

TOP-HAT PLAN PARTICIPATION AND REPORTING

By

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Nonqualified deferred compensation plans are intended to be exempt from the substantive provisions of Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) (Pub. L. 93-406, 88 Stat. 829, enacted September 2, 1974, codified in part at 29 U.S.C. Ch. 18). The most commonly used exemption from ERISA for nonqualified plans is a “top-hat” plan exemption. A top-hat plan is defined in Sections 201(2) of Part 2, 301(a)(3) of Part 3, and 401(a)(1) of Part 4 of Title I of ERISA as an “unfunded” plan that is “maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” If a plan satisfies this definition, the plan is exempt from the participation, vesting, funding, and fiduciary responsibility rules of ERISA. A top-hat plan is subject only to Part 1 of Title I of ERISA, the reporting and disclosure rules, which are satisfied by filing a registration statement with the Department of Labor under 29 C.F.R Section 2520.104-23 within 120 days after the plan becomes subject to ERISA, and Part 5 of Title I, the preemption and enforcement rules.

Although the Department of Labor has not issued guidance specifically stating how a top-hat plan is defined for purposes of Sections 201(2), 301(a)(3), and 401(a)(1) of ERISA, the guidance issued by the Department of Labor, the Department of Treasury, and the courts suggests that the eligibility requirements for participation in a nonqualified deferred compensation plan that is intended to satisfy the definition of a top-hat plan should be narrowly applied so that the number of employees who are eligible to participate is limited to a “select group” of high-level employees whose average compensation is significantly greater than the average compensation of all other employees.

The guidance regarding eligibility to participate in a top-hat plan issued by the Department of Labor is limited. In DOL Advisory Opinion 90-14A, 1990 WL 123933 (May 8, 1990); *see also* DOL Advisory Opinion 92-13A, n.1 (May 19, 1992) (repeating the same position) the Department stated:

It is the view of the Department that in providing relief for “top-hat” plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore, would not need the substantive rights and protections of Title I [of ERISA].

The Department stated in footnote 1 of Advisory Opinion 90-14A that:

It also is the Department's position that the term "primarily," as used in the phrase "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" in sections 201(2), 301(a)(3) and 401(a)(1), refers to the purpose of the plan (i.e., the benefits provided) and not the participant composition of the plan. Therefore, a plan which extends coverage beyond "a select group of management or highly compensated employees" would not constitute a "top-hat" plan for purposes of Parts 2, 3 and 4 of Title I of ERISA.

A top-hat plan is subject to an alternative method of compliance with the reporting and disclosure requirements of Part 1 of Title I of ERISA. Those requirements are explained in *Dorsey v. Aetna Life Insurance Co.*, 2013 WL 1288165, *22, E.D. Va., March 26, 2013. In that case, the court explained that top-hat plans are a "rare subspecies" of ERISA plans "specifically exempted from ERISA's participation, vesting, funding, and fiduciary requirements." *Guiragoss v. Khoury*, 444 F.Supp.2d 649, 658 (E.D. Va. 2006). Although ERISA does not exempt top-hat plans from compliance with its reporting and disclosure provisions entirely, *Id* at 658, n. 10. Section 110 of ERISA authorizes the Secretary of Labor to prescribe alternative methods of compliance by administrative regulation. 29 U.S.C. Section 1030; *see also In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996) (top-hat plans are exempted from "ERISA's reporting and disclosure requirements upon promulgation of the proper administrative regulations"). Pursuant to this authority, the Secretary of Labor has promulgated a regulation which imposes only minimal reporting requirements with respect to top-hat plans, and no obligation whatsoever to disclose plan instruments to participants or beneficiaries. *See* 29 C.F.R. Section 2520.104-23; *see also Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 290 (2d Cir. 2000) ("[A] top-hat plan is deemed to have satisfied the reporting and disclosure requirements of ERISA... by filing a short statement with the Secretary of Labor and providing plan documents to the Secretary upon request.").

A top-hat plan is "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." Section 110(a)(1) of ERISA; *Davis v. Old Dominion Tobacco Co., Inc.*, 755 F.Supp.2d 682, 703-04 (E.D. Va 2010). In addition to those two statutory elements, the court said that it has recognized a third requirement: "that employees participating in the alleged top hat plan have sufficient influence within the company to negotiate compensation agreements that will protect their interests where ERISA provisions do not apply." *Id.* At 704.

The requirements for the top-hat plan exemption, and the requirements for compliance with the alternative method of compliance with the reporting and disclosure requirements of Part 1 of Title I of ERISA for a top-hat plan, were discussed by the Second Circuit Court of Appeals in *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283 (2d Cir. 2000). In that case, the Second Circuit determined that a bank's deferred compensation plan maintained for a group of management or highly compensated employees, consisting of over 15% of the bank's employees,

was a top-hat plan. A significant factor in this determination was whether the group covered by the plan was a “select” group of management or highly compensated employees.

In 1995, Banco Exterior de Espana, a Spanish bank and the corporate parent of Extebank, began negotiating the sale of Extebank to North Fork Bank, a New York bank. The negotiations resulted in a merger between Extebank and North Fork in March 1996, whereby North Fork acquired all of the outstanding shares of Extebank and assumed all of its obligations. The individual defendant, Stephen Maroney, was the president of Extebank and resigned following the merger. The plaintiffs were bank officers of Extebank, all of whom served as vice-president, manager, assistant vice-president or senior vice-president, and participated in its deferred compensation plan, Plan B.

Extebank established Plan B in 1987, in addition to its pension plan. Plan B was offered to assistant vice-presidents, managers, and other senior officers, representing approximately 15% of the workforce of Extebank. Approximately 7% to 10% of Extebank employees actually participated in Plan B, which allowed participants to defer up to 25% of their salary as contributions to Plan B. Participants were also permitted to borrow money at the prime rate from Extebank in order to contribute the maximum allowable amount to Plan B. Participants in Plan B would vest upon reaching retirement age, at which time they were to receive a return on their investment at a compounded annual rate of 20%. If participants left Extebank before they vested, Plan B provided for repayment of the amount invested, plus interest at a compounded annual rate of 10%. In order to help pay for its obligations under Plan B, Extebank purchased, and was the beneficiary of, life insurance contracts on its employees. The proceeds of these contracts were kept in an account entitled the “Deferred Compensation Liability Account.”

