misleading or incomplete SPD can frame her complaint as a suit for equitable relief to redress a violation of the statutory obligation that the summary "be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."[102] Second, some misleading or incomplete non-SPD communications involve a breach of fiduciary duty, potentially supporting a claim for equitable relief to redress that statutory violation.[103] Nevertheless, each of these two theories of liability typically comes to naught if the plan administrator has distributed a caveat-encrusted liability-shield SPD.

Courts generally accept a liability-shield SPD as sufficient to apprise participants and beneficiaries of their rights and obligations,

99. ERISA § 502(a)(1)(A), (c)(1), (3), 29 U.S.C. § 1132(a)(1)(A), (c)(1), (3). Several of the specified civil penalties are geared to notification requirements, but none of the authorized penalties relate to defective SPDs or non-SPD communications concerning plan contents.

100. *Id.* §§ 1132(a)(1)–(3), 1109.

101. *Id.* § 1144; *see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding that ERISA preempts state common law tort and contract actions founded on an insurer's bad faith refusal to pay claims, relying on "the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive"); Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 147 (1985).

102. ERISA § 102(a), 29 U.S.C. § 1022(a); CIGNA Corp. v. Amara, 536 U.S. 421, 432, 443 (2011). Commonly, failure to warn of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," ERISA § 102(b), 29 U.S.C. § 1022(b), is the asserted defect.

103. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1); Varity Corp. v. Howe, 516 U.S. 489, 502-03 (1996) (observing that "administrators, as part of their administrative responsibilities, frequently offer beneficiaries more than the minimum information that the statute requires" and in doing so engage in discretionary fiduciary action).

marking technical compliance with the statutory duty to warn, regardless of understandability.[104] That stance defeats defective SPD claims.[105]

Workers disappointed by misleading or incomplete non-SPD communications face other obstacles. Harmful non-SPD communications, if made by a plan fiduciary, might well breach ERISA's duties of loyalty or care, but misinformation supplied by lower-level employer functionaries, like staff members in the human resources or benefits department, likely would not be actionable because the purveyor is not a fiduciary.[106] Centrally orchestrated substitute non-SPD disclosures are another matter, because the decision to provide supplementary information is a discretionary act of plan management subject to fiduciary oversight.[107] Assuming that circumstances establish disloyal or imprudent *fiduciary* communication, the call for equitable relief most commonly comes by invocation of estoppel.[108] So framed, the defendant will challenge compliance with estoppel's elements, particularly the requirement that the complainant neither knew nor had sufficient reason to know the true facts.[109] Distribution of a liability-shield SPD is

104. WIEDENBECK & MAHER, *supra* note 1, at 74–75, 79–87. Evaluated realistically, an SPD that is not understandable fails to supply reason to know of adverse terms. Alternatively, it could be argued that a formal liability-shield SPD that is not understandable is not an SPD within the meaning of ERISA, justifying reliance on other communications. As will be explained below, however, caselaw does not support wholesale disregard of a formal SPD based on lack of understandability. *See infra* Section III.A.

105. *See* WIEDENBECK & MAHER, *supra* note 1, at 94–98.

106. 29 C.F.R. § 2509.75-8, D-2 (2024) provides that persons who have no power to make decisions about plan policy, interpretation, practices, or procedures, but who merely perform certain administrative tasks under a framework of rules established by others, are not fiduciaries. Most of the listed tasks involve information processing (such as record keeping, communicating, reporting, and initially applying plan rules determining eligibility for participation or benefits) and advisory functions. WIEDENBECK & MAHER, *supra* note 1, at 120.

107. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); Varity Corp. v. Howe, 516 U.S. 489, 505 (1996) (holding discretionary "statements about the security of benefits amounted to an act of plan administration" subject to review for breach of fiduciary duty).

108. *See* WIEDENBECK & MAHER, *supra* note 1, at 103–10.

109. Pomeroy's treatise on equity lists six essential elements of equitable estoppel. 3 SPENCER W. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 805 (5th ed. 1941) [hereinafter POMEROY]. The party asserting estoppel must not know the true facts (for present purposes, the actual terms of the plan) at the time the false representation was made and when it was acted upon. This element demands more than simple ignorance of the true facts (good faith); the party asserting estoppel must also lack a reason to know the truth. Pomeroy goes on to suggest:

ordinarily conceived as providing reason to know that other communications may be unreliable. There is a substantial body of lower court precedent refusing to enforce non-SPD communications in order to preserve SPD primacy, again, regardless of SPD understandability.[110]

In summary, a sponsor can promote the plan using non-SPD (informal) communications, which carry miniscule risk of liability for misrepresentation. Consequently, an SPD crafted to liability-proof the plan need not communicate meaningfully with participants and beneficiaries. There is virtually no cost associated with issuing an SPD that is impenetrable gobbledygook.

As shown in Part I, satisfying the competing goals of simplified disclosure—setting the tradeoff between understandability and reliability—presents a difficult optimization problem. Yet, an employer distributing a liability-shield SPD faces no significant countervailing pressure, legal or economic, to make the SPD understandable. Optimal disclosure cannot be achieved with the one-sided incentive that currently prevails. To revive balanced disclosure, the sponsor must either obtain some benefit by making its SPD understandable or avoid a cost for failing to do so. ERISA's incentive structure requires thoughtful recalibration.

III. Reviving Understandability

Workers must take into account pension and welfare plan coverage, and the limits thereof, to avoid costly omissions or duplications in their financial preparedness for major life events, including retirement,

> Since the whole doctrine is a creature of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted with good faith and reasonable diligence; otherwise, no equity will arise in his favor.

Id. § 813, at 236. *Accord* JAMES W. EATON, HANDBOOK OF EQUITY JURISPRUDENCE § 61, at 172 (1901) (party to whom representations are made cannot "claim to have been misled by the false representations or concealment of facts by the party sought to be estopped, if he could have ascertained the truth by prosecuting an inquiry with due diligence" (footnote omitted)); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1553*b*, at 785 (Jairus W. Perry ed., 12th ed. 1877) ("A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth." (footnote omitted)); *see* Steel v. Smelting Co., 106 U.S. 447, 456–57 (1882) (notice required of application for title to mining lands prevented occupants who had improved land from asserting estoppel against title owner).

110. *See* WIEDENBECK & MAHER, *supra* note 1, at 103–06.

disability, injury, and disease.[111] Benefit plan information must be simultaneously understandable and reliable to enable each worker to advantageously incorporate it into her personal life plan.[112] The delicate balance between understandable and reliable information—the optimal disclosure envisioned by Congress—has not been achieved. Instead, understandability was sacrificed as employers moved to liability-proof their disclosures.[113] At this juncture, reviving understandability and reclaiming ERISA's projected economic efficiency gains would require fundamental changes, which are explored in the remainder of this Article.

Resurrecting understandability requires satisfaction of two conditions. First, plan administrators must be given an incentive to take understandability seriously when drafting the SPD. Second, they must be protected in doing so: a zone of security must be recognized for good faith decisions concerning the appropriate trade-off between the value of simplification and condensation (understandability) and the competing interest in completeness (reliability).

A. Incentive to Simplify

To usefully inform important life decisions, the key provisions of a complex plan must be communicated in a simplified summary form. Translation and distillation introduce imprecision and omissions. Disclosure yields the greatest net benefit when it is optimized to the needs and capacities of a particular workforce.[114] ERISA focuses on the average plan participant[115] and acknowledges the tension between information that is realistically accessible (understandable) to the average worker and that which is correct and complete in every particular

111. WIEDENBECK & MAHER, *supra* note 1, at 61.
112. *See supra* Section I.A.
113. *See supra* Part II.
114. *See supra* text accompanying note 68; WIEDENBECK & MAHER, *supra* note 1, at 72.
115. *See* Harris v. UnitedHealth Grp., Inc. of Tex., 2024 U.S. Dist. LEXIS 94195 (May 28, 2024) (finding that the "average plan participant" understandability standard incorporated in required notice of availability of group health plan COBRA continuation coverage was satisfied, despite employer's alleged knowledge of the plan participant's massive brain tumor and impaired cognitive ability).

(reliable).[116] Yet, the prevailing liability-shield SPD forsakes the middle ground.

That is because current law provides no real incentive to rein in an overly detailed technically worded SPD.[117] The Labor Department is not equipped to provide advance review of proposed disclosures.[118] No civil penalty is well-attuned to the task of deterring unintelligible disclosures.[119] With few exceptions, employers are not called to account when warnings go unheeded because the manner of presentation obscures their meaning.[120] Even if it were available, post-hoc judicial

116. ERISA § 102(a), 29 U.S.C. § 1022(a) (requiring the SPD to "be *sufficiently* accurate and comprehensive to *reasonably* apprise" plan members of their rights and obligations (emphasis added)).

117. *See* WIEDENBECK & MAHER, *supra* note 1, at 72.

118. The Department abjured the task of preclearing SPDs from the outset, and it never developed the staffing or budget that would be required to provide advance expert evaluation. *See* text and discussion *supra* notes 71–72.

119. *See* discussion *supra* note 99.

120. In 2005, the ERISA Advisory Council observed:

> [T]here is no discernable enforcement of the regulatory requirement that SPDs be understandable to the average plan participant. This lack of enforcement, combined with plan sponsors' desire to be protected from potential legal action, significantly contributes to the current trend of SPDs being written by attorneys for attorneys instead of by benefit communications specialists for plan participants.

RETIREMENT PLAN COMMUNICATIONS 2005 REPORT, *supra* note 87 (conclusion of Short-Term Recommendation 1). *See* Transcript of Oral Argument at 39–41, CIGNA Corp. v. Amara, 563 U.S. 421 (2011) (No. 09-804) (colloquy between Justice Alito and Stephen Bruce observing "the worst that can happen [to a plan sponsor issuing a lengthy unintelligible summary] . . . is you could be faced with an injunction to provide a more concise and comprehensible statement"); *see also* Pratt, *supra* note 10, at 813 n.22 ("The author is unaware of a single case in which the plan administrator has been faulted for providing an SPD that was not sufficiently understandable.").

A few exceptional cases do in fact endorse liability for harms traceable to ineffective disclosures. King v. Blue Cross & Blue Shield of Ill., 871 F.3d 730, 740, 742 (9th Cir. 2017) (finding notice of lifetime benefit maximum under retiree health plan was not reasonably understandable); *accord* Meguerditchian v. Aetna Life Ins. Co., 999 F. Supp. 2d 1180, 1188 (C.D. Cal. 2014), *aff'd*, 648 F. App'x 605 (9th Cir. 2016) (holding that the short-term disability plan SPD was not understandable where the 60-day period for filing notice of disability was defined in terms of absence from work, but the employer maintained a mandatory 90-day temporary part-time return to work program); Koehler v. Aetna Health, Inc., 683 F.3d 182 (5th Cir. 2012) (finding that the health maintenance organization SPD was ambiguous concerning whether pre-approval was required for coverage of out-of-network referrals and holding ERISA's understandability standard requires ambiguities in the SPD to be resolved in favor of participants and beneficiaries, even if the plan administrator is expressly given discretion to interpret the plan); Veilleux v. Atochem N. Am., Inc., 929 F.2d 74, 76 (2d Cir. 1991) (holding that the SPD of the severance pay plan was inadequate

assessment of the typical worker's ken would be rife with error.[121] What is needed is an incentive for balanced drafting by the plan administrator at the outset.

Current law supplies no direct means to disrupt the protective expatiation dynamic.[122] Because employers can publicize the advantages of a plan through virtually unregulated non-SPD communications, they face no pressure to make the SPD understandable.[123]

For purposes of illustration, first consider an extreme (blunt force) corrective. The risk-reward calculus would shift dramatically if the law provided that: (1) an overly detailed official "summary" (the purported SPD) is not an SPD within the meaning of ERISA because it is not understandable by the average plan participant; and (2) the employer's informal explanations serve, alone or in combination, as the plan's functional or de facto SPD, and therefore should be enforced as an SPD would, warts and all.[124] The prospect of liability based on misleading or incomplete informal communications might create a powerful stimulus to craft a balanced, abbreviated explanation. Analytically, this approach would equate an incomprehensible SPD with a missing SPD: in each case, there is no "real" (meaning ERISA-compliant) SPD due to the sponsor's failure to reasonably apprise participants and beneficiaries of their rights and obligations under the plan.[125] Cases impose liability in

where the explanation that employees transferred to a new employer upon the sale of their division were not eligible for benefits appeared under the heading "Leaves of Absence" and within the "Maternity" subsection).

