

November 2, 2011

## ERISA Participant Disclosure Will Not Violate SEC Advertising Rules

In response to [a request from the Department of Labor](#) (DOL), the staff of the Securities and Exchange Commission (SEC) on October 26, 2011, issued a [no-action letter](#) concluding that disclosure provided by a retirement plan administrator to plan participants that is required by and complies with DOL's new [disclosure regulation for participant-directed retirement plans](#) will be treated "as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act."

- Starting May 31, 2012, the DOL rule requires a retirement plan administrator to disclose specific investment-related information to plan participants, in a format intended to facilitate a comparison of investment options available under the plan.
- SEC [Rule 482](#) permits a registered mutual fund to include, among other things, uniformly calculated performance information in sales material.
- The performance presentation requirements of the DOL rule and Rule 482 are not entirely consistent.
  - The DOL rule requires a plan administrator to disclose the 1-, 5- and 10-calendar year average total returns of plan investment options for which returns are not fixed (including mutual funds) at the time the participant can first direct the investment of his or her plan account and at least annually thereafter, with quarterly updates on a website. The performance information required under the DOL rule may not always meet the "timeliness" requirements of Rule 482, including that the total return must be current to the most recent month ended seven business days prior to date of use (or calendar quarter ended before sales material is submitted for publication if total returns current to the most recent month ended seven business days prior to use are available by identified phone number or website).
  - The DOL rule requires a money market fund's total return to be disclosed; Rule 482 requires current yield to be presented.
  - The DOL rule and Rule 482 have somewhat different requirements for legends and presentation of information.

In light of the purposes behind the DOL rule, the SEC staff was satisfied that communications provided by a plan administrator to plan participants pursuant to and in accordance with the DOL rule "should not be viewed as inconsistent with" Rule 482.

- This conclusion may reflect jurisdictional as well as substantive considerations; the letter does not expressly address whether communications used by plans and plan administrators generally are subject to Rule 482.
- These jurisdictional considerations could provide an alternative basis for the outcome in the no-action letter.

The no-action letter also notes that these participant disclosures need not be filed with the SEC or the Financial Industry Regulatory Authority, Inc. (FINRA) under Investment Company Act § 24(b) or SEC Rule 497, and that the FINRA staff intends to interpret FINRA rules in a manner consistent with the SEC interpretation.

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