All of the plaintiffs left Extebank shortly before or soon after the merger with North Fork. Most had not reached retirement age and therefore received a lump sum under Plan B that included their contributions to Plan B, plus compounded interest at 10%, less any pre-retirement payments previously disbursed, including amounts received as loans. Only one of the plaintiffs was eligible for full retirement benefits, and he received his contributions, minus any pre-retirement payments, plus interest at 20% compounded annually.

The plaintiffs filed a complaint in December 1997, claiming benefits under ERISA and various common law claims. The defendants moved to dismiss the complaint on the basis that Plan B was a top-hat plan exempt from the substantive requirements of ERISA. The district court held that Plan B was a top-hat plan and exempt from the substantive requirements of ERISA.

The sole question in the case for the Second Circuit was whether Plan B was a top-hat plan and, therefore, exempt from most of the substantive requirements generally imposed on deferred compensation plans by ERISA. To answer this question, the court was required to determine whether Plan B was: (1) unfunded; and (2) maintained primarily for a select group of management or highly compensated employees. The plaintiffs maintained that Plan B was neither; however, the court disagreed.

The plaintiffs argued that Plan B was funded within the meaning of ERISA because: (1) it was funded through the purchase of life insurance contracts on the participants; (2) the proceeds

were kept in a separate bank account, the Deferred Compensation Liability Account; and (3) Extebank's documents stated that "the Bank has funded this liability through the purchases of insurance coverage." The court found no merit to this argument. The court stated that it had "previously noted that a plan was unfunded where 'benefits thereunder will be paid... solely from the general assets of the employer.'" The court then reviewed the provisions of Plan B and stated that the terms of Plan B "do not give plaintiffs a greater legal right to the funds in the Deferred Compensation Liability Account than that possessed by an unsecured creditor. The district court correctly found that the revenues from the insurance policies purchased on the participating employees, although deposited in a separate account, 'became part of the general assets of Extebank,' and thus that the Plan was unfunded as a matter of law."

The court next examined the issue of whether Plan B was maintained primarily for a select group of management or highly compensated employees. The court concluded that, viewing Plan B as a whole, Plan B qualified for top-hat status. As a preliminary matter, the court noted that Plan B was supplemental to Extebank's pension plan, and not a substitute for it. In addition, Plan B was established "as a means to retain valuable employees," and the terms of Plan B were quite favorable to the participants, although perhaps in hindsight not as favorable as they would have liked. In terms of being established for a "select group," although Plan B was offered to a relatively large percentage of the workforce, all participants were selected officers of the bank, were in management positions, and were highly compensated in comparison to bank employees at large. Therefore, the court held that Plan B was a top-hat plan as a matter of law.

The plaintiffs argued that the "select group" requirement for a top-hat plan was not met because: (1) participation in Plan B was offered to 15.34% of Extebank employees; (2) the participants were not all either management or highly compensated, and (3) the participants did not have the ability to effectively negotiate for themselves.

The court stated that, "[w]hile plans offered to a very small percentage of an employer's workforce often qualify as top-hat plans, ... there is no existing authority that establishes when a plan is too large to be deemed 'select.'" The plaintiffs argued that no case has ever held that a plan offered to 15% of an employer's workforce was a top-hat plan. The plaintiffs cited one case and one Department of Labor letter in support of their argument. In *Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 397 (E.D. N.C. 1989), aff'd, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992), the court considered the size of the plan and found that 18.7% of the workforce was too large a percentage for a benefit plan to qualify as a top-hat plan. On the other hand, the Department of Labor, in DOL Opinion Letter 85-37A, found that a deferred compensation plan offered to 7.5% of employees was not a top-hat plan because of the composition of the group, rather than its size.

The Second Circuit stated that the circumstances in *Demery* were different from those in *Darden* or the Department of Labor letter. The district court determined that Plan B was offered only to bank officers, most of whom were employed in managerial positions, and found that Plan B participants' average compensation was more than twice the average compensation of Extebank employees. The court also noted that the plaintiffs described themselves in their complaint as a select group and that minutes of the Extebank board reflected the fact that Plan B at its inception was "viewed as a means to retain valuable employees."

The plaintiffs also claimed that despite the fact that all Plan B participants were officers of Extebank, they did not constitute a select group because they were neither key executives nor highly compensated. The court did not find this argument compelling; “[w]hile Plan B participants did include assistant vice presidents and branch managers, and therefore swept more broadly than a narrow range of top executives, it was nonetheless limited to highly valued managerial employees.” The court also stated that “the average salary of plan participants was more than double that of the average salary of all Extebank employees.”

The court also stated, importantly, that:

[f]inally, we think it significant that the statute defines a top-hat plan as ‘primarily’ designed to provide deferred compensation for certain individuals who are management or highly compensated. *Id.* It suggests that if a plan were principally intended for management and highly compensated employees, it would not be disqualified from top-hat status simply because a very small number of the participants did not meet that criteria, or met one of the criteria but not the other. See, e.g., *Belka*, 571 F.Supp. at 1252 (participants in valid top-hat plan included ‘salesmen and a diverse group of executives, including vice presidents, sales managers, [and] supervisors’). Therefore, we do not find plaintiffs’ focus on the two or three employees who were arguably not ‘highly compensated’ or ‘a select group of management’ to be dispositive.