121. Wiedenbeck, *supra* note 63, at 57–58.

122. *Id.* at 58.

123. *See supra* Section II.B.

124. In theory, the Labor Department could take steps to encourage the law to develop in this direction. It might issue an interpretive regulation or general statement of policy declaring that an overly complex or lengthy explanation is *not* an SPD. At this juncture—fifty years after ERISA's enactment—that action might prove difficult to defend following the demise of *Chevron* deference. *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). And 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 the plan's de facto SPD. In view of the longstanding judicial acquiescence in liability-shield SPDs, however, the plea for a declaration that a complex disclosure document is not an SPD seems to have scant chance of success. Instead of categorical rejection of a purported SPD, this Article recommends a more focused approach to encouraging understandability. *See infra* Part IV.

125. The Eighth Circuit takes the view that a disclosure document should be treated as an SPD only if it contains substantially all of the categories of information

instances of deliberate failure to supply an SPD.[126] Where participants must get their information about the plan from informal

required by ERISA § 102(b), 29 U.S.C. § 1022(b), and the corresponding Labor Department regulation on the contents of the SPD, 29 C.F.R. § 2520.102–3 (2024). *E.g.*, Antolik v. Saks, Inc., 463 F.3d 796, 801 (8th Cir. 2006) ("If a document is to be afforded the legal effects of an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and qualification purposes." (citation omitted)); *see generally* Richard J. Link, Annotation, *What Documents Constitute "Summary Plan Descriptions"?*, 124 A.L.R. FED. 355 (1995 & Supp.). Superficially, this provides support by analogy for disregarding an incomprehensible SPD. Generally, however, the dispute centers on whether language in an ostensible SPD should be given effect if it conflicts with the terms of the underlying plan. In such cases, refusing to recognize the document as an SPD avoids application of estoppel, allowing undisclosed plan terms to prevail. Hicks v. Fleming Cos., Inc., 961 F.2d 537, 542 (5th Cir. 1992). In contrast, here the argument is that a purported SPD that is not understandable is not an SPD, and where informal communications effectively function as substitutes for the SPD they should be enforced (including assertions and omissions of required warnings) in derogation of the underlying plan terms.

126. A decade after the statute's enactment the Ninth Circuit held that an employer's deliberate noncompliance with ERISA's disclosure rules was sufficient to justify an order awarding a disappointed worker benefits under ERISA § 502(a)(1)(B), even if the worker was ineligible under the terms of the plan. Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984). Other circuits distinguished *Blau* on the ground that it involved egregious and bad-faith disclosure violations. *E.g.*, Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 744–45 (7th Cir. 1991) (unlike *Blau*, no evidence of active concealment, unfair administration, or bad faith); Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 525 (8th Cir. 1988) (no active concealment). So limited, the Ninth Circuit reaffirmed *Blau*'s holding. Peralta v. Hispanic Bus., Inc., 419 F.3d 1064, 1075–76 (9th Cir. 2005); Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 971 (9th Cir. 2006). In contrast, the Third Circuit rejected nondisclosure as a justification for an award of benefits not provided by the terms of the plan. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1170 (3d Cir. 1990).

Even absent evidence of bad-faith nondisclosure, some courts permit recovery in certain circumstances. The Second Circuit holds that complete failure to develop and provide an SPD should be treated like a summary that lacks required information, triggering liability for benefits if the failing causes "likely prejudice." Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst., 404 F.3d 167, 171 (2d Cir. 2005).

The Eighth Circuit follows a similar approach where the SPD is faulty, so long as it is not hopelessly inadequate. *Compare* Dodson v. Woodmen of the World Life Ins. Soc'y, 109 F.3d 436, 439 (8th Cir. 1997) (reliance or prejudice will support recovery under faulty SPD), *with* Palmisano v. Allina Health Sys., 190 F.3d 881, 888 (8th Cir. 1999) (hopelessly inadequate SPD has no legal effect). *See* Antolik v. Saks Inc., 383 F. Supp. 2d 1168, 1174–78 (S.D. Iowa 2005) (explaining Eighth Circuit cases), *rev'd*, 463 F.3d 796, 801–02 (8th Cir. 2008). The view that liability cannot be premised on a wholly inadequate SPD apparently derives from *Hicks*, 961 F.2d 537, which concluded that, in view of the binding effect of the SPD, in order to avoid "a trap for the unwary employer," "there should be no accidental or inadvertent SPDs." *Id.* at 542; *Palmisano*, 190 F.3d at 888 ("If a document is to be afforded the legal effects of

communications, the argument goes, they should be protected in their reliance on those functional or de facto SPDs.

The sweeping version of this argument—that an incomprehensible SPD should be treated as a legal nullity justifying worker reliance on other communications—appears to have no support in ERISA case law.[127] Moreover, attention to ERISA's policies demands rejection of such a simplistic approach. Instead of inducing optimal disclosure, this sort of countervailing legal exposure creates an acute risk of triggering widespread flight from plan sponsorship. Aiming at optimal disclosure in such a crude fashion, plan sponsors would reasonably object, which puts the administrator in an untenable position. The employer could be sued for saying either too much or too little. Amplifying ERISA litigation in this way would dramatically increase plan administration expenses.[128] Because plan sponsorship is voluntary, broad discontinuance (termination) of private pension and welfare plans seems the likely result.

By itself, imposing liability for want of an understandable SPD cannot be the answer—not under a regime that also imposes liability in cases of inadequate disclosure (failure to warn). Like balancing a sphere atop a pyramid, this approach mandates attainment of an unstable equilibrium. "Abridgement and simplified expression make information realistically accessible but often create the impression that general explanations and illustrations are not subject to qualification or

an SPD, such as conferring benefits when it is at variance with the plan itself, that document should be sufficient to constitute an SPD for filing and qualification purposes." (quoting *Hicks*)). That rationale, of course, does not extend to informal explanations provided in instances of deliberate noncompliance with ERISA's disclosure rules. And note that the Eighth Circuit suggested in *Simmons* that egregious nondisclosure might trigger liability.

127. This is unsurprising because disappointed plan members have no reason to assert such a far-reaching claim. There is no civil penalty or bounty to be captured by calling out an impenetrable SPD. *See supra* notes 76, 99. The participant or beneficiary who institutes a civil enforcement action is instead narrowly focused on avoiding application of specific plan terms that adversely impact her. The plaintiff might argue that specific terms, although disclosed in the SPD, were communicated in a way that failed to raise awareness of the potential problem. Such a claim hinges on the assertion that specific SPD provisions were not reasonably understandable and should therefore be disregarded. *See* King v. Blue Cross & Blue Shield of Ill., 871 F.3d 730 (9th Cir. 2017). Whether the SPD is undecipherable from beginning to end is not relevant to the suit.

128. Litigation costs have been a particular focus of concern in numerous Supreme Court ERISA opinions in recent years. *See* Wiedenbeck, *supra* note 38, at 1056–57, 1059.

exceptions in special circumstances. In contrast, excessive detail inhibits utilization and obscures the principal features, conditions, and limitations of the benefit plan."[129] Getting this central trade-off right is the objective of the SPD. While one may wonder whether it can be achieved by the plan administrator, surely episodic post-hoc second guessing by federal judges will miss the mark. More nuance is required to accommodate the tension between understandable and reliable disclosure.

An incentive is needed to reinvigorate understandability, but an incentive that's not strictly antagonistic to reliability. The incentive could be liability based, but carefully crafted guardrails on liability would be essential.[130] Preliminarily, however, it is vitally important to recognize that empowerment of worker career and financial planning calls for a zone of security for reasonable, good-faith efforts to provide balanced information.

B. Zone of Security

The best accommodation between understandability and reliability demands a difficult judgment call—the optimum will rarely be indisputable. Countervailing incentives cannot ensure that the plan administrator will identify some theoretically perfect solution. Exposure to potential liability for missing the mark in either direction, while meant to drive sponsors away from the extremes toward the middle ground, instead might drive employers away from plan sponsorship altogether. Exposing the SPD drafter to liability for telling workers either too much (not understandable) or too little (not sufficiently accurate and comprehensive) as determined by a judge in hindsight would create a fearful Catch-22, leading companies to reassess the wisdom of continued voluntary provision of pension and welfare benefits.[131] A zone of security for reasonable, albeit imperfect, attempts to strike a balance between understandable and reliable information is essential.

ERISA fiduciary law offers tools to fashion such a safe zone.[132] The proper balance between "understandable" and "sufficiently accurate and comprehensive" information entails an exercise of judgment by the plan administrator, and such discretionary decision-making is

129. Wiedenbeck, *supra* note 14, at 12; WIEDENBECK & MAHER, *supra* note 1, at 95.
130. *See* Wiedenbeck, *supra* note 63, at 62.
131. *Id.*
132. *Id.* at 62–63.

therefore a fiduciary act under ERISA.[133] If the plan document includes an express grant of discretionary authority to implement the plan, then the administrator's determinations on disclosure should, if challenged in court, be subject to the restricted abuse-of-discretion standard of review.[134] 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).[135] Therefore, the plan administrator's resolution of the tension between understandable and reliable information is very likely to withstand attack, which would of course deter challenges in the first place.

Deferential review applies only to discretionary fiduciary determinations, yet many disclosures arguably proceed from mandatory duties. In particular, the SPD "shall contain" a description of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."[136] Many successful challenges to SPD adequacy assert such a failure to warn or could be reframed as such.[137] If interpreted as an unyielding mandate, the duty to warn broadly exposes the administrator to judicial second guessing.

133. *See* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); 29 C.F.R § 2520.102-2(a) (2024) (providing that the plan administrator, in writing the SPD to be understandable and sufficiently comprehensive, "shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan"); WIEDENBECK & MAHER, *supra* note 1, at 117–21 (discussing centrality of discretionary authority in fiduciary classification).

134. *See* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). If the plan does not contain an express grant of discretion, or if the grant is interpreted as not extending to disclosure decisions, then the court would apply de novo review, and would be authorized to second guess the administrator's determination. Substituted judgment means no zone of security, but this should not threaten continued plan sponsorship. Virtually all plans today explicitly confer discretionary decision-making powers. Wiedenbeck, *supra* note 38, at 1073–74. And if the language of the grant were construed narrowly, as not protecting the administrator's disclosure choices, sponsors would quickly respond by amending their plans to fix the problem. Consequently, de novo review should present only a short-term transitional risk.

135. *See* RESTATEMENT (SECOND) OF TRUSTS § 187 & cmt. d–g, i (1959) (explaining components of abuse of discretion review of fiduciary exercise of discretionary powers under private trust law); Varity Corp. v. Howe, 516 U.S. 489, 496–97 (1996) (observing that the common law of trusts offers a starting point that informs interpretation of ERISA's fiduciary regime).

136. ERISA § 102(b), 29 U.S.C. § 1022(b).

137. *See* WIEDENBECK & MAHER, *supra* note 1, at 94–98, 114.

