



FIELD ASSISTANCE BULLETIN 2009-03

DATE: SEPTEMBER 8, 2009

MEMORANDUM FOR: VIRGINIA C. SMITH, DIRECTOR OF ENFORCEMENT,
REGIONAL DIRECTORS

FROM: ROBERT J. DOYLE
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: DELIVERY OF A SUMMARY PROSPECTUS IN AN ERISA
§404(c) PLAN.

ISSUE: May a plan fiduciary of a participant-directed individual account plan use a mutual fund's Summary Prospectus, which has been provided to the plan under Rule 498 of the Securities Act of 1933, to satisfy its prospectus delivery obligations under the Department's ERISA §404(c) regulations?

BACKGROUND AND LAW

Section 404(c) of ERISA provides that, in the case of an individual account plan that permits participants or beneficiaries to exercise control over assets in their accounts, no person who is otherwise a fiduciary shall be liable under part 4 of Title I of ERISA for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control. The §404(c) regulations require, among other things, that a participant or beneficiary shall be provided or have the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan.¹

In the case of an investment alternative subject to the registration requirements of the Securities Act of 1933 (Securities Act) such as a mutual fund, the §404(c) regulations provide that a participant or beneficiary shall be furnished by the identified plan

¹ 29 CFR 2550.404c-1(b)(2)(i)(B).

fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), a copy of the most recent prospectus that was provided to the plan, either immediately before the participant's or beneficiary's initial investment in such investment alternative, or immediately following the participant's or beneficiary's initial investment.² The §404(c) regulations also provide that a participant or beneficiary shall be furnished, either directly or upon request, based on the latest information available to the plan, copies of any prospectuses, financial statements and reports, and of any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan.³

On September 8, 2003, the Department issued Advisory Opinion 2003-11A finding that the use of a mutual fund Profile under former Rule 498 of the Securities Act would satisfy the prospectus delivery obligations imposed on plan fiduciaries under the ERISA §404(c) regulations. Although the Department took no position in the advisory opinion with respect to the application of the federal securities laws to a plan fiduciary's prospectus delivery obligations, it did express the view that while the Department has not defined the term "prospectus" in the §404(c) regulations or elsewhere, the term "prospectus" includes a Profile under the §404(c) regulations. The Department observed that a Profile, designed to comply with section 10(b) of the Securities Act, provides a clear summary of key information about a mutual fund, which is information of the sort that the Department intended a participant or beneficiary in a §404(c) plan to receive with respect to a plan investment. The advisory opinion concludes that the delivery of a Profile by an identified plan fiduciary or designee satisfies the requirements of 29 CFR §§ 2550.404c-1(b)(2)(i)(B)(1)(viii) and (B)(2)(ii) to furnish a prospectus both automatically and upon request to plan participants and beneficiaries.

On January 26, 2009, the Securities and Exchange Commission (Commission) published rules for an enhanced disclosure framework for mutual funds including a new Summary Prospectus rule.⁴ The new Summary Prospectus rule (Rule 498 of the Securities Act) is an optional means of compliance with the prospectus delivery requirements under section 5(b)(2) of the Securities Act, which requires the delivery of a statutory prospectus, i.e., a prospectus that meets the requirements of section 10(a) of the Securities Act, to an investor upon the purchase of mutual fund shares. This differs markedly from the status, for federal securities law purposes, of the Profile, which under former Rule 498 of the Securities Act, was permitted to be provided in connection with an offer of mutual fund shares. However, in order to comply with section 5(b)(2) of the Securities Act, an investor deciding to purchase fund shares based on the information in a Profile was then required to receive the fund's statutory prospectus

² 29 CFR 2550.404c-1(b)(2)(i)(B)(1)(viii).

³ 29 CFR 2550.404c-1(b)(2)(i)(B)(2)(ii).

⁴ 74 FR 4546 (Jan. 26, 2009).

with delivery of the security or confirmation of the transaction. As part of the final rules for enhanced disclosure and the new Summary Prospectus delivery option, the Commission eliminated the Profile.⁵

Under the new Summary Prospectus rule, a person may satisfy the mutual fund statutory prospectus delivery obligations by sending or giving a Summary Prospectus and by providing the statutory prospectus online at a specified Web site address; funds selecting this delivery option must also send the statutory prospectus free of charge to any requestor in paper or by email.⁶ The Commission has stated that the new rules, in practice, will require any fund that is relying on the Summary Prospectus to meet its obligations under section 5(b)(2) of the Securities Act to post both its Summary Prospectus and statutory prospectus on the Internet at all times.⁷

The Summary Prospectus must include at the beginning or on the cover page the mutual fund's name, the share classes to which the Summary Prospectus relates, the ticker symbol for each such class, and a required legend containing a Web site address, the approximate date of the Summary Prospectus' first use, e-mail address and toll-free telephone number where investors may obtain the statutory prospectus and other information free of charge. In addition, the Summary Prospectus must contain the key information required to appear at the beginning of the statutory prospectus under the new rules, including information regarding the investment objectives or goals of the fund, fee and expense information, principal investment strategies, the risks associated with an investment in the fund, fund performance, investment advisers and sub-advisers, portfolio managers, purchase and sale of fund shares, tax information and financial intermediary compensation.⁸ As stated by the Commission, the Summary Prospectus rule is intended to create a disclosure regime that is tailored to the unique needs of mutual fund investors in a manner that provides ready access to the information that investors need, want, and choose to review in connection with a mutual fund purchase decision.⁹

In acknowledgement of the fact that many retirement plans¹⁰ offer mutual funds as an investment option, the legend required on the cover page or beginning of the Summary Prospectus may include a statement that the Summary Prospectus is intended for use in connection with a defined contribution plan that meets the requirements for qualification under §401(k) of the Internal Revenue Code (Code), a tax-deferred

⁵ 74 FR 4546, 4560 n.194 (Jan. 26, 2009).