Also, the plaintiffs claimed that the defendants failed to file a registration statement for Plan B with the Department of Labor and the Internal Revenue Service for 10 years, and refused to honor their requests for Plan documents. The court stated that “a top-hat plan is deemed to have satisfied the reporting and disclosure requirements of ERISA, including the furnishing of a summary plan description and annual reports to plan beneficiaries, by filing a short statement with the Secretary of Labor and providing plan documents to the Secretary upon request.” The court determined that the defendants filed a registration statement with the Department of Labor and with the Internal Revenue Service, and thereby satisfied the reporting and disclosure requirements of ERISA. The court stated that “[w]hile we note that this statement was not filed ‘within 120 days after the plan becomes subject to Part 1,’... since it was not filed until several years after the Plan was initiated, plaintiffs do not allege any harm from this deficiency. In the absence of prejudice to plaintiffs, we find no abuse of discretion in the district court’s decision not to impose the penalties permitted by 29 U.S.C.A. § 1132(c)...”

The court concluded that Plan B was a deferred compensation plan maintained primarily for a select group of management or highly compensated employees, and that the alternative method of compliance with the reporting and disclosure requirements of Part 1 of Title I of ERISA for a top-hat plan was satisfied; therefore, Plan B was a top-hat plan as a matter of law.

In *Taylor v. NCR Corporation*, 2015 WL 5603040, 61 Employee Benefits Cas. 2434 (September 23, 2015), the United States District Court for the Northern District of Georgia

addressed the alternative method of compliance with the reporting and disclosure provisions of Part 1 of Title I of ERISA for a top-hat plan and the enforcement of the plan provisions once the status of the plan was determined. In that case, Taylor was an employee of NCR for approximately 21 years. In November 1999, he became a participant in NCR's Retirement Plan for Officers of NCR (the "Plan"). The Plan was a non-qualified "top-hat" plan for senior officers of NCR. The Plan was intended to "provide for the payment of supplemental retirement benefits to executives" of NCR.

Taylor retired from NCR on March 31, 2006. Pursuant to the Plan, Taylor elected a joint and 100% survivor annuity benefit so that he and his wife would receive an annual benefit of \$29,062.80 for their lives, which, under the terms of the Plan was to be paid in monthly installments. NCR began making bi-weekly payments to Taylor beginning around December 2006.

On or about April 12, 2013, NCR informed Taylor that it had terminated the Plan effective February 25, 2013, and that Taylor would receive a lump sum payment "equal to the actuarial present value of [his] accrued benefit under the plan(s) on April 25, 2014". NCR's correspondence indicated that Taylor's lump sum payment value before taxes was \$370,236.01, and Taylor would be paid an additional \$70,739.87 for the joint and survivor annuity component of the benefit. The total lump sum payment was \$440,975.88. After federal and state income taxes were withheld, the remaining value of the lump sum was \$254,063.00.

Article X of the Plan provided in relevant part as follows:

The Committee shall have the right, without the consent of any Participant, former Participant, Spouse or any other person claiming under or through a Participant or former Participant, to amend or modify the Plan or any agreement between the Company and any Participant thereunder from time to time or to terminate or repeal the Plan or any such agreement entirely at any time; provided, however, that (1) no such action shall adversely affect any Participant's, former Participant's or Spouse's accrued benefits prior to such action under the Plan or the benefits payable under Appendix X.

Taylor alleged that on or about March 19, 2013, NCR "restate[d] the Plan with an effective date of January 1, 2013." Taylor also alleged that "[t]he pre-January 1, 2013 version of the Plan did not permit for mandatory lump sum distributions," and that "the restated Plan contains numerous additional provisions that were not effectuated through an amendment to the Plan in accordance with Article X, and are therefore invalid."

On or around June 7, 2013, Taylor filed a claim with the NCR SERP Plan Administrator (the "Plan Administrator"). Taylor challenged NCR's decision to terminate the Plan on the grounds that the lump sum payment "adversely affected" his accrued benefit because of the federal and state income tax consequences, and the use of a "5% present value reduction factor, resulted in a 52.5% reduction in Taylor's monthly pension benefit under the Plan." On or around July 17, 2013, the Plan Administrator denied Taylor's benefit claim, finding that the termination of the

Plan and payment of the benefit in a lump sum did not adversely affect Taylor's accrued benefit under the Plan.

On July 26, 2013, Taylor's counsel sent a letter to the Plan Administrator "requesting various documents under 29 U.S.C. § 1024(b)(4) and the claim regulations, 29 C.F.R. § 2560.503-1." On September 18, 2013, the Plan Administrator responded, "but failed to provide all of the requested Plan documents."

On November 19, 2013, Taylor submitted his appeal, which was denied by the Plan Administrator on March 18, 2014. On July 14, 2014, Taylor initiated his lawsuit and sought statutory penalties under Section 502(c) of ERISA for NCR's alleged failure to timely provide him information he requested, as allegedly required by Section 104(b)(4) of ERISA. Taylor also brought a claim under Section 502(a)(1)(B) of ERISA to "recover benefits due to him under the terms of his Plan [and] to enforce his rights under the terms of the plan." Taylor alleged that the "Committee's decision to amend the Plan to provide for payment of participant's accrued benefit in a lump sum has resulting, or will result, in Plaintiff incurring a significant taxable event, which when combined with other factors will reduce the value of his accrued benefit under the Plan by approximately 52%." The only other specific factor Taylor alleged was a "5% present value reduction factor to calculate the lump sum benefits." Taylor claimed that the Committee's decision adversely affected his benefits in violation of Article X of the Plan. Article X, Taylor claimed, granted the Committee the right to amend or modify the Plan, provided that "no such action shall adversely affect [a Participant's] accrued benefits...."

Taylor asserted a claim for civil statutory penalties under Section 502(c)(1)(B), alleging that the Plan Administrator failed to comply with Section 104(b)(4) of ERISA by not responding to Taylor's document request within thirty (30) days. NCR argued that, because Section 104 of ERISA does not apply to top-hat plans, Taylor's claim for statutory penalties had to be dismissed.