The obligatory phrasing of the duty to warn does not tell the full story. The apparent mandate in the specification of SPD contents, section 102(b), is qualified by section 102(a), which provides that the SPD "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."[138] Three clauses—set off by commas and joined by a conjunction—jointly define the SPD. The summary must simultaneously contain specified content, be understandable, and "reasonably" inform workers of their standing with respect to the plan. The understandable description need only be "sufficiently accurate and comprehensive," not completely so. Imposing in one breath these essential attributes of a useful summary on the list of SPD contents must be taken to relax the ostensibly inflexible command of the subsection (b) duty to warn. Absent that interpretation, the optimal disclosure prescription becomes, not extraordinarily difficult nor even impractical, but utterly unattainable. Accordingly, the duty to warn does not require that the SPD flag every conceivable pitfall or obstacle to benefit entitlement, but only those likely to be material to the average plan participant's life planning.[139]

Abuse of discretion review—also known as the arbitrary and capricious standard—demands reasoned decision-making.[140] Central tenets require the decision maker to consider all relevant factors and refrain from taking into account any irrelevant factors.[141] The criteria are

138. ERISA § 102(a), 29 U.S.C. § 1022(a).

139. The Labor Department's regulatory rendition of the duty to warn incorporates the germ of this idea, it requires:

> a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (e.g., by exercise of sub-rogation or reimbursement rights) of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

29 C.F.R. § 2520.102–3(*l*) (2024). Here, the duty to warn is limited to disabusing participants and beneficiaries of notions of benefit entitlement that could sensibly be engendered ("might otherwise reasonably expect") by the plan's summary description of eligibility for participation and benefits. Tying the duty to warn to benefits that a participant or beneficiary might otherwise reasonably expect based on the required description of benefits dates from 1977. 42 Fed. Reg. 14266, 14275 (Mar. 15, 1977).

140. Wiedenbeck, *supra* note 38, at 1074–75 & n.288.

141. *Id*.

set by the legislative standards for decision.[142] Hence in SPD drafting the plan administrator must give thought to what the average plan participant can comprehend. Protecting workers from loss due to insufficient information is, of course, another relevant factor. Protecting the plan sponsor from litigation is *not* a legitimate independent consideration.[143]

Plan administrators are ordinarily company insiders, infecting the disclosure tradeoff with a conflict of interest.[144] Such fiduciary conflicts are permitted and pervasive under ERISA, but conflicted fiduciaries are still commanded to act in good faith.[145] The Supreme Court says limited judicial review under the abuse-of-discretion test applies notwithstanding the conflict.[146] In practice, this relaxed judicial oversight of conflicted decisions by insider fiduciaries implicitly tolerates some employer-regarding decisions.[147] Consequently, an insider plan administrator might skew disclosures to favor completeness over understandability without being found to have abused discretion.[148] To

142. The criteria may be expressed in the statute or implied by legislative objectives.

143. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) ("[F]iduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."); Wiedenbeck, *supra* note 38, at 1074–75 & n.288.

144. *See* Wiedenbeck, *supra* note 38, at 1070–88 (discussing covert relaxation of ERISA's duties of loyalty and care as applied to insider fiduciaries).

145. *See* ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3) (excepting insider fiduciary from prohibited transaction rules); Wiedenbeck, *supra* note 38, at 1072.

146. Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008); Wiedenbeck, *supra* note 38, at 1053–54.

147. Wiedenbeck, *supra* note 38, at 1070–85 (explaining the nature and extent of implicit exculpation of ERISA's duty or loyalty).

148. *See id.* at 1054. The conflict becomes especially acute in explaining plan amendments adopted to reduce or control costs, such as by limiting eligibility or scaling back benefits. Such amendments, involving the employer's strategic plan design decisions, constitute settlor functions exempt from fiduciary oversight. *Id.* at 1024–33. The required explanation of such plan changes in the summary of material modifications or SPD, however, is a fiduciary act. 29 C.F.R § 2520.102-2(a) (2024) (requiring plan administrator writing the SPD to "exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan"); ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). That presents a dilemma, because messaging to workers is often integral to successful roll-out and achievement of the amendments' objectives. In that case, the same executive or management team that instituted the changes may naturally oversee communications, crafting them with a view toward maximizing success of employer objectives. Downplaying or obscuring alterations that disadvantage workers, if done to that end, surely abuses discretion, but the breach may not come to light under the less-than-searching conflict of

that extent the insider-administrator's resolution of the tension between accessible and reliable information may not represent an unbiased attempt to achieve optimal disclosure. Nevertheless, in sharp contrast to current law, abuse-of-discretion review would require showing that SPD utility was taken seriously in crafting disclosures.

Reviving understandability should induce shorter and simpler explanations at the point of entry to plan information. Summation in layman's terms buys accessibility, albeit at some cost to reliability. Recall that understandability declined in response to judicial endorsement of claims that some SPDs were insufficiently accurate and comprehensive to reasonably apprise plan members.[149] Making the SPD practically informative to the actual workforce would require truly transformative simplification and distillation. Elevated pressure on reliability seems inevitable. The remainder of this Article investigates whether balanced understandable communication is achievable, and if so, how it could be achieved.

IV. Crafting a Compromise

This Part explores whether review of discretionary disclosure trade-offs could effectively mediate between understandability and reliability. We begin with a proposal that could be implemented by executive action under current law. That feature is significant because prevailing legislative polarization effectively precludes statutory amendment,[150] and in view of existing case law, the judiciary cannot be expected to adopt an innovative approach to disclosure. A regulatory nudge might do the trick, however. Arguably, Labor Department rulemaking could force a transition to more effective communication.

A. The SPD Overview

The 2017 ERISA Advisory Council studied the effectiveness of disclosures and made recommendations designed to adapt current

interest review protocol suggested by Supreme Court precedent. Wiedenbeck, *supra* note 38, at 1070-85.

149. *See supra* Section II.A.

150. Congress, for example, is not going to enact a civil penalty targeting opaque disclosures. Plan sponsors would uniformly oppose such a penalty and are well represented before Congress. In contrast to such a penalty's concentrated costs, the benefits of improved career and financial planning are subtle and diffuse, and most workers are not represented by a union.

practice—the prevalence of the liability-shield SPD—to better serve the planning function and promote economic efficiency.[151] "[T]he SPD has developed into a behemoth document that does not serve participant interests because it is so detailed that it discourages participants from reading it at all."[152] In response, the Council recommended development of an introductory section to the SPD, a "quick reference guide," that would provide a brief summary of the most pertinent aspects of the plan, those "that play a critical role in [participants'] retirement readiness."[153]

The Council presented a model quick reference guide for a typical 401(k) plan—the model is less than 2,000 words (five pages) long.[154] The Council also recommended creation of a corresponding quick reference guide for group health plans and presented a model, which is about 2,200 words (six pages) long.[155] To achieve such astonishing brevity,[156] each model cross references important categories of required information. The 401(k) model incorporates by reference information concerning available investment alternatives and investment defaults,[157] while the health care model links to the plan's summary of benefits and coverage (SBC),[158] as well as to lists of participating medical service

151. RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 9; HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 2.

152. RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 14.

153. *Id.* at 15.

154. *Id.* at 39–43. To achieve that brevity, the model cross references but does not include required disclosures concerning either: (1) the investment choices available under the plan, 29 C.F.R. §§ 2550.404a-5, 2550.404c-1(b)(2)(B) (2024); or (2) the notice required of plans providing that in the absence of an investment election by the participant funds will be invested in a qualified default investment alternative, *id.* § 2550.404c-5(c)(3), -5(d).

155. HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 17–24.

156. By way of comparison, merely the explanation of subrogation and reimbursement rights in the SPD of Washington University's basic health care plan contains 2227 words. *See supra* note 83, at 111–15.

157. Defined contribution plans calling for participant-directed investments must supply information concerning the investment choices available under the plan, 29 C.F.R. §§ 2550.404a-5, 2550.404c-1(b)(2)(B) (2024). In addition, notice is required if the plan provides that in the absence of an investment election by the participant funds will be invested in a qualified default investment alternative, *id.* § 2550.404c-5(c)(3), -5(d).

158. The SBC is a simplified disclosure vehicle mandated by the Affordable Care Act for group health care plans. It provides a condensed overview of plan benefits and coverage in a uniform format, using uniform definitions of standard insurance and medical terms, to facilitate comparison of cost, coverage, benefits, and exceptions. ERISA § 715(a)(1), 29 U.S.C. § 1185d; 42 U.S.C. § 300gg-15. The SBC must

providers and available prescription drugs.[159] As an introductory overlay, the quick reference guide would extensively cross reference more detailed explanations of plan members' rights and obligations in the corresponding portions of the full SPD, thereby preserving all of its defensive (liability-shield) features.[160]

The quick reference guide's synopsis of basic plan features was not intended to stand alone. It was meant to function as the gateway to fuller explanations and examples accessible when needed. To effectively inform plan members that access should be instantaneous, effortless, and focused on the relevant portions of a large body of information. Those characteristics make electronic communication of hyperlinked information essential to the success of this structure.[161]

This recommended approach to simplified disclosure under ERISA parallels developments under federal securities law. Millions of Americans invest in mutual funds to accumulate resources for retirement, higher education, and other financial goals. Individual retail

utilize terminology understandable by the average plan enrollee, include examples of coverage for common benefit scenarios, and be presented in a standardized template that does not exceed four double-sided pages in length, and does not include print smaller than 12-point font. While the SBC does not legally substitute for the SPD, it supplies a condensed summary that facilitates comparisons between insurance alternatives.

159. HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 20.

160. *See* RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 15, 17 (quick reference guide would be an introductory section or component of the complete SPD, "not an additional stand-alone disclosure [so that] the availability and existence of the complete SPD is not compromised"); HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 15, 16 (introductory portion of SPD, with references to "permit the participant to access the SPD's full language"). The 2017 ERISA Advisory Council did not recommend modifications to disclosure liability.

161. The ERISA Advisory Council's 2017 recommendation contemplated the possibility that a retirement plan quick reference guide might cross reference, presumably by page number, printed SPDs distributed years previously. *See* RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 15, 39. The current ubiquity e-commerce and mobile communications makes it wholly unrealistic to expect plan members to find or secure a copy of another document, including an electronic document, and locate information therein. Hence, the proposal examined below would require immediate pinpoint access to more detailed information.

Since 2020, pension plans have been permitted to make electronic notification and internet posting the default method of regularly scheduled disclosures to plan participants and beneficiaries. 29 C.F.R. §§ 2550.104b-31, -1(f) (2024). Health care and other welfare benefit plans are limited to employing electronic disclosure to workers with regular job-based internet access and those participants and beneficiaries who affirmatively consent to disclosure via electronic media. *Id.* § 2550.104b-1(c)(2).

investors, however, typically find fund prospectuses unhelpful in choosing among thousands of available mutual fund options, because the statutory prospectus is long, detailed, and frequently expressed in language that is complex and legalistic.[162] Responding to concerns that these investors need key information presented in a simplified language and a concise user-friendly format, in 2009, the SEC promulgated a rule requiring that mutual fund prospectuses start with a summary of specified categories of key information presented in plain English in a standardized order.[163] In addition, the rule permits a fund to satisfy its prospectus delivery obligations under the Securities Act of 1933 by sending only the stand-alone summary prospectus, provided that the fund's full statutory prospectus and other specified documents are available online at an internet address specified at the start of the summary.[164] Similarly, in 2019, the SEC prescribed Form CRS, the client relationship summary, requiring registered investment advisers and registered broker-dealers to provide retail investors a short and accessible disclosure to informing them of services, fees, costs, conflicts of interests, standard of conduct, and the disciplinary history of the firm and its financial professionals.[165] The relationship summary must be presented in a question-and-answer format with standardized headings in a prescribed order, using plain English, subject to a four-page length limit, with access to more detailed information via hyperlinks, QR codes, or other technologies facilitating layered disclosure.[166]

A short, simple introductory overlay, akin to the quick reference guide proposed in 2017,[167] seems a promising path toward better understanding. The version proposed here will be called the SPD Overview. Labor Department rulemaking would prescribe this new

162. *See* Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies, 74 Fed. Reg. 4546, 4547 (Jan. 26, 2009).

163. *Id.* The current version of the summary prospectus presentation and content rules, prescribed under 17 C.F.R. § 274.11A (2024), is Part A of Form N-1A, Registration Form Used by Open-End Management Investment Companies, https://www.sec.gov/files/form-n-1a.pdf; 1 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 937–44 (7th ed. 2024); *see also* Plain English Disclosure, 63 Fed. Reg. 6370 (Feb. 6, 1998) (requiring issuers to write the cover page, summary, and risk factors section of prospectuses in plain English).

164. 17 C.F.R. § 230.498 (2024).