⁶ 17 CFR 230.498(c) and (d). See also 74 FR 4546, 4561 (Jan. 26, 2009).

⁷ 74 FR 4546, 4561 (Jan. 26, 2009).

⁸ 17 CFR 230.498(b). A Summary Prospectus meeting the requirements of paragraph (b) will be deemed to be a prospectus that is authorized under §10(b) of the Securities Act and §24(g) of the Investment Company Act for purposes of §5(b)(1) of the Securities Act.

⁹ 74 FR 4546, 4560 (Jan. 26, 2009).

¹⁰ This guidance applies only to defined contribution plans covered under title I of ERISA.

arrangement under Code §403(b), or a variable contract as defined in Code §817 and is not intended for use by other investors.¹¹

Since the issuance of the Commission's rule regarding the Summary Prospectus, the Department has received numerous inquiries regarding whether a mutual fund's Summary Prospectus may be used to satisfy the ERISA prospectus delivery obligations under §§ 2550.404c-1(b)(2)(i)(B)(1)(viii) and (B)(2)(ii).

ANALYSIS

In the preamble to the §404(c) regulations, the Department states that the prospectus delivery requirement is intended to ensure that, immediately before or immediately after a participant's or beneficiary's initial investment in an investment alternative, such as a mutual fund, that is required to deliver a prospectus to investors under federal securities laws, participants and beneficiaries must be afforded the opportunity to review the prospectus.¹² Although the Department has not defined the term "prospectus" in the §404(c) regulations, in our view, the term "prospectus" wherever used in the regulation, includes a Summary Prospectus. We believe that the delivery of a Summary Prospectus, both automatically and upon request, by an identified plan fiduciary or designee to plan participants or beneficiaries satisfies the prospectus delivery requirements of the §§ 2550.404c-1(b)(2)(i)(B)(1)(viii) and (B)(2)(ii).¹³ The Summary Prospectus is a short-form document, written in plain English in a clear and concise format, and its required contents provide a summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. Moreover, if a participant or beneficiary wishes additional information, the Summary Prospectus provides an Internet address that leads directly to the statutory prospectus as well as a toll free (or collect) telephone number and e-mail address for obtaining free of charge in paper or by email the statutory prospectus and other information.¹⁴

The views expressed herein are solely for purposes of a plan fiduciary's ERISA prospectus delivery obligations under §§ 2550.404c-1(b)(2)(i)(B)(1)(viii) and (B)(2)(ii)

¹¹ 17 CFR 230.498(b)(1)(v)(B). See also 74 FR 4546, 4564 (Jan. 26, 2009).

¹² 57 FR 46906, 46911, (Oct. 13, 1992).

¹³ 29 CFR § 2520.104b-1(c) sets forth a safe harbor under which plan administrators will be deemed to satisfy their disclosure requirements under ERISA via electronic media. While compliance with this safe harbor would constitute good faith compliance with the prospectus delivery obligations under the §404(c) regulations, we note that the safe harbor is not the exclusive means by which plan administrators could, in the absence of other guidance, satisfy their obligation to furnish information to participants and beneficiaries. This guidance does not foreclose the use of other means by which documents may, consistent with ERISA and the E-SIGN Act, be furnished to participants and beneficiaries electronically.

¹⁴ 17 CFR 230.498(b)(1)(v)(A). See also 74 FR 4546, 4564 (Jan. 26, 2009).

and do not purport to address any issues relating to compliance with federal securities laws.

CONCLUSION

The Department believes that the delivery of a Summary Prospectus by an identified plan fiduciary or designee to participants and beneficiaries satisfies the requirements of the ERISA section 404(c) regulations because the required contents of the Summary Prospectus provide key information about a mutual fund that will assist participants and beneficiaries in making informed investment decisions. Specifically, an identified plan fiduciary or designee may satisfy the requirement of § 2550.404c-1(b)(2)(i)(B)(1)(viii) to furnish a prospectus immediately before or immediately after a participant or beneficiary's initial investment in a mutual fund by delivering to such individual the most recent Summary Prospectus received by the plan, if the Summary Prospectus is the most recent prospectus provided to the plan. Further, it is the view of the Department that if a participant requests a prospectus, and the most recent prospectus received by the plan is a Summary Prospectus, the plan fiduciary or designee may provide, for purposes of § 2550.404c-1(b)(2)(i)(B)(2)(ii), such Summary Prospectus in satisfaction of the request.

PAPERWORK REDUCTION ACT

The information collection addressed in this FAB is approved under OMB Control Number 1210-0090, which is scheduled to expire on June 30, 2012. The FAB does not revise the information collection. The Department notes that a federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. See 44 U.S.C. § 3507. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 44 U.S.C. § 3512.

Any questions concerning this matter may be directed to the Division of Fiduciary Interpretations, Office of Regulations and Interpretations, 202.693.8510.