Section 104(b)(4) of ERISA provides that "the administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, [etc.]...." Section 502(c)(1)(B) of ERISA provides, in relevant part, that any administrator:

who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to \$100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Section 110 of ERISA authorizes the Secretary of Labor to promulgate regulations "prescrib[ing] an alternative method for satisfying any requirement" of Part 1 of Title 1 of ERISA, of which Section 104(b)(4) is a part. *See* 29 U.S.C. Section 1030. The Secretary of Labor has promulgated Regulations pursuant to Section 110 of ERISA, 29 C.F.R. Section 2520.104-23 of

the Regulations. The Regulations allow the administrator of a top-hat plan to “satisfy the reporting and disclosure provisions of part 1 of title I of the Act by (1) Filing a statement with the Secretary of Labor... [and] (2) Providing plan documents ... to the Secretary upon request.” 29 C.F.R. Section 2520.104-23(b). The Regulations exempt top-hat plans from ERISA’s disclosure requirements. *See Simpson v. Mead Corp.*, 187 Fed. App’x 481, 484 (6th Cir. 2006) (“[T]op hat plans are exempted from ERISA’s reporting and disclosure requirements but subject to administrative regulations.”); *In re New Valley Corp.*, 89 F.3d 143, 149 (3d Cir. 1996) (top-hat plans are exempted from “ERISA’s reporting and disclosure requirements upon promulgation of the proper administrative regulations”). Accordingly, the Regulations “impose []... no obligation whatsoever to disclose plan instruments to participants or beneficiaries.” *Dorsey v Aetna Life Ins. Co.*, Civ. No. 2:12cv90, 2013 WL 1288165, at *22 (E.D. Va. Mar. 26, 2013); *see also Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 290 (2d Cir. 2000) (“[A] top hat plan is deemed to have satisfied the reporting and disclosure requirements of ERISA, including the furnishing of a summary plan description and annual reports to plan beneficiaries, by filing a short statement with the Secretary of Labor and providing plan documents to the Secretary upon request.”).

Taylor based his complaint on Sections 104 and 502 of ERISA. As the court explained, those sections do not apply to top-hat plans. Taylor did not dispute that the Plan was a top-hat plan. (“Defendant The Retirement Plan for Officers of NCR is ... a non-qualified Top Hat Plan”); (“[T]his dispute involves a terminated top hat plan.”). Taylor did not allege that the Plan failed to comply with a Department of Labor request for documents.

Taylor argued that NCR had the burden of establishing that it had complied with the terms of the Regulations. However, Taylor did not allege that NCR did not comply with the Regulations, and his argument was therefore not properly before the court and the court did not consider it. *See Huls v. Llabona*, 437 Fed. App’x 830, 832 n. 4 (11th Cir. 2011)(per curiam)(argument not properly raised where plaintiff asserted it for the first time in response to defendant’s motion to dismiss instead of seeking leave to file an amended complaint); *Jiles v. PNC Bank Nat. Ass’n.*, No. 5:10-cv-180-CAR, 2012 WL 3241927, at *5 (M.D.Ga. Aug 7, 2012 (court not required to consider new allegation raised for the first time in response to defendant’s motion to dismiss and not raised in the complaint or amended complaint); *cf. Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) (“[P]laintiff may not amend her complaint through argument in a brief opposing summary judgment.”).

The court said that, even if the issue was properly before it, Section 502(c) of ERISA only authorizes penalties for a plan administrator’s refusal “to comply with a request for any information which such administrator is required by *this* subchapter to furnish.” 29 U.S.C. Section 1132(c)(1)(B). Other courts have held that Section 502(c) does not provide for penalties for a plan administrator’s failure to comply with regulations. *See Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 406 (7th Cir. 1996) (holding that the sanctions of Section 502(c) cannot be imposed for violation of an agency regulation); *Groves v. Modified Ret. Plan*, 803 F.2d 109, 118 (3d Cir. 1986) (“Because § 502(c) authorizes penalties only for breach of duties imposed by ‘this subchapter,’ such sanctions cannot be imposed for violation of an agency regulation.”); *Brucks v. Coca-Cola Co.*, 391 F.Supp.2d 1193, 1212 (N.D.Ga. 2005) (“In the absence of Eleventh Circuit authority on this issue, the Court declines to rewrite [ERISA § 502(c)] to authorize statutory

penalties against an administrator for failure to provide documents other than those identified in the statute itself.”).

The court said that, even if the court construed Taylor’s complaint as stating a claim for statutory damages based on NCR’s failure to comply with the Regulations—and even if the court found that Section 502(c) provided for penalties for a plan administrator’s failure to comply with the Regulations—Taylor’s claim would fail because NCR appeared to have complied with the Regulations by making the required filing with the Department of Labor. Top-hat plan filings are publicly available from the Department of Labor. No serious question as to the authenticity of the filing existed, and the court said that it took judicial notice of NCR’s filing with the Department of Labor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 355 (2007) (on a motion to dismiss, the court had to consider the complaint and matters of which it could take judicial notice); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276-78 (11th Cir. 1999) (court could take judicial notice of official public records and could base its decision on a motion to dismiss on the information in those records); *see also Belmonte v. Examination Mgmt. Servs., Inc.*, No. 05 C 3206, 2007 WL 551578, at *1 n. 2 (N.D.Ill. Feb. 16, 2007) (taking judicial notice that defendant filed a top-hat plan statement with the Department of Labor).

The court said that, because the Plan was a top-hat plan, NCR was not required by Section 104 of ERISA to furnish any documents to Taylor. Taylor did not allege any alternate basis for statutory penalties under ERISA.

Taylor also asserted a claim under Section 502(a)(1)(B) of ERISA, which would allow Taylor “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. Section 1132(a)(1)(B). Taylor alleged that the “Committee’s decision to amend the Plan to provide for the payment of participant’s accrued benefits in a lump sum has resulted, or will result, in Plaintiff incurring a significant taxable event, which when combined with other factors will reduce the value of his accrued benefit under the Plan by approximately 52%.” The only other specific factor Taylor alleged in his complaint was a “5% present value reduction factor to calculate the lump sum benefits.” Taylor claimed the Committee’s decision adversely affected his benefits in violation of Article X of the Plan, which granted the Committee the right to amend or modify the Plan, provided that “no such action shall adversely affect [a Participant’s] accrued benefits....”