165. Form CRS Relationship Summary; Amendments to Form ADV, 84 Fed. Reg. 33492, 33500, 33504–08 (July 2019).

166. *Id*.

167. *See* RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91.

component of the SPD, designed to provide a brief balanced plain-language summary of the core terms of the plan. Topics required to be addressed by the SPD Overview would vary according to plan type (health care, 401(k), traditional pension plan, etc.), and an overall maximum word length might be imposed. The Overview would highlight key conditions or limitations on qualification for plan benefits and cross reference via hyperlinks explanations of plan members' rights and obligations set forth in the rest of the SPD.[168] Portions relevant to a specific matter addressed in the Overview would be accessed from the Overview directly via pinpoint links—general reference to the contents of a liability-shield SPD would not suffice. Where the Overview links to the description of a benefit limitation that itself requires extended explanation (e.g., health care plan coordination of benefits rules, or break in service provisions of a traditional pension plan),[169] the regulation should require the initial link to call up a brief summary of the requirements, perhaps one or two paragraphs in length, that contains further (second level) links pointing to the detailed elements or components. Word and number searching should be supported.[170] In view of the expectations created by today's communication environment, such an enhanced SPD should be required to be accessible at virtually any time from smartphones, tablets, and other mobile devices, as well as networked computers.

The variety and complexity of employee benefit programs might justify phased transition to such a new approach to disclosure. Perhaps the SPD Overview should first be required only for a reasonably

168. ERISA § 109(c), 29 U.S.C. §1029(c) (authorizing the Secretary of Labor to "prescribe the format and content of the summary plan description").

The regulation might designate some topics that can be dispatched simply by stating the issue and including a targeted reference to explanations contained in the longer document. Examples might include a link to a detailed schedule of benefits under a group health plan, the explanation of the extent of PBGC-guaranteed benefits under an insured defined benefit plan, or a statement of ERISA rights. *See* 29 C.F.R. § 2520.102-3(j)(2), (m), (t) (2024).

169. *See* ERISA § 109(c), 29 U.S.C. §1029(c).

170. In the preamble to the proposed electronic disclosure rule, the Labor Department observed that "a notice and access framework also facilitates . . . interactivity, just-in-time notifications, layered or nested information, word and number searching, engagement monitoring, anytime or anywhere access, and potentially improved visuals, tutorials, assistive technology for those with disabilities, and translation software." Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 84 Fed. Reg. 56894, 56908 (proposed Oct. 23, 2019). None of those features (nor understandability generally) were actually required by the rule, either as proposed or adopted.

standardized plan type, such as a participant-directed 401(k) plan. Based on that experience, the Labor Department could adjust and extend the regulations to cover types of pension and welfare benefits that exhibit broader variation along more dimensions, like traditional pensions or health care plans.

How to induce compliance with a new SPD Overview mandate also requires attention. In principle, the rule could contain either a positive or negative incentive to simplify and summarize, by extending some sort of benefit for compliance, imposing a cost for noncompliance, or both. The 2017 quick reference guide proposal relied on carrots alone.[171] The guide, which would be distributed annually, would allow sponsors to dispense with issuing a number of other disclosure documents that are currently required, including the summary of material modifications (a plan amendment notice) and the summary annual report.[172] Alternatively, the regulation could specify that in the absence of a proper SPD Overview the plan administrator would be treated as having failed to issue an SPD, increasing exposure to estoppel claims based on other representations.[173]

B. Ongoing Obstacles

An SPD Overview mandate of the sort proposed here offers no panacea. Several serious ongoing obstacles to understanding can be anticipated. Mistakes happen. Sometimes the SPD Overview, being a brief synopsis, will contain statements that conflict with the more complete

171. *See* RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 9, 17 (suggesting that retirement plan quick reference guide could substitute for summary annual report and summary of material modifications); HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 2, 17.

172. *See* RETIREMENT PLAN COMMUNICATIONS 2017 REPORT, *supra* note 91, at 15–17; HEALTH PLAN COMMUNICATIONS 2017 REPORT, *supra* note 89, at 17.

173. Without the required SPD Overview, participants and beneficiaries would be treated as lacking reason to know of conditions or limitations set forth in the liability-shield SPD. Consequently, justifiable reliance on other communications could more readily be established.

> The notion that reliance on non-SPD communications is unjustified if the participant or beneficiary has reason to know of inconsistent plan terms should accordingly be tempered by sensitive appraisal of what plan information is realistically accessible. Plan members' claims for relief based on non-SPD communications cannot fairly be repulsed with the observation that they "should have known better," if "knowing better" requires deciphering a lengthy, opaque, liability-shield SPD.

WIEDENBECK & MAHER, *supra* note 1, at 106.

explanation to which it refers. It is entirely predictable that in many instances the SPD Overview will fail to flag all relevant "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."[174] The relationship between the newly enhanced SPD and other communications about the plan also deserves attention. Each of these complications is examined below.

1. SPD DEFECTS: FAILURE TO WARN

The proposed SPD Overview would introduce and highlight the most important features of the plan. Rather than entirely redesigning existing liability-shield SPDs, plan sponsors can be expected to respond to an SPD Overview mandate by adding an overlay or wrapper with links to in-depth information contained in the existing SPD. That approach would necessarily involve a simplified restatement of some explanations appearing in the liability-shield SPD, and such a restatement introduces possible inconsistency or conflict between the new and old parts of the document. As such conflicts are virtually inevitable, their appropriate resolution must be addressed.

Approaching the question with cognizance of the objectives of disclosure, it seems important to distinguish between internal conflicts that are readily apparent to the average plan participant and those that are not.[175] Where the SPD obviously contradicts itself, further inquiry is the reasonable response. A plan member aware of the inconsistency would be foolhardy to credit either statement, hence an estoppel claim would collapse for want of reasonable reliance.[176] Calling attention to the conflict, in contrast, promotes prompt correction of the communication oversight, advancing disclosure's collaboration function.[177]

Self-help and collaborative advancement are not available if the conflict is imperceptible to the intended audience. A lawyer or judge might see the contradiction, but if the average plan participant would not, she should be protected in relying on the apparent meaning of the SPD, even if that reading is at odds with the terms of the plan

174. ERISA § 102(b), 29 U.S.C. § 1022(b).
175. WIEDENBECK & MAHER, *supra* note 1, at 87–94, 113–14.
176. *Id.* at 87–88.
177. *Id.* On the collaboration function, *see supra* notes 28–30 and accompanying text.

document.[178] In such cases, the SPD is defective—it fails to reasonably apprise participants and beneficiaries of their rights and obligations—and appropriate equitable relief to remedy that ERISA violation is authorized.[179]

Realistically, the imperceptible conflict most likely to be generated by the SPD Overview involves silence rather than contradictory express language.[180] The Overview will state that the plan pays benefits of given types in specified amounts to eligible employees or their beneficiaries who satisfy certain conditions, and it will direct the reader, via hyperlinks, to relevant portions of the underlying liability-shield SPD setting forth more complete definitions of eligibility, benefit types and levels, and qualification conditions. A difficult question is presented if the Overview flags, via hyperlink cross references, some but not all necessary conditions. Assume, for example, that the liability-shield SPD does accurately explain a particular "circumstance[] which may result in disqualification, ineligibility, or denial or loss of benefits,"[181] but the SPD Overview fails to flag that explanation with a pinpoint link.

A condition that is disclosed in the complete SPD but not specifically flagged by the SPD Overview starkly presents the difficulty of accommodating understandability and reliability. The SPD Overview's pinpoint links to full explanations are designed to make workers actually aware of important benefit conditions and limitations that may be relevant to their personal circumstances. A readable Overview that specifically directs attention to some potential pitfalls makes it most unlikely that a participant or beneficiary will search for additional threats to entitlement. Equipped with a user-friendly guide to the plan, workers are not going to peruse the remainder of the liability-shield SPD out of curiosity. The Overview's links will reinforce the assumption that they have all they need to know, dissuading them from looking for other loopholes in the employer's commitment.

178. Imperceptible contradictions were implicated in the many cases from the 1990s involving SPDs that promised lifetime health care benefits but simultaneously reserved to the sponsor the unrestricted right to amend or terminate the plan. A number of famous appellate decisions refused relief even though the contradiction was virtually invisible to plan participants. WIEDENBECK & MAHER, *supra* note 1, at 88–94, 113–14.

179. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

180. *See* WIEDENBECK & MAHER, *supra* note 1, at 94–95, 98–100.

181. ERISA § 102(b), 29 U.S.C. § 1022(b).

It is tempting to adopt the view that conditions not flagged in the Overview are effectively undisclosed—that being realistically invisible they should therefore be unenforceable. That goes too far, however. To establish a right to benefits all of the plan's conditions must be satisfied; most conditions apply in series (are conjunctive) and there may be multitudes. Consider a health care plan, for example. Payment or reimbursement of the cost of health care typically requires (among other conditions): (1) that the cost was incurred by or on behalf of an eligible employee or an enrolled dependent; (2) that the cost was incurred while coverage was in effect; (3) that the employee paid any required premiums for coverage; (4) that the amount was a cost of medical care (i.e., for the diagnosis, cure, mitigation, treatment, or prevention of disease); (5) that the claims administrator determines the health services or supplies were "medically necessary"; (6) that they are not excluded from coverage as experimental or investigational; (7) that the eligible employee has satisfied any required individual or family deductible; (8) that the cost does not exceed the plan's limit on coverage for the type of care in question; and (9) that the plan's obligation is not reduced by other insurance coverage under the plan's coordination of benefits rules.[182] Even if each of these conditions for payment are satisfied, many plans impose conditions subsequent that, in effect, retract prior benefit payments, such as by giving the plan the right to subrogation or reimbursement from any recovery obtained from a third party who caused the injury or sickness that generated the need for medical care.[183] Now consider how plan sponsors would respond to a rule that a benefit condition not flagged by a pinpoint link in the SPD Overview becomes unenforceable. The Overview would expand to the maximum extent permitted by regulation, and virtually every word within it would link directly or indirectly to extended definitions in an associated liability-shield SPD. Digital cross referencing the SPD Overview to every clause in a 150-page liability-shield SPD is not the path to enlightenment.

182. Wiedenbeck, *supra* note 38, at 1044–51; *see*, *e.g.*, Summary Plan Description, Washington University Choice Plus Basic Plan, *supra* note 83, at 3 (eligibility), 4 (cost of coverage), 5 (time coverage begins), 9-12 (eligible expenses), 1 (generally applicable "medically necessary" condition), 13–5 (annual deductible, coinsurance, and out-of-pocket maximum), 34–70 (additional limitations on covered care and coverage caps), 81 (exclusion of experimental or investigational services), 78-92 (additional exclusions from coverage), 104–10 (coordination of benefits).

183. *See* Wiedenbeck, *supra* note 38, at 1044–51 (explaining that welfare plan benefits are ordinarily defined solely by contract; property law principles do not apply).

Demanding a pinpoint link from the SPD Overview to a specific explanation of every condition on benefit entitlement is an invitation to become lost in a tangle of hyperlinks. That seems no more conducive to informed career and financial planning than is the admonition to read an entire liability-shield SPD because you might not have all the information you need by reading only one part.[184] If every limitation not flagged in the SPD Overview were treated as an actionable failure to warn, nothing would be achieved by way of improved understandability, and plan sponsors' defensive reaction (the tangle of hyperlinks) would quickly return the system to a state where plan sponsors are virtually immune from liability. To promote understanding, failure to flag any particular condition cannot *by itself* be equated with an actionable failure to warn of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."[185] Linking from the SPD Overview to specific portions of an underlying liability-shield SPD must be selective.

Some disqualifying conditions are more common and important than others. Awareness of how and when they may come into play can be crucial to empowering decision-making. As to those conditions, details matter, and the omission of a link to fuller explanation would properly support failure-to-warn liability.[186] The SDP drafter needs to prioritize, curating disclosures to adapt them to the needs and abilities of the average plan participant. In other words, judgment is required. That judgment, of course, is an exercise of discretion in plan administration—a fiduciary act.[187] As such, the complaint that an SPD Overview's failure to highlight the contours of some particular benefit condition justifies failure-to-warn liability calls for review of the discharge of fiduciary duties.[188] Judicial determination of whether those duties were breached ought ordinarily to be conducted by applying the deferential abuse-of-discretion scope of review.[189] Administrators cannot be expected to perfectly optimize the disclosure tradeoff. They should be protected in making a good faith attempt to balance—to "reasonably apprise [] participants and beneficiaries of their rights and obligations

184. *See supra* note 83 and accompanying text.
185. ERISA § 102(b), 29 U.S.C. § 1022(b).
186. For discussion of cases imposing liability for failure to warn, *see* WIEDENBECK & MAHER, *supra* note 1, at 95–98.
187. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).
188. *See* WIEDENBECK & MAHER, *supra* note 1, at 100–03.
189. *See supra* Section III.B.

under the plan."[190] That protection is available in the zone of security created by abuse-of-discretion review of fiduciary decisions.[191] To revive understandability, the Labor Department should expressly provide, in the rulemaking that prescribes the SPD Overview and its contours, that the decision whether the Overview should link to the details of any particular benefit condition is subject to review only for abuse of discretion, provided that the terms of the plan broadly grant of discretion to the administrator.

To assist plan sponsors and provide guidance to the courts, a rule establishing abuse-of-discretion as the standard of review should offer examples. Each example would involve a disqualifying condition that is not flagged in the SPD Overview together with an explanation why, under the circumstances, omission is or is not an abuse of discretion. The explanation would necessarily emphasize factors influencing the omission and how they measure up to ERISA's fiduciary duties. To illustrate, consider these cases:

- In conjunction with the conversion of a traditional defined benefit pension plan into a cash balance plan, the employer issues a new SPD. The Overview assures participants that the full value of their previously earned pension (accrued benefits) will be preserved, and their retirement savings will grow with continued employment as annual compensation and interest credits are made to their cash balance accounts. In fact, the transition to the cash balance plan includes a wear away feature not flagged by the Overview that will operate to relieve the employer from increasing plan members' retirement savings for several years after the transition. Top corporate executives decide not to alert workers to the wear away feature, which works a de facto suspension of pension contributions, to avoid employee dissatisfaction. The omission breaches ERISA's duty of loyalty;[192] as an abuse of discretion (i.e., consideration of an improper factor), the duty to warn is violated.
- A health care plan sponsor has a workforce with a demographic composition (e.g., age and ethnicity) that predisposes an unusually large proportion of workers to a particular disease or health condition, such as hypertension and heart attack. To control health care premium increases, the plan is

190. ERISA § 102(a), 29 U.S.C. § 1022(a).

191. This conclusion depends critically on the accommodation between ERISA § 102(a) and (b) previously suggested. The facially mandatory phrasing of the duty to warn (subsection (b) says "shall contain") must be construed as consistent with and subsidiary to the general standard for SPD adequacy (subsection (a) says "reasonably apprise"). *See supra* notes 136–39 and accompanying text.

192. *See* CIGNA Corp. v. Amara, 563 U.S. 421 (2011); ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

amended to impose new limits on various coverages, including cardiac care. The SPD Overview links to the plan's summary of benefits and coverages without specifically highlighting the new restriction on cardiac care. The omission is not deliberate (multiple coverage changes are made every year), but stems from management's inattention to the special needs of its workforce. In light of the special characteristics of the average plan participant, failure to flag new restrictions on cardiac care may breach ERISA's duty of prudence.[193] If so, the omission constitutes an abuse of discretion (i.e., failure to consider a relevant factor) and the duty to warn is violated.

- The SPD Overview of a health care plan does not link to the explanation of the plan's coordination of benefits (COB) rules set forth in the underlying liability-shield SPD. The plan administrator decided not to flag COB to simplify the Overview and because the need to allocate financial responsibility among multiple insurers arises infrequently and has little relevance to the financial planning of the average plan participant. The omission reflects a reasonable exercise of discretion, does not breach the administrator's fiduciary duties, and does not violate the duty to warn.

2. NON-SPD COMMUNICATIONS: FIDUCIARY BREACH

The defensive liability-shield SPD led employers to turn to other channels to impress upon workers the value of their benefit programs.[194] Non-SPD communications are used to promote the plan, ignoring or downplaying its restrictions and limitations.[195] A campaign of unbalanced boosterism can be pursued with minimal risk because the formal SPD, however impenetrable it may be to a typical plan member, defeats estoppel claims based on misleading or incomplete non-SPD communications.[196] Courts generally find that a liability-shield SPD prevents justifiable reliance on other information by establishing reason to know (constructive notice) of adverse conditions.[197] Some decisions also ground their lack of sympathy to estoppel claims on

193. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

194. *See supra* Section II.B.

195. *See, e.g.*, WIEDNEBECK & MAHER, *supra* note 1, 103 (observing that "[a]dministrators regularly provide more information about the plan than the minimum required by the SPD and ERISA's other disclosure obligations" and if "participants are given a lengthy complex liability-shield SPD, the plan sponsor knows that the advantages of the plan will have to be made clear to employees by other means").

196. *See supra* notes 107–10 and accompanying text.

197. *See* WIEDENBECK & MAHER, *supra* note 1, at 103–06 (arguing, in contrast with broad application of constructive notice, that reliance on non-SPD communications is unjustified only if the participant or beneficiary actually knows or *reasonably should know* that the representations are mistaken or dangerously incomplete).

congressional intent that the SPD be accorded primacy under ERISA's disclosure scheme.[198]

The new style SPD, to prove successful, must undercut this dynamic. If the SPD (meaning the composite of SPD Overview and linked detailed explanations) is understandable, the need to rely on other communications to impress workers with the value of the plan will fall. Some employers might still attempt to garner undeserved (excessive) wage discounts by disseminating unbalanced promotional material.[199] Yet, if the new style SPD actually makes workers aware of the basic features and value of the plan, those efforts will backfire.[200] The resulting dissonance between non-SPD promotional material and the understandable SPD will only increase workforce skepticism and distrust of employer actions.[201]

From a planning perspective, substituting an understandable, balanced SPD for dependence on understandable non-SPD communications—communications that are sometimes blatantly promotional and that frequently prove incomplete and misleading—is unquestionably a good thing.[202] And the Labor Department might consider steps to amplify the effect. To encourage routine reliance on the new style SPD, for example, the Department might issue templates for "Planning Guides." The guides would address common issues that predictably arise as workers encounter various major life events and (importantly) would be pervasively keyed to the SPD, directing readers via hyperlinks to relevant portions of the SPD for answers and examples. In the case of a 401(k) plan, one could envision brief straightforward guides presenting questions such as: "Handling Your 401(k) Account If You Leave the Company"; "The Impact of Divorce on Your Retirement Savings"; "Accessing Your 401(k) Savings While Still Working"; "Information for Beneficiaries on the Death of Their 401(k) Plan Participant"; and "Considering Your Investment and Distribution Options as You Approach Retirement."

If the renovated SPD proves successful, such that workers regularly utilize the document, one consequence will be fewer non-SPD communications. But non-SPD communications will not (and should

198. *See supra* Section II.B; WIEDENBECK & MAHER, *supra* note 1, at 103–06.
199. *See* WIEDENBECK & MAHER, *supra* note 1, at 103–06.
200. *See id.*
201. *See id.*
202. *See id.*

not) entirely disappear. There are some matters that are vitally important to workers that the SPD does not address, such as the prospects for continuation or amendment of the benefit plan.[203] Disseminating information on such matters would generally be fiduciary action, reviewable under ERISA's standards of loyalty and care.[204] Because the information pertains to questions beyond the scope of the SPD, constructive notice would not defeat fiduciary breach claims (i.e., the SPD supplies no reason to know otherwise).[205]

Similarly, at the individual level (micro scale), the proper application of plan terms to a specific set of facts may be unclear and yet extremely important to the plan member involved.[206] Health plan coverage of special nutritional needs of an infant diagnosed (perhaps prenatally) with a life-threatening genetic metabolic disorder offers an example.[207] The fiduciary's advice or initial response to the resolution of such a high stakes benefit entitlement question cannot be gleaned from the SPD but foreseeably induces reliance.[208]

These cases show that, even if an SPD is actually made understandable to the average plan participant, there will still be occasions to provide certain types of information that cannot be checked against the SPD. Courts should take seriously fiduciary breach claims founded on such non-SPD communications.[209]

203. *See* 29 C.F.R. § 2520.102-3 (2024) (contents of the SPD must "accurately reflect the contents of the plans as of a date not earlier than 120 days prior to the date" the SPD is disclosed).

204. *See* Varity Corp. v. Howe, 516 U.S. 489, 502–03 (1996) (holding voluntary "statements about the security of benefits amounted to an act of plan administration").

205. Because the SPD does not address the future of the plan, representations concerning the likelihood and nature of possible plan changes cannot be checked against the summary. Hence, harms resulting from imprudent or disloyal representations by fiduciaries about prospective benefits could redressed via suit for breach of fiduciary duty. WIEDENBECK & MAHER, *supra* note 1, at 107–09.

206. *Id.* at 106–07.

207. *See*, *e.g.*, Susan A. Berry, Mary Kay Kenney, Katharine B. Harris, Rani H. Singh, Cynthia A. Cameron, Jennifer N. Kraszewski, Jill Levy-Fisch, Jill F. Shuger, Carol L. Greene, Michele A. Lloyd-Puryear & Coleen A. Boyle, *Insurance Coverage of Medical Foods for Treatment of Inherited Metabolic Disorders*, 15 GENET. MED. 978 (2013) (finding nearly all children with inherited metabolic disorders had medical coverage of some type, yet families paid substantial out-of-pocket costs for all types of products).

208. *See* WIEDENBECK & MAHER, *supra* note 1, at 106–07.

209. The author has argued that existing law supports fiduciary liability for some faulty communications, even if the problem could be detected by reference to

3. JUDICIAL RELUCTANCE

Skeptics may reasonably doubt whether the approach proposed here could succeed in making the SPD understandable, such that it would empower workers as Congress envisioned. Among the greatest vulnerabilities of the proposal is its ultimate dependence on supportive fact-intensive judicial decision-making. If the SPD is to inform important life decisions, the Overview must direct the user to more complete explanations of important conditions and limits on benefits, yet links to the details must be thoughtfully curated lest the SPD devolve into a morass.[210] Even under the restrained abuse-of-discretions standard, oversight of plan administrators' tradeoffs between understandability and reliability asks a lot of the lower courts. That is certainly so compared to the near automatic dismissal of estoppel claims based on the claimant's supposed reason to know of the laundry list of caveats set out in a liability-shield SPD.[211]

For the understandability project to succeed, courts will need to change their handling of ERISA disclosure litigation. The Labor Department rule prescribing the new system should emphasize the break with the past and offer real guidance, by way of examples, on how to assess failure to warn claims.[212] Perhaps the rule should go further, pointing the way for the courts to recalibrate the elements of estoppel in the ERISA context.[213] Legal scholarship on equitable remedies, and estoppel in particular, demonstrates that adaptation of estoppel's requirements to the employee benefit plan context would be entirely consistent

the SDP, at least if the guidance comes from an executive who is reasonably understood to be communicating as a plan fiduciary. "In such cases of notorious fiduciary advice, reliance appears reasonable without resort to the SPD." WIEDENBECK & MAHER, *supra* note 1, at 110. That argument has special force in the era of the liability-shield SPD because of the unreality of the notion that the plan member has reason to know of a problem. Put bluntly, the application of constructive notice to a liability-shield SPD seems absurd. If measures are taken to make the SPD understandable and routinely utilized, the argument might need to be reevaluated. Or perhaps liability should be limited to cases of egregious disinformation coming from the highest level.

210. *See supra* Section IV.B.1.

211. *See supra* note 107–10 and accompanying text.

212. ERISA § 505, 29 U.S.C. § 1135, grants the Secretary of Labor power to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions" of ERISA Title I. A few examples of the abuse-of-discretion calculus are suggested *supra* text accompanying notes 191–93.