NCR responded that the Plan expressly granted the Committee the right to amend or modify the Plan, that tax consequences were not part of an accrued benefit under ERISA, and that Taylor failed to allege any adverse effect arising from NCR’s use of a present value reduction factor. The court agreed.

The court said that, plan sponsors have a right under ERISA to terminate or amend plans where that right is reserved in plan documents. For instance, in *Holloman v. Mail-Well Corp.*, under similar facts, the Eleventh Circuit granted summary judgment to defendant where it paid plaintiff a lump sum pursuant to plan language granting “[t]he Board ... the right in its sole discretion to accelerate the payment of any benefits payable under the Plan ... but the Board shall make no reductions in benefits other than those provided in the Plan, based on the applicable Actuarial Assumptions.” 443 F.2d 832, 838 (11th Cir. 2006); *see also Alday v. Container Corp. of*

America, 906 F.2d 660, 666 (11th Cir. 1990) (noting that the plan documents at issue reserved defendant’s “right to terminate or modify the plan”); *Frankel v. Detroit Med. Ctr.*, No. 05-40249, 2007 WL 2902897, at *11 (E.D. Mich. Sept. 28, 2007) (plan documents explicitly reserved the right to reduce or terminate benefits under specified conditions even after the payment of benefits had begun).

Taylor did not dispute that NCR had the right to terminate or amend the Plan, and did not challenge any actuarial assumptions. Instead, he argued that NCR’s right was “circumscribed by the limitation that any such amendment cannot ‘adversely affect Participant’s ... accrued benefits prior to such action.’” He alleged that the lump sum “adversely impacted his accrued benefits” because an increased tax liability “reduced his monthly benefit by over 50%.”

The court said that, Taylor’s adverse effect argument centered on his allegation that the lump sum payment resulted in Taylor “incurring a significant taxable event.”

The court said that courts uniformly have concluded that tax losses do not fall within the relief available to redress a violation of ERISA. *See, e.g., Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 281 (7th Cir. 1994) (“[T]ax losses are extracontractual and thus, do not fall within the ‘appropriate equitable relief’ available to redress a violation of ERISA” (citing *Novak v. Andersen Corp.*, 962 F.2d 757, 760-61 (8th Cir. 1992))); *see also Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 204 n. 15 (3rd Cir. 2004) (dismissing damages claim for “increased tax liability” incurred because of a lump-sum payment, reasoning the claim was “no more than an ordinary claim for [compensation] money damages” not recoverable as equitable relief under ERISA); *Glencoe v. Teachers Ins. & Annuity Ass’n*, No. 99-2417, 2000 WL 1578478, at *1 (4th Cir. 2000) (per curiam) (claim for extra tax burden is one for ‘extracontractual damages’ prohibited under ERISA); *Belleville v. United Food and Commercial Workers Intern. Union Indus. Pension Fund*, 620 F.Supp.2d 277, 281 (D.R.I. 2008) (dismissing claim because “claim for income tax ‘reimbursement’ is not cognizable under § 502 of ERISA”).

The court noted that the Eleventh Circuit similarly had held that “the various types of relief available to plaintiffs in civil actions brought pursuant to ERISA’s civil enforcement scheme do not include extra-contractual ... damages.” *Amos v. Blue Cross-Blue Shield of Al.*, 868 F.2d 430, 431 (11th Cir. 1989). The court agreed that an adverse tax impact was not a basis for an ERISA remedy under Section 502(a)(1)(B).

Taylor’s only other allegation of an adverse effect on his accrued benefit rested on NCR’s purported use of a “5% present value reduction factor to calculate the lump sum benefits.” Taylor, however, failed to allege that the present value reduction factor was miscalculated, incorrect, or improperly applied. Taylor alleged that the use of the present value reduction factor was, in itself, improper because it amounted to a reduction of his future monthly payments under the plan. The court said that the allegation was incorrect as a matter of law.

In *Holloman*, the Eleventh Circuit held:

We cannot accept the contention that the act of discounting Holloman’s benefit payments to present value necessarily amounted to a reduction in benefits.

Discounting to present value is a standard way to account for the fact that a dollar amount to be received in the future is generally worth less than the same dollar amount received in the present. By contending that Mail-Well could not discount future payments to present value, the Hollomans are essentially saying that the value of any lump-sum payment had to exceed the value of the stream of future payments that it was meant to replace.

443 F.3d at 840. In this case, Taylor alleged that “the use of a 5% present value reduction factor, resulted in a ... reduction in Plaintiff’s monthly pension benefits.” But a present value reduction factor by definition results in a reduction of future monthly payments, because “a dollar amount to be received in the future is generally worth less than the same dollar amount received in the present.” *Holloman*, 443 F.3d at 840. Taylor failed to allege that the present value reduction factor was the wrong factor to apply, was miscalculated, or otherwise resulted in lowering the actuarial value of his benefits.

Taylor argued that the *Holloman* court addressed a motion for summary judgment, not a motion to dismiss, and therefore its holding did not apply. The *Holloman* plaintiffs’ claims failed at the summary judgment stage because there was no genuine issue of fact whether the discounting of Holloman’s benefit payments to present value amounted to an actuarial reduction in his benefits. *Holloman*, 443 F.3d at 840. The court said that Taylor failed to *allege* that the application of the present value reduction factor resulted in an actuarial reduction in his benefits. His allegation that the present value reduction factor decreased his future monthly payments was correct, but irrelevant—a present value decrease of future payments was precisely the purpose of applying a present value reduction factor.

The court said that the Plan expressly granted the Committee the right to amend or modify the Plan, and Taylor could not maintain a claim under Section 502(a)(1)(B) for the “adverse effect” of tax consequences. Taylor failed to allege that the application of a present value reduction factor or any other assumption resulted in a lump sum payment that was actuarially less than his accrued benefit under the Plan.