213. T. Leigh Anenson, *Equitable Defenses in the Age of Statutes*, 36 REV. LITIG. 659, 665 (2018).

with the traditions of the field.[214] History "shows that equity's established emphasis on the public interest and judicial discretion intersect in refining the application of these doctrines," including estoppel.[215] Equitable principles are expanded or contracted in service of the public interest, and the Supreme Court has equated the public interest with the purposes or objectives of governing legislation.[216] Courts have, for example, adjusted estoppel's reliance element when needed to promote fair play and protect weaker parties.[217] Indeed, in some circumstances courts have dispensed with the reliance requirement entirely, adopting a doctrine of "quasi-estoppel."[218] While such tailoring of equitable doctrines lies beyond the remit of an administrative agency, the Labor Department could by regulation invite courts to reconsider and redefine "appropriate equitable relief"[219] in the context of statutory disclosure violations so as to inject understandability into the calculus.

Possibly the most serious threat to implementation of a nuanced SPD understandability standard could come from the Supreme Court. In *CIGNA Corp. v. Amara,* the Court ruled that the SPD is only commentary; it does not supply the core terms of the plan itself.[220] Consequently, the disclosure violations in that case could be addressed only by equitable remedies, not via breach of contract claims.[221] Six Justices joined the Court's opinion outlining equitable remedies that might support monetary recovery on the facts of *Amara*, including estoppel, reformation, and surcharge.[222] The remedial discussion seemed designed to send a message that the Court stood ready to disavow the notion that *Mertens v. Hewitt Associates* excludes all monetary awards from the category of equitable *relief.*[223] Lower courts broadly accepted the invitation

214. *Id*.
215. *Id.* at 664.
216. *Id.* at 672–78.
217. T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. 377, 389–98 (2008).
218. *Id.* at 394–98; T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 640 n.45, 650–51 (2007); *see* POMEROY, *supra* note 109, §§ 816, 818 (discussing acquiescence as grounds for quasi-estoppel).
219. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).
220. CIGNA Corp. v. Amara, 563 U.S. 421, 438 (2011).
221. *Id.* at 438.
222. *Id.* at 423, 438–42.
223. Mertens v. Hewitt Associates, 508 U.S. 248 at 257–58 (1993). The *Amara* Court pointedly distinguished *Mertens* as a claim against a non-fiduciary. 563 U.S.

and have imposed monetary awards as appropriate equitable relief for disclosure violations where warranted by the facts of the case.[224] The Court itself has not decided a post-*Amara* case awarding monetary relief against a fiduciary under ERISA § 502(a)(3), however, and some opinions cast doubt on support for that reading.[225] Hence, there appears to be substantial risk that an increasingly pro-business conservative majority might revert to a reading of *Mertens v. Hewitt Associates* that

at 439 ("[P]laintiff [in *Mertens*] sought 'nothing other than compensatory damages' against a nonfiduciary" while *Amara* "concerns a suit by a beneficiary against a plan fiduciary."). This undermining of *Mertens* may have provoked the separate opinion of Justice Scalia, who authored the Courts' opinion in *Mertens*. *See generally* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens*, and* Great-West, 103 COLUM. L. REV. 1317, 1320 (2003).

224. *See*, *e.g.*, Amara v. CIGNA Corp., 775 F.3d 510, 526 (2d Cir. 2014) (finding, following remand from the Supreme Court, that fraudulent summary disclosures justified plan reformation); Osberg v. Foot Locker, Inc., 862 F.3d 198, 212–13 (2d Cir. 2017) (holding, on facts similar to *Amara*, that detrimental reliance need not be shown to support remedy of plan reformation, and that proof of mistake to support class-wide reformation need not be individualized, but can be established "through generalized circumstantial evidence in appropriate cases"); Pearce v. Chrysler Grp. LLC Pension Plan, 893 F.3d 339, 347–48 (6th Cir. 2018) (holding inequitable conduct not involving fraud or intent to deceive justified reformation); Gimeno v. NCHMD, Inc., 38 F.4th 910, 914–15 (11th Cir. 2022) (finding that insurance proceeds may be recovered via surcharge where the employer failed to notify the participant of the required evidence of insurability form but withheld supplemental life insurance premiums and provided benefits summary listing coverage); Sullivan-Mestecky v. Verizon Commc'ns Inc., 961 F.3d 91, 102–03 (2d Cir. 2020); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 720–22 (8th Cir. 2014); Gearlds v. Entergy Servs., Inc., 709 F.3d 448, 451–52 (5th Cir. 2013) (finding that surcharge supported a claim for medical benefits where the plaintiff was induced to take early retirement by negligent oral and written assurances that he would continue to receive medical benefits); McCravy v. Metro. Life Ins. Co., 690 F.3d 176, 181 (4th Cir. 2012) (finding plaintiff, who paid life insurance premiums for several years for her child only to learn upon the child's death that the child had been ineligible for dependent coverage, could potentially recover insurance proceeds via surcharge, not just refund of premiums mistakenly paid); *see also* Kenseth v. Dean Health Plan, Inc., 722 F.3d 869, 883 (7th Cir. 2013) (discussing *McCravy* and *Gearlds*). *But see* Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162, 1167 (9th Cir. 2012) (finding that surcharge was unavailable where retirees failed to show they changed positions due to inaccurate SPD).

225. In 2016, the Court pointedly distanced itself from the interpretation that *Amara* "all but overrul[es] *Mertens v. Hewitt Associates*," instead asserting that "our interpretation of 'equitable relief' in *Mertens*, *Great-West*, and *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), remains unchanged." Montanile v. Board of Trustees of the Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 148 n.3 (citing US Airways, Inc. v. McCutcheon, 569 U.S. 88 (2013)). It may be noteworthy that the *Montanile* opinion was authored by Justice Thomas, who had joined Justice Scalia's separate opinion in *Amara* complaining that the Court's entire discussion of estoppel, reformation, and surcharge was unwarranted dicta. 563 U.S. at 449 (Scalia, J., concurring in the judgment).

broadly forecloses pecuniary awards as a component of appropriate equitable relief.[226]

V. Minimum Standards Alternative?

A skeptical (or astute) observer of the forgoing proposal, with all its supporting rules and potential infirmities, might assert that it largely replicates, in the construction of the SPD Overview, the accessibility/reliability tradeoffs that should always have been incorporated in SPD drafting. Instead of a curated SPD referencing the underlying plan document, it would substitute a curated Overview referencing an underlying liability-shield SPD.[227] This round-about approach may have little to recommend it. Critics might conclude that the Overview superstructure, erected atop a faulty foundation (the liability-shield SPD), is little

226. Recent limitations on class action litigation suggest that a spate of collective suits filed by plaintiff firms on behalf of plan participants might induce the Court to confine or repudiate *Amara*'s discussion of conditions for equitable relief. *See*, *e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (discussing Rule 23(a) commonality requirement); Comcast v. Behrend, 569 U.S. 27, 34 (2013) (discussing Rule 23(b)(3) predominance requirement); Chavez v. Plan Benefit Services, Inc., 957 F.3d 542, 544 (5th Cir. 2020) (vacating class certification for lack of "rigorous analysis" of commonality and class type in suit for breach of ERISA fiduciary duties); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441 (2013); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) (discussing implications of broad validation of arbitration provisions containing class action waivers); *see generally* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019) (showing Supreme Court disfavor of collective litigation and arguing that a preference for private ordering, combined with the need to support markets by enforcing contracts and preventing fraud, support class actions).

A Court majority barring monetary awards under § 502(a)(3) might be composed of Justice Thomas (who joined Justice Scalia's opinion for the Court in *Mertens* and his separate opinion in *Amara*), Justices Gorsuch, Kavanaugh, and Barrett, who joined the Court post-*Amara*, along with the Chief Justice or Justice Alito. The Chief Justice and Justice Alito joined Justice Breyer's opinion for the Court in *Amara,* but their support might be dislodged by the prospect of widespread collective litigation seeking enormous sums. Such switches are not unprecedented in ERISA cases, as exemplified by the Court's rapid reversal of its initial sensitivity to allegations that a conflict of interest infected decisions by an ERISA fiduciary. *See* Wiedenbeck, *supra* note 38, at 1074–85 (contrasting Metropolitan Life Ins. Co. v. Glenn, 554 U.S. 105 (2008) with Conkright v. Frommert, 569 U.S. 105 (2010)).

227. But as noted earlier, lengthy complex health plan SPDs are now commonly used as the governing plan document. *See supra* note 89 and accompanying text. In such cases, the proposed SPD Overview would indeed operate as a simplified synopsis that directs the reader to controlling plan terms.

more than a concession to path dependence. Mandating a simplified Overview linked to the SPD merely accommodates current practice as a baseline, and perhaps to that extent might ease the transition to a renovated disclosure regime that takes understandability seriously.

Contracts of adhesion supported by lengthy technical written documents appear throughout the modern economy. The pattern is pervasive: internet terms of service, data privacy policies, credit cards, mortgages and other consumer lending transactions, warnings disclaiming liability for risks and side effects of medications, and on and on. Big business has lawyered up and defensively papered over all sorts of mass transactions. Employee benefit plans and their liability-shield SPDs can be viewed as just another example. It may be a special case only because courts have permitted bullet-proof disclaimers to proliferate in spite of—rather than in the absence of—a governing legal standard that purports to demand informed consent.

The law has responded differently in other domains in which freedom of contract, combined with unequal bargaining power, have enabled imposition of deceptive terms or concealment of onerous terms in a mass of verbiage. For example, the Truth in Lending Act (TILA) mandates standardized disclosure (including timing and formatting) of prescribed key elements of consumer credit transactions, such as borrowing costs (annual percentage rate), fees, and service charges, and the items disclosed are meticulously defined to make disclosures by different lenders comparable.[228] In the privacy arena, the General Data Protection Regulation (GDPR) of the European Union gives the subject of personal data various substantive rights to access and control the data.[229] Each of these instances entails the imposition of minimum standards, but minimum standards of two very different sorts. TILA, with minor exceptions, does not prescribe or constrain the terms of consumer loan contracts. It adopts a disclosure-only approach, but to promote comprehension minimum standards govern the items and

228. 15 U.S.C. §§ 1604–1606; 12 C.F.R. §§ 1026.6–1026.7 (2024) and Appendix G-17 (showing tabular format, headings, content and highlighting required of account-opening disclosures of open-end credit not secured by a home). Thanks to Professor Scott Baker for suggesting TILA as a potentially fruitful analogy.

229. GDPR also contains an understandability standard comparable to ERISA: effective consent by the data subject to processing of personal data must be based on a request that is specific and presented in an "intelligible and easily accessible form, using clear and plain language." Regulation 2016/679 of the European Parliament and Council, Arts. 4(11), 7.

mechanics of the disclosures. GDPR constrains the substance of the relationship between a data subject and the custodian or processor of that data. Intervention altering the parties' respective rights implements social value judgments and might be thought unrelated to disclosure. Yet, substantive minimum standards limit the variation of important contract terms, and in doing so, they simplify to the task of effectually communicating the meaning and effect of contract terms selected.

ERISA, of course, abounds with minimum standards; they characterize the legislative approach to pension content controls.[230] Those content controls—including creditor protections, spousal rights, vesting, and defined benefit plan funding and termination insurance—provide baseline labor protections.[231] But some might also serve another function. Certain pension content controls may be justified, at least in part, by their tendency to reduce contract variation, keeping it within understandable bounds.[232] Whatever the understandability benefits—or side effects—of substantive minimum standards may be, Congress, at this juncture, is not going to erode ERISA's core commitment to freedom of contract in setting the terms of employee benefit plans.

In contrast, the minimum standards approach to key disclosures is at least conceivable. It could be pursued without legislation, because the statute makes understandability a touchstone of disclosure adequacy and expressly empowers the Secretary of Labor to prescribe the format and content of the SPD and make "such rules and regulations he finds necessary or appropriate to carry out the provisions" of ERISA Title I.[233] Required standardized disclosures, akin to the reporting mandates applicable to consumer credit transactions under TILA Regulation Z, would avoid the imponderables of the accessibility/reliability tradeoff. Whether they could effectively inform workers of the principal conditions and limitations on the employer's benefit commitment poses a more fundamental concern.

230. WIEDENBECK & MAHER, *supra* note 1, at 19–21, 225–26.

231. *See supra* note 36 and accompanying text.

232. Wiedenbeck, *supra* note 1, at 574–76; WIEDENBECK & MAHER, *supra* note 1, at 259, 261–62, 266 (observing, at 262, that in some areas such as vesting "[r]eining in abstruse outlier plan terms could be used as a mechanism to limit information costs and thereby allow workers to inexpensively assess salient differences that remain" and noting at 266, that the pension anti-alienation rule might be justified in part by information cost concerns).

233. ERISA §§ 109(c), 505, 29 U.S.C. §§ 1029(c), 1135.

Two great challenges to standardized disclosures are immediately apparent. These are, first, the specification of the terms that must be reported, and second, devising a workable mechanism to induce compliance.

Diversity of pension and welfare benefit types yields diversity in plan terms. Among pension plans, there are (at least) traditional pension plans, some determining benefits using a unit credit formula and others using a flat benefit formula; qualified annuity plans; cash balance plans; target benefit plans; defined contribution annuity plans; money purchase pension plans; profit-sharing plans; stock bonus plans; employee stock ownership plans; and 403(b) plans. Within the profit-sharing and stock bonus categories, some plans contain an elective contribution feature under a cash-or-deferred arrangement (so called 401(k) plans) and others do not. Welfare benefits are similarly varied; in addition to health care (which may be in the form of traditional indemnity insurance or could be defined contribution coverage such as a health savings account), welfare plans may provide disability benefits, life insurance, severance or unemployment benefits, etc.[234] Such a wide array in the nature of deferred compensation and contingent in-kind compensation necessarily breeds great variation in the terms and conditions imposed to qualify for benefits.

Daunting as these lists are, all plan types would not need to be addressed simultaneously. A regulation could tackle only 401(k) profit-sharing plans, for example, specifying in detail how a terms sheet must describe the plan's conditions and limitations on benefits. Conditions requiring standardized reporting would presumably include, among others: conditions on eligibility to participate in the profit-sharing plan and in the cash-or-deferred arrangement; manner of designating elective deferrals and limits on amounts that may be deferred; the amount of any employer matching or nonelective contributions; any conditions under which employer matching or nonelective contributions may be forfeited and the duration of forfeitability (vesting schedule); investment risks and manner of designating investments (if participant-directed); fees and expenses chargeable to the account; conditions under which elective contributions may be distributed; conditions on distributions of employer matching or nonelective contributions; requisites for effective beneficiary designation; whether a participant's spouse is

234. For a diagrammatic overview of major employee benefit plan types, *see* WIEDENBECK & MAHER, *supra* note 1, at 10–11.

entitled to the nonforfeitable account balance on death or instead entitled to qualified joint and survivor annuity and qualified preretirement survivor annuity protections; potential loss of benefits pursuant to a qualified domestic relations order; and required minimum distributions. This is a simple plan type and yet there are a lot of caveats to be reported, although the terms of a particular plan may make some of these items unnecessary.

To implement standardized truth-in-lending disclosures, Regulation Z, which has been refined and elaborated over decades, now absorbs 449 pages in the print edition of the Code of Federal Regulations.[235] Given the degrees of contractual freedom incorporated in employee benefit plans—even pension plans, limited content regulation notwithstanding—a regulatory undertaking to prescribe standardized uniform disclosures would clearly involve a very heavy lift for the Labor Department.

Improbable as standardized specification of employee benefit plan terms may appear, there may be a still greater impediment to effective deployment of the minimum standards disclosure technique. While the Labor Department has ample authority to prescribe standardized disclosures, compliance is another matter. Absent statutory amendment, there seems to be no mechanism that is well adapted to enforcement. Compare the truth-in-lending model, which contains administrative enforcement provisions, creates criminal liability for willful and knowing violations, authorizes recission of certain transactions, and provides the borrower with a civil action for damages.[236] ERISA, in contrast, offers a relatively paltry arsenal.

A rule prescribing standardized ERISA disclosure obligations would not emerge with ready-made sanctions. The Labor Department would presumably have authority to investigate potential violations,

235. 12 C.F.R. Part 1026 (2024) (consisting of §§ 1026.1–1026.61 & Apps.). Supplementary official interpretations of the regulations extend another 500 pages. Good faith compliance with official administrative interpretations of Regulation Z affords protection from civil liability under 15 U.S.C. § 1640(f).

236. 15 U.S.C. §§ 1607 (administrative enforcement), 1611 (criminal liability), 1635 (recission), 1640 (civil liability of creditor, including actual damages and double the finance charge), 1641 (liability of assignee of creditor); 12 C.F.R. §§ 1026.15, 1026.23 (2024) (right of recission). Administrative enforcement may include, in cases where an annual percentage rate or finance charge was inaccurately disclosed, requiring the creditor to make an adjustment to the account of the borrower so as to assure that the borrower will not be required to pay a finance charge in excess of the finance charge actually disclosed or the dollar equivalent of the annual percentage rate actually disclosed. 15 U.S.C. § 1607(e).

and the generally disused criminal penalty for willful reporting and disclosure violations might theoretically apply, but administrative enforcement would be stymied for want of a relevant civil penalty.[237] Plan participants and beneficiaries would likewise be handicapped. Lack of the prescribed warning might lead them to make planning mistakes, perhaps costly mistakes, but such a complaint is not a claim for benefits. It would be cognizable only as a request for appropriate equitable relief to redress a violation or ERISA, namely, noncompliance with the SPD understandability standard implemented by the new rule. Estoppel is almost sure to be the relief requested, which again means that the claim would be founded on incomplete or misleading non-SPD communications. Justifiable reliance would take center stage. Enforcement would be haphazard, expensive, and messy.[238]

Prescribing minimum standards for understandable disclosures (required warnings), it seems, comes with its own set of pathologies. It does not seem obviously superior or more workable than the SPD Overview proposal explored earlier.[239] Each of these mechanisms to promote planning by increasing actual awareness of important conditions and limitations on plan benefits could be instituted by rule under the current statute. But without more, each comes freighted with complications in the courts.

237. ERISA § 504(a), 29 U.S.C. § 1134(a) (2018) (investigative authority); *id.* § 1131 (criminal penalty). While many civil penalties are tied to specific reporting or disclosure violations, none are explicitly linked to the understandability or adequacy of the SPD. *See supra* note 99; ERISA § 502(a)(6), (c), 29 U.S.C. § 1132(a)(6), (c).

Section 502(c)(6), however, might possibly be harnessed to that end. It authorizes the Secretary to assess a civil penalty of up to $100 per day, but not more than $1000, on a plan administrator who fails to timely furnish certain requested information, including the SPD. ERISA §§ 104(a)(6), 502(a)(6), (c)(6), 29 U.S.C. §§ 1024(a)(6), 1132 (a)(6), (c)(6). If investigation reveals that a plan is not providing the disclosures required by such a rule, the Department might submit a request for a compliant SPD, invoking the penalty if the administrator does not respond. Success would depend upon acceptance of the argument that an SPD lacking the standardized disclosures is not an SPD within the meaning of the statute. *See supra* note 104 and text accompanying notes 124–26.

238. The regulation prescribing standardized disclosures might endeavor to boost compliance by providing that, upon showing that the plan administrator failed to publish a required understandable warning, plan members acting on other information (non-SPD communications) will be presumed to have had no reason to know that the plan contained the disabling condition or limitation sought to be applied against them. Such an adjustment of traditional equitable principles, if accepted by the courts, *see supra* notes 212–19 and accompanying text, might facilitate collective (class action) enforcement.

239. *See supra* Part IV.

VI. Could AI Make Disclosures Understandable?[240]

Language-based GenAI tools, such as ChatGPT and other LLMs, can be used to summarize lengthy texts and rephrase language into a specified style.[241] The filtering and translation functionality raises an alluring prospect, that LLMs might one day be harnessed to redress the understandability deficit in participant-facing ERISA disclosures. But existing GenAI tools are notorious for their propensity to make stuff up—they often hallucinate by fabricating information, including inventing fictional authority for their responses.[242]

Ideally, one might envision a system which employs GenAI to harvest information directly from the plan document and other instruments under which the plan is established or operated (including the plan's annual report and any bargaining agreement, trust agreement, or insurance contract). If, with proper guardrails, training, and testing, GenAI could accurately extract, filter, organize, summarize, and simplify plan information, then the LLM would itself function as an on-demand bespoke SPD, obviating the need for human intermediation in communicating accessible and reliable information about the plan. At the current stage of technological evolution, that may seem fantastical, but it is a fantasy that may be realizable in the near future. Already, legal scholars have highlighted the potential of LLMs to improve the accuracy, consistency, and quality—including understandability—of government agency communications with their citizen-constituents.[243] In the tax arena, "an LLM-powered chatbot that has been fine-tuned with a carefully curated, domain-specific dataset for taxpayer communications" could adjust its explanations according to the user's tax knowledge and reading comprehension, elucidating complex tax concepts in taxpayer-comprehensible language.[244]

240. The author thanks Professor Dana Muir for posing this question.

241. *See* JOSÉ ANTONIO BOWEN & C. EDWARD WATSON, TEACHING WITH AI: A PRACTICAL GUIDE TO A NEW ERA OF HUMAN LEARNING, 48–50 (2024).

242. *Id.* at 19 (defining hallucination and observing that generative AI "is also generative of misinformation" such that "the potential for 'hallucination' is built into the 'Generative' part of GPT").

243. Orly Mazur & Adam Thimmensch, *Transforming Tax Communications with Large Language Models*, 185 TAX NOTES FED. 757, 758–60 (Oct. 28, 2024) [hereinafter *Tax Communications*]; Orly Mazur & Adam Thimmensch, *Beyond ChatGPT: Transforming Government with Augmented LLMs*, 92 TENN. L. REV. 12–16 (forthcoming 2025) [hereinafter *Beyond ChatGPT*] (discussing fine-tuning an LLM with domain-specific information).

244. *Tax Communications*, *supra* note 243, at 760.

Some likely components of an ERISA-compliant SPD-bot can be anticipated. Existing LLMs allow users to specify by prompt the format, as well as the "voice" or style of output. For example: provide a jargon-free summary of *X* suitable to a 10th grade reading comprehension level.[245] Constraining the output to maximize accuracy of a summary response (promoting reliability by controlling hallucination) will be essential. This will entail tuning the LLM to minimize creativity.[246] In addition, fine tuning the model using reinforcement learning with human feedback (RLHF), incorporating evaluative assessments of the model's output by ERISA experts (employed or supervised by EBSA), may be necessary to maximize accuracy and context sensitivity of the algorithm.[247] As a further check on accuracy, the SPD-bot should require each summary response to be accompanied by citation to the specific provisions of the plan instruments from which it is derived, appending to the response excerpts from or links to that authority.[248]

AI tools customized to legal applications, including extracting and analyzing contract terms, already exist.[249] Imagine loading such a tool with a reference database composed of a large sample of plans of a particular type, such as participant-directed 401(k) retirement savings plans. Comparing the terms of a specific plan to such a rich set of training data could be used to identify unusual or distinctive provisions of the specific plan under review, thereby assuring that such unusual

245. BOWEN & WATSON, *supra* note 241, at 49–50, 53–55.

246. *Id.* at 19–20, 69 (controlling hallucinations); *see also* Yonathan Arbel & David A. Hoffman, *Generative Interpretation*, 99 N.Y.U. L. REV. 451, 481, 502–04 (2024) (discussing LLM "temperature" settings to adjust the degree of randomness—which humans interpret as creativity—that the model generates).

247. *See generally* Uday Kamath, *Tuning for LLM Alignment*, in UDAY KAMATH, KEVIN KEENAN, GARRETT SOMERS & SARAH SORENSON, LARGE LANGUAGE MODELS: A DEEP DIVE 177–217 (Springer Nature Switzerland 2024); Sumit Singh, *Reinforcement Learning with Human Feedback (RLHF) for LLMs*, LABELLERR (June 21, 2023), https://www.labellerr.com/blog/reinforcement-learning-with-human-feedback-for-llms/ [https://perma.cc/JLB7-KV4P]; Akshit Mehra, *Complete Guide On Fine-Tuning LLMs using RLHF*, LABELLERR (Nov. 7, 2024), https://www.labellerr.com/blog/reinforcement-learning-from-human-feedback/#reinforcement-learning-from-human-feedback-overview [https://perma.cc/W3BQ-D58X].