In *Owens v. Western & Southern Life Insurance Company*, 717 Fed. Appx. 412 (5th Cir. 2018), the Fifth Circuit Court of Appeals examined the reporting and disclosure requirements for a top-hat plan and the reason for the alternative method of compliance with the reporting and disclosure requirements for top-hat plans. In that case, Earl Owens and Joseph Espat sued Western & Southern Life Insurance Company and Western & Southern Life Insurance Long Term Incentive and Retention Plan for payment of benefits under a retirement plan in which Owens and Espat participated. Both sides filed motions for summary judgment.

The district court granted summary judgment in favor of the defendants. As Owens and Espat violated the forfeiture provision of the retirement plan, they were not entitled to the plan’s post-retirement benefits.

Earl Owens and Joseph Espat were retired former employees of Western & Southern Life Insurance Company (“Western & Southern”). Western & Southern sold life and health insurance in addition to providing other financial investment products and services. Both Owens and Espat

participated in a retirement plan with Western & Southern—the Western & Southern Agency Group Long Term Incentive and Retirement Plan (the “Plan”). According to its purpose statement, the Plan was “designed to provide an incentive for selected key field associates...to maximize performance and remain with the organization and ... to attract well-qualified candidates.” To be eligible to participate in the Plan, an employee had to be “in the top 5% of Employees when ranked by annual Compensation as measured during the previous calendar year.” Owens became eligible to participate in the Plan in 2006 and retired in 2010; Espat became eligible in 2008 and retired in 2012. Both began receiving payments after they retired.

The Plan had a forfeiture provision, which stated in relevant part:

4.7 Forfeitures. The contingent right of Participant or Beneficiary to receive future payments hereunder with respect to both vested and nonvested Performance Units shall be forfeited upon the occurrence of any one or more of the following events:

...

(b) If the Participant within three years after termination of employment with the Company or any Affiliate (1) enters into a business or employment which is competitive with the business of the Company or any Affiliate, (2) solicits the Company’s or any Affiliates’ employees, agents or clients to work for or buy products from, or (3) acts in any other way which, had the Participant been employed with the Company or any Affiliate, would have provided the Company with “Cause” to terminate such Participant’s employment.

Western & Southern had a policy that employees would be subject to termination if they were appointed to sell policies for another insurance company.

After Owens and Espat retired from Western & Southern, they became licensed by other insurance companies and began selling policies for these other companies. Western & Southern sent letters to Owens and Espat in November and December 2012, respectively. These letters stated that Western & Southern had discovered that Owens and Espat were appointed by other insurance companies and that they had forfeited their rights under the Plan by “enter[ing] into a business relationship or employment with” these other companies within three years of retirement. The letters incorporated a demand for repayment of already paid benefits under the Plan. Neither Owens nor Espat responded to the letters.

Subsequently, in March 2013, Western & Southern sued Owens in Ohio state court to recoup the already paid benefits under state law theories of recovery. The following month, the lower court dismissed the action for lack of jurisdiction, finding that Western & Southern’s claims arose under an ERISA covered plan and were preempted by 29 U.S.C. Section 1144. Western & Southern appealed, and the appeals court affirmed the lower court’s decision. In its opinion, the appeals court noted that “[b]oth parties agree that [the Plan] is a top hat employee benefit plan as defined under ERISA.”

While the state court action was pending, Owens and Espot initiated an action against Western & Southern in June 2013 in the federal district court, seeking payment of benefits under the Plan. Both sides filed motions for summary judgment. The district court then stayed the action, pending the resolution of the state court appeal. The district court stated that one of the issues on appeal was whether the Plan was a top-hat plan and that the implications from the resolution of that issue would affect the district court's decision related to the motions for summary judgment. After the state court appeal ended, the district court reopened the action and reconsidered the motions for summary judgment. In their motion, the defendants had argued that Owens and Espot did not exhaust their administrative remedies under the Plan. The district court agreed and therefore remanded the case to the plan administrator. In its order, the district court acknowledged the state appeals court's statement that both parties agreed that the Plan was a top-hat plan.

While waiting for Owens and Espot to pursue the administrative process, the district court again stayed the action. Eventually, the plan administrator denied Owens and Espot's claim for benefits. It concluded that they violated the forfeiture provision of the Plan by engaging in "business affiliations with organizations competitive with" Western & Southern and participating in activity that if done while employed would have been "Cause" for termination. The district court again reopened the action, and the parties again cross-motivated for summary judgment. The district court granted the defendants' motion for summary judgment and denied Owens and Espot's. It held that the plan administrator did not abuse its discretion in denying the benefits because the conditions for forfeiture had been met. Owens and Espot then filed a motion for reconsideration, which the district court denied. Subsequently, they appealed.

The court reviewed the district court's grant of summary judgment de novo, applying the same standard as the district court. *See Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015). Where the language of the ERISA plan "grants the plan administrator discretionary authority to interpret the plan and determine eligibility for benefits, the plan administrator's denial of benefits is reviewed for an abuse of discretion." *Id.* (quoting *Cooper v. Hewlett-Packard Co.*, 592 F.3d 645, 651-52 (5th Cir. 2009)). In order to avoid reversal, the plan administrator's decision "must be supported by substantial evidence in the administrative record." *Id.* (quoting *High v. E-Systems Inc.*, 459 F.3d 573, 576 (5th Cir. 2005)). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Cooper*, 592 F.3d at 652). The plan administrator's determination should fall "somewhere on a continuum of reasonableness—even if on the low end." *Id.* (quoting *Corry v. Liberty Life Assurance Co. of Bos.*, 499 F.3d 389, 398 (5th Cir. 2007)). As the payer of benefits is the plan administrator, the court considered this conflict of interest as "one factor among many" in determining whether there had been an abuse of discretion. *Holland v. Int'l Paper Co. Ret. Plan*, 576 F.3d 240, 247-48 (5th Cir. 2009).