248. *See Beyond ChatGPT*, *supra* note 243, at 31 (emphasizing the importance of disclosing primary sources that support guidance).

249. *E.g.*, *CoCounsel: The GenAI for Professionals*, THOMPSON REUTERS, https://www.thomsonreuters.com/en/artificial-intelligence.html. [https://perma.cc/B8L9-ANXG] (last visited Mar. 4, 2025).

terms—premier candidates for failure to warn claims—are accurately summarized by GenAI.[250]

As mentioned above, training would be necessary to adapt a general-purpose LLM to the specialized technical domain of employee benefits. While LLMs are often described as probabilistic next-word prediction machines, that characterization is oversimplified because the models attend to the context (both local and global) in which a word appears and use that context to adjust the meaning assigned to the word.[251] In specialized fields, language is used in specialized ways and appears in recurring specialized surroundings; hence, inputting a large volume of field-specific information (documents) sensitizes the LLM to nuanced meaning in situ. Given necessary resources, the Labor Department could adapt a general-purpose LLM to create a special purpose tool (an SPD-bot) dedicated to communicating accurate on-demand plain language summaries of plan information. The training data would consist of a very large number of actual plan documents, perhaps supplemented by legal authorities (employee benefit statutes, regulations, opinion letters, etc.). Fine tuning the SPD-bot using RLHF would be expensive, but the potential cost savings to plan sponsors of automated disclosures might motivate industry groups to support an EBSA budget increase dedicated to this purpose.

Once this dedicated employee benefit plan explanatory tool had been trained, fine-tuned as necessary using RLHF and tested by the Labor Department, it would be ready for release to plan administrators. The administrator would load the sponsor's current plan document as the reference text to be interrogated by participants and beneficiaries. Inquiries and responses would be informed by (interpreted against) the background knowledge gleaned from the training data. Presented with a user question (in the case of a pension plan, for example, the requisites for vesting, or the circumstances under which a current employee may

250. *See* Michael Gerstenzang & Ilona Logvinova, *Best Use of Generative AI in Law Practice Melds Human and Machine*, BLOOMBERG LAW (Oct. 1, 2024, 3:30 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%2000000192-25a2-d141-afff-fdbf86530001 [https://perma.cc/G422-DYTU] ("Machines capture an enormous quantity of data, summarize it, and present it for further—human—analysis and review. . . . Generative AI expands our field of vision, augmenting the breadth and quality of analytical inputs. It doesn't replace the analytics process entirely.").

251. Arbel & Hoffman, *supra* note 246, at 476–82 (providing an excellent intuitive explanation of the conversion of words into multidimensional tensors that capture both semantic meaning and syntactic relationship to other words).

obtain distribution), the SPD-bot would first identify and retrieve the relevant plan terms. (As has been noted, those terms would be included with the machine's response or hyperlinked therein.[252]) Existing LLM technology adequately handles this retrieval step. Controlled testing has shown that LLMs are astonishingly good at identifying relevant language in complex legal documents, the organization of which is not standardized.[253]

After identifying relevant plan provisions, the SPD-bot would translate retrieved terms into an explanation suited to the user's level of knowledge and language facility. This "translation" step could involve actual translation for non-native English speakers (most publicly available general-purpose LLMs already support translation), but ordinarily the output would consist of an accessible and personalized plain language summary of the plan terms of interest. Currently available LLMs are very good at this task.[254] Experience seems to indicate, however, that the identification and translation steps should be bifurcated rather than combined in one query because LLMs sometimes fail to correctly implement an instruction containing a conjunction (logical "and").[255]

252. *See supra* note 248 and accompanying text.

253. In one recent study, ChatGPT was used to search corporate charters of almost 4,900 publicly traded Delaware corporations to identify language exculpating officers from liability for breach of the fiduciary duty of care. The results were validated using trained research assistants tasked with reviewing a random sample of the charters. The AI output matched the human findings for ninety-seven percent of the instruments. Jens Frankenreiter & Eric L. Talley, *Sticky Charters? The Surprisingly Tepid Embrace of Officer-Protecting Waivers in Delaware* 25–29 (Eur. Corp. Governance Inst. L. Working Paper, Paper No. 762/2024, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4764290.

254. *See Tax Communications*, *supra* note 243, at 759–60; *Beyond Chat GPT*, *supra* note 243, at 37 ("LLM-powered chatbots, when fine-tuned and integrated with a carefully curated domain-specific dataset, have the potential to explain complex concepts or procedures to members of the public with different levels of technical knowledge, literacy, or comfort."). Another study found that "smart readers" based on GPT-3 were "effective in the (1) simplification and summary of the text [of complex consumer contracts]; (2) personalization of text to the specific readers' characteristics; (3) construction of the meaning of the contract; and (4) benchmarking of contracts by assigning them a score relative to the competition." Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83, 89 (2022).

255. *See* Jason Wei, Xuezhi Wang, Dale Schuurmans, Maarten Bosma, Brian Ichter, Fei Xia, Ed H. Chi, Quoc V. Le & Denny Zhou, *Chain-of-Thought Prompting Elicits Reasoning in Large Language Models*, *in* NIPS' 22: PROCEEDINGS OF THE 36TH INTERNATIONAL CONFERENCE ON NEURAL INFORMATION PROCESSING SYSTEMS 1,

The Labor Department surely would not release an SPD-bot into the wild without extensive testing and validation. Several components of a monitored cautious roll-out process can be anticipated. As a first step, EBSA might issue a request for information (RFI) concerning the current or planned utilization of LLMs in plan member communications. In light of rapid technological advances, one might suspect that call centers maintained by large health insurance companies or health plan third party administrators may already be using specially trained LLMs in the background to rapidly retrieve and summarize information, allowing human personnel to efficiently respond to plan member inquiries (informal communications). Responses to such an RFI could well determine prioritization of an SPD-bot initiative (Is the technology ready for prime time?) and alert EBSA to major opportunities and threats.

If the Labor Department decides to move forward, the project could be undertaken incrementally, focusing first on one particular type of plan. Informed by a sample of human-prepared SPDs for plans of that type and by EBSA's experience with disclosure controversies, the agency could generate a list of issues key to workers' career and financial planning. It might then craft a set of prompts designed to extract and summarize plan terms typically important to workers. After testing the quality of the output and refining the prompts as necessary, EBSA might, as a pilot program, roll out the tool along with a specified prompt set as an authorized substitute SPD for plans of that type. That authorization might be conditioned on requiring the plan administrator to test the responses returned by applying EBSA's recommended prompt set to the plan instruments and compare the results to the plan's existing human-prepared SPD. A rule might give the SPD-bot a green light for use by a particular plan only if that comparison demonstrates that the quality of machine responses proves as accurate and comprehensive as the traditional SPD and, of course, at least as understandable.

24824 (S. Koyejo, S. Mohamed, A. Agarwal, D. Belgrave, K. Cho & A. Oh eds. 2022) [https://perma.cc/N32W-UN3H] ("[G]enerating a *chain of thought*—a series of intermediate reasoning steps—significantly improves the ability of large language models to perform complex reasoning."); *accord* Interview with Professor Jens Frankenreiter, Washington University School of Law (Oct. 31, 2024) (observing that LLMs given compound prompts sometimes interpret the word "and" conversationally or colloquially).

Conclusion

ERISA's effort to promote informed financial decision-making—the statute's often-overlooked economic efficiency objective—has not gotten much respect. In the aftermath of enactment, the Labor Department targeted its limited resources on controversial high-profile issues, declining to monitor plan summaries for understandability. Nor did the opposite problem of reliability, whether a summary is "sufficiently accurate and comprehensive to reasonable apprise . . . participants and beneficiaries of their rights and obligations under the plan,"[256] garner administrative attention. When federal courts began awarding monetary relief to plan members injured by inaccurate or incomplete disclosures (particularly an SPD's failure to warn of "circumstances which may result in the disqualification, ineligibility, or denial or loss of benefits"[257]), plan sponsors adopted the obvious defensive measure, expanding the "summary" to cover all details and potential pitfalls in order to preclude harmful omission complaints. In the hands of plan lawyers, SPDs were converted into lengthy technical disclaimer documents, but, of course, such liability-shield SPDs failed to effectively communicate with plan participants.

Plan sponsors turned to other vehicles to impress upon workers the value of their benefit programs. Those non-SPD communications could be both simple and misleading. With minimal risk of liability, the sponsor could downplay, elide, or entirely omit information about plan conditions or limitations because distribution of the liability-shield SPD was assumed to afford plan members adequate notice of the plan's requirements, preventing justifiable reliance on other representations.

To create an incentive to make the SPD understandable, it might seem that plan sponsors should be subjected to liability for losses that a clear warning or straightforward explanation would prevent. That direct approach is incompatible with ERISA's foundational commitment to voluntary plan sponsorship, however. Exposing the SPD drafter to liability for telling workers either too much (not understandable) or too little (not sufficiently accurate and comprehensive) as determined by a judge in hindsight would create a fearful Catch-22 driving employers away from plan sponsorship. Consequently, a zone of security for reasonable, albeit imperfect attempts to strike a balance between

256. ERISA § 102(a), 29 U.S.C. § 1022(a).
257. *Id.* § 1022(b).

understandable and reliable information is essential. Subjecting the plan administrator's discretionary compromise between understandable and reliable disclosures to limited judicial review under the abuse-of-discretion standard might secure the necessary breathing room.

Building on the recommendations of the 2017 ERISA Advisory Council, this Article proposes that the Labor Department spur more effective communication by prescribing the addition of a brief simplified introduction to the SPD. The introductory presentation, here called the SPD Overview, would describe the plan's main features and direct the reader (immediately, via hyperlinks) to explanations of conditions on benefit eligibility and amount. Flagging all conditions would lengthen and complicate the Overview, obscuring what is most important for informed career and financial planning. Therefore, the plan administrator would be required to exercise judgment as to which conditions warrant cautionary cross references in the Overview. That judgment would be a fiduciary act, reviewable for abuse of discretion. And a finding of abuse of discretion would be required to support a claim for equitable relief based on an incomplete SPD.

Alternatively, the Labor Department might invoke its rulemaking authority to mandate a set of standardized disclosures geared to the conditions imposed by employee benefit plans of a given type. Such a minimum standards approach to the accessibility/reliability accommodation might be modeled on truth-in-lending disclosures required in consumer credit transactions, which highlight key aspects of the loan transaction and assure that different lenders report data that is comparable.

Whether either of these systems would prove effective in restoring balanced effective disclosure is at best uncertain. Perhaps these proposals merely illuminate difficulties inherent in an effort to optimize the tradeoff between understandable and reliable information. Still, the potential gains that effective communication of plan-related information might yield merit serious study of the feasibility question. Improved economic performance from better-informed worker career and financial planning is one source of those gains. Effective communication might unlock another by permitting employers to differentiate their programs. The declining prevalence of specially designed plans customized to advance the personnel objectives of a particular

employer may stem in part from workers' inability to comprehend or credit what they are told about distinctive plan features.[258]

Properly trained and constrained GenAI may soon provide the mechanism for on-demand bespoke optimal disclosure. Existing off-the-shelf GenAI tools can summarize and simplify, but not reliably so. It seems likely that a substantial investment in research and would be required to develop an automated disclosure system that reliably generates understandable and accurate summaries of plan-related information. Nevertheless, the potential benefits of this investment could be very large, by facilitating career and financial planning, allowing differentiation of specially designed plans, and ultimately decreasing disclosure costs.

258. The ability to tailor plan features to promote particular (and perhaps unusual) personnel policies of the employer is discussed *supra* note 39. The trend toward increased standardization of employee benefit programs is examined *supra* notes 46–54 and accompanying text.