In evaluating whether the plan administrator abused its discretion in denying the claim for benefits, the court engaged in a two-step analysis. *See Vercher v. Alexander & Alexander Inc.*, 379 F.3d 222, 227 (5th Cir. 2004). First, the court determined whether a plan administrator gave a legally correct interpretation of the plan. *See Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 471 (5th Cir. 1995). Determining the legally correct interpretation entailed examining (1) whether the administrator had given the plan a uniform construction, (2) whether the administrator's interpretation was fair and reasonable, and (3) whether different interpretations of the plan would

result in unanticipated costs. *See Id.* In this case, the court said that Owens and Espot did not claim that the interpretation of the Plan was not uniform or that there were unanticipated costs, the only inquiry at hand was whether the construction of the Plan was fair and reasonable. *See Vercher*, 379 F.3d at 228. If the plan administrator's interpretation was legally correct, then no abuse of discretion occurred, and the analysis ends. *See Id.* at 227. However, if the court decided that the interpretation was not legally sound, the court then moved on to step two and determined whether the interpretation itself constituted an abuse of discretion. *See Id.* at 227-28.

Owens and Espot contested whether their actions violated Section 4.7(b)(1) of the forfeiture provision. Section 4.7(b)(1) provided that a participant forfeited his benefits if he "within three years after termination of employment ... enters into a business or employment which is competitive with the business of the Company or any Affiliate." Owens and Espot argued that they did not violate this clause because they were not employees, but instead independent agents. They also argued that the work they did was not "competitive with" Western & Southern's business because they did not sell the same insurance policies or target the same buyers. The court said that their contentions were unpersuasive. An "employee" could be defined as a "person who works for another in return for financial or other compensation." *Employee*, the American Heritage Dictionary (4th ed. 2000). Employment could be competitive if the goods or services sold by one company were in the same market as those sold by another; they need not be the exact goods or services or be sold to identical consumers. *See Competition*, the American Heritage Dictionary (4th ed. 2000) (defining competition as "[r]ivalry between two or more businesses striving for the same ... market"). The court said that it was fair and reasonable to interpret becoming appointed with another life insurance company and getting compensated to sell that company's policies as "employment which is competitive with" Western & Southern's business of selling life insurance policies.

The court said that Owens and Espot undisputedly became appointed to sell and in fact sold policies for other life insurance companies within three years of their retirement from Western & Southern. Therefore, they violated Section 4.7(b)(1) by engaging in employment competitive with Western & Southern's business. The court said that, even assuming arguendo that Owens and Espot did not violate Section 4.7(b)(1), their actions still satisfied the conditions for forfeiture by violating Section 4.7(b)(3). Section 4.7(b)(3) provided that a participant forfeited his benefits if he "within three years after termination of employment ... acts in any other way which, had the Participant been employed with the Company or any Affiliate, would have provided the Company with 'Cause' to terminate such Participant's employment." Western & Southern had a policy that employees would be subject to termination if they became appointed by another insurance company. Owens and Espot undisputedly knew this policy and became appointed to sell policies for other life insurance companies within three years of their retirement from Western & Southern. They violated Section 4.7(b)(3) and forfeited their benefits. Accordingly, the plan administrator did not abuse its discretion in denying Owens and Espot's claim for benefits.

Next, Owens and Espot contended that the Plan was not a top-hat plan and therefore ordinary ERISA disclosure requirements applied. They claimed that Western & Southern violated such requirements by not providing them with a summary plan description containing the forfeiture provision, which in turn rendered the provision unenforceable. The court agreed with the district court's conclusion that Owens and Espot were judicially estopped from making that argument.

The court reviewed the district court’s invocation of judicial estoppel for an abuse of discretion. *Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (citing *Hall v. GE Plastic Pac. PTS Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003)). “Judicial estoppel is an equitable doctrine that defies ‘inflexible prerequisites or an exhaustive formula.’” *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). This doctrine “prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding.” *Id.* (quoting *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598 (5th Cir. 1996)). This doctrine “prevent[s] litigants from playing fast and loose with the courts,” *Id.* (quoting *Hall*, 327 F.3d at 396), and protects “the integrity of the judicial process,” *Id.* (quoting *United States ex rel. Am. Bank v. C.I.T. Constr. Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir. 1991)). Two elements were necessary for judicial estoppel: (1) the estopped party’s position had to be “clearly inconsistent with its previous one,” and (2) “that party must have convinced the court to accept that previous position,” *Id.* (quoting *Hall*, 327 F.3d at 396). The court said that it did not need to consider these two elements exclusively. Other factors such as inadvertence or mistake could provide a reason not to apply judicial estoppel. *See New Hampshire*, 532 U.S. at 753, 121 S.Ct. 1808; *Hall*, 327 F.3d at 399–400; *see also Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011).

The court said that judicial estoppel applied in this case. The two principal elements were found in this case. First, Owens and Espat represented to the district court that the Plan was a top-hat plan at least four times. Their representations conflicted with their later claim in their June 2016 motion for summary judgment that the Plan was not a top-hat plan. Second, their representations were adopted in the order remanding the case to the plan administrator when the district court accepted the state appeals court’s statement that the Plan was a top-hat plan. *See Hall*, 327 F.3d at 398 (“[A]cceptance of a party’s argument could be ‘either as a preliminary matter or as part of a final disposition.’” (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (5th Cir. 1999))).

Owens and Espat argued that their representations were inadvertent. The court found their contention unpersuasive. First, there were several representations that the Plan was a top-hat plan. Second, the first representation to the district court was in November 2013—about two-and-a-half years prior to the June 2016 motion for summary judgment. During this time, Owens and Espat had the opportunity and incentive to contend that the Plan was not a top-hat plan, but they did not. *Cf. Id.* at 399 (rejecting the estopped party’s defense of mistake because the estopped party had the “opportunity or incentive” to discover the information upon which he based his second position at the time he adopted his first position). For example, Owens and Espat did not raise this argument in their first summary judgment motion in November 2014. Further, they did not raise this contention in the proceeding before the plan administrator. Permitting them to evade judicial estoppel would have given them a strategic benefit and incentivize parties to play “fast and loose.” *See Id.* at 396. The equities were in favor of the defendants. Accordingly, under the deferential abuse of discretion standard, the district court did not err by invoking judicial estoppel.

Finally, Owens and Espat contended that even if the Plan was a top-hat plan, the forfeiture provision was unenforceable. They argued that top-hat plans were still subject to ERISA’s ordinary disclosure requirements with which Western & Southern failed to comply. Alternatively,

they argued that if top-hat plans were exempt from such requirements and subject only to a minimal filing requirement, Western & Southern did not meet the latter requirement. The court said the contentions were meritless.

The court said that a top-hat plan is an ERISA plan “which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.” 29 U.S.C. Section 1101(a)(1). ERISA’s regulation of top-hat plans was more relaxed because of Congress’s view that “high-echelon employees, unlike their rank-and-file counterparts, are capable of protecting their own pension interests.” *Alexander v. Brighams & Women’s Physicians Org., Inc.*, 513 F.3d 37, 43 (1st Cir. 2008). ERISA expressly exempts top-hat plans from its participation and vesting provisions (29 U.S.C. Sections 1051-61), its funding provisions (29 U.S.C. Sections 1081-86), and its fiduciary responsibility provisions (29 U.S.C. Sections 1101-14). See *Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505, 512 (5th Cir. 2002); accord *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 287 (2nd Cir. 2000). Although top-hat plans are not exempt from ERISA’s reporting and disclosure requirements, see *Reliable*, 295 F.3d at 515—which include the provision of a summary plan description and annual reports to the beneficiaries of the plan, see 29 U.S.C. Section 1024(b)—the Secretary of Labor is authorized by 29 U.S.C. Section 1030 to promulgate regulations that prescribe alternative methods for satisfying these requirements, see *Demery*, 216 F.3d at 290.

One such regulation, 29 C.F.R. Section 2520.104-23(b), allows a top-hat plan to be deemed to satisfy ERISA’s reporting and disclosure requirements if the plan administrator files a short statement with the Secretary of Labor and provides plan documents to the Secretary upon request. See *Demery*, 216 F.3d at 290. The short statement must include:

the name and address of the employer, the employer identification number (EIN) assigned by the Internal Revenue Service, a declaration that the employer maintains a plan or plans primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees, and a statement of the number of such plans and the number of employees in each.

29 C.F.R. Section 2520.104-23(b)(1). This statement must be filed within 120 days of the plan becoming subject to ERISA. *Id.* Section 2520.104-23(b)(2).

Western & Southern met the requirements of 29 C.F.R. Section 2520.104-23(b) and therefore satisfied the ERISA reporting and disclosure requirements. The Plan was formed in 2006, and Western & Southern filed a short statement that complied with the requirements of 29 C.F.R. Section 2520.104-23(b)(1) on April 21, 2006.

Courts understand the intent and purpose of the alternative method of compliance with the reporting and disclosure requirements for certain plans for a select group of management or highly compensated employees and interpret and apply compliance with the requirements by employers. The Department of Labor has been consistent with its understanding of the intent and purpose of the alternative method of compliance since 1975 and the enforcement of the provisions of top-hat plans.

In the introductory material to the final regulations concerning coverage under, reporting and disclosing requirements of, and alternative methods of compliance with ERISA published in the Federal Register of August 15, 1975 40 Fed. Reg. 34526, 34530), the Department discussed the alternative method of compliance with the reporting and disclosure requirements for top-hat plans under Section 2520.104-23 and the reasons for creating the alternative method of compliance.

The Department said that it received comments that included proposals for defining the term, “select group of management or highly compensated employees.” The Department said that it was “not yet in a position to issue a detailed definition of this term.” The Department said that further guidance would be provided before major reporting and disclosure obligations became due.

The Department said that, in view of the nature of the plans or programs involved and of the comments that it received, it made several findings.

First, the use of the alternative method of compliance was consistent with the purposes of Title I of ERISA, and provided adequate reporting to the Secretary of Labor and adequate disclosure to the participants and beneficiaries of plans with respect to which it was available. The class of employees with respect to whom the alternative method of compliance applied—highly compensated or management employees—generally have ready access to information concerning their rights and obligations and did not need the protections afforded to them by Part 1 of Title I of ERISA. In addition, the possibility of breaches of fiduciary responsibilities was decreased because the alternative method of compliance applied only to unfunded or totally insured pension plans. Consequently, reporting requirements geared to the enforcement of the fiduciary responsibility provisions of Title I, such as certain portions of the annual report, became less important.

Second, application of the reporting and disclosure requirements of Part 1 of Title I would increase the administrative costs of plans to which the alternative method applied. The imposition of the reporting and disclosure requirements of Part 1 of Title I of ERISA on unfunded pension plans maintained by employers primarily for the purpose of providing deferred compensation for select groups of management or highly compensated employees would require wasteful expenses associated with the preparation, printing, and distribution of unnecessary materials.

Third, the application of Part 1 of Title I to unfunded pension plans maintained by employers primarily for the purpose of providing deferred compensation for select groups of management or highly compensated employees would be adverse to the interests of plan participants in the aggregate. Imposition of those requirements could cause employers to eliminate such plans completely or to reduce benefits offered under such plans.

The position taken by the Department of Labor in the introductory material to the regulations is consistent with its position in DOL Advisory Opinion 90-14A, the class of employees with respect to whom the alternative method for satisfying reporting and disclosure requirements applies generally have access to information concerning their rights and obligations under a top-hat plan and do “not need the substantive rights and protections of Title I [of ERISA].”

Part 1 of Title I is intended to ensure that participants in a plan subject to ERISA have the necessary information made available to them by the employer to make informed decisions with respect to the plan and that the Department of Labor be notified that the employer is complying with the disclosure requirements. Participants in a top-hat plan have access to the information concerning their rights and obligations and do not need the protections of Title I of ERISA and imposing any additional burdens on an employer under Part 1 of Title I of ERISA appears to be unnecessary and cause additional and unwarranted oversight by the Department of Labor.