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SEC Staff Grants No-Action Relief on Compliance with ERISA Disclosure Rule

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The Division of Investment Management of the U.S. Securities and Exchange Commission (SEC) recently issued a no-action letter to the U.S. Department of Labor (DOL), taking the position that disclosures required by a DOL regulation on participant-directed retirement plans would be treated as satisfying the SEC's rules on mutual fund advertising.[1]

Background

In 2010, DOL adopted a regulation under the Employee Retirement Income Security Act of 1974, as amended (ERISA), that requires employee benefit plan administrators to provide certain disclosures to plan participants and beneficiaries who can direct the investment of their plan accounts. These disclosures include investment performance and fee information for the investment options available under the plan, which are to be furnished in a comparative chart using a specified format (the regulation contains a model chart). Additional information about each investment option is required to be made available on a website. The investment options available under these plans commonly include open-end investment companies that are registered under the Investment Company Act of 1940 (mutual funds), which are subject to extensive regulation by the SEC.

Comments on the DOL regulation had raised questions as to how compliance with the DOL regulation would be treated under the SEC rules on mutual fund advertising. SEC Rule 482, which regulates the presentation of mutual fund investment performance information in advertisements and other sales materials, differs from the DOL regulation in requiring sales materials to contain more current performance information and in imposing additional requirements on the presentation of information for money market mutual funds, among other things. DOL was concerned that applying Rule 482 to the disclosures required by its regulation would greatly complicate compliance, and raised the question with the SEC staff and the staff of the Financial Industry Regulatory Authority (FINRA). DOL reported in the preamble to its final regulation that the SEC staff would communicate its position on the issue in a no-action letter, and that the FINRA staff would apply the advertising rules in a manner consistent with the SEC staff position. According to DOL, the SEC staff planned to issue the no-action letter before the regulation's applicability date, which originally was November 1, 2011 (subsequently extended to May 31, 2012).

1. *See* SEC Division of Investment Management No-Action Letter to the Department of Labor, File No. 132-3 (Oct. 26, 2011); *see also* Letter from Department of Labor to SEC Division of Investment Management (Oct. 26, 2011) (both available at http://www.dol.gov/ebsa).

No-Action Letter

The SEC staff has now issued the no-action letter requested by DOL. In the letter, the SEC staff has agreed to treat information provided to plan participants and beneficiaries in accordance with the DOL regulation by a plan administrator, or by any person designated by a plan administrator to act on its behalf, as if it satisfies the requirements of Rule 482.

The SEC staff noted that the DOL regulation requires that all investment-related information regarding plan investment options be disclosed in a comparative format, and that all "variable rate investment options" (i.e., those that do not provide a fixed rate of return) be presented in the same manner, to facilitate comparison. It also noted that any comparative chart includes a statement that additional investment-related information is available at a listed website address for the plan investment options. Taking into consideration the purposes and policies behind the DOL regulation, the SEC staff took the position that disclosures provided in compliance with the DOL regulation should not be viewed as inconsistent with the Rule 482 requirements, including those on the timeliness of investment performance information. The SEC staff added that the DOL-required disclosures need not be filed with the SEC or other regulatory bodies such as FINRA, and noted that FINRA has said it intends to interpret its advertising rules in a manner consistent with the SEC staff position.

Implications

The SEC no-action letter eliminates a potential issue that could have complicated compliance with the new ERISA participant-directed plan disclosure rules. The DOL regulation requires that the disclosures be provided in a specific format, and guidance was needed as to whether varying that format to include additional information for mutual funds in accordance with SEC rules would violate the terms of the regulation. Also, plan administrators and service providers were concerned about the possibility of compliance with ERISA disclosure rules raising compliance issues under federal securities laws.

However, the letter continues to skirt an interesting and longstanding issue—whether the SEC has jurisdiction over disclosures to plan participants regarding their plan investment options. In its May 1992 report, *Protecting Investors: A Half Century of Investment Company Regulation*, the SEC Division of Investment Management, citing the limited nature of the then-current disclosure rules under ERISA, recommended that federal securities laws be amended to require the delivery of mutual fund and other pooled investment fund prospectuses and periodic reports to plan participants who direct their account investments. While no change has been made to federal securities laws in this regard, DOL has by regulation—including most notably the regulation that is the subject of the current no-action letter—mandated detailed investment-related disclosures to such plan participants under ERISA.

Nevertheless, the fact that this no-action letter was both requested and issued implies the possibility of SEC jurisdiction over the fund-related disclosure materials provided to plan participants, despite previous no-action letters on SEC Rule 482 in which the SEC staff acknowledged, or at least did not challenge, the view that the plan trust rather than the plan participants was the purchaser and owner of the securities.[2] This could have implications for those who prepare disclosure materials describing mutual funds that are available as plan investment options, since Rule 482 disclosures are subject to Securities Act prospectus and antifraud liability.

2. See Fidelity Institutional Retirement Services Co. SEC No-Action Letter, 1995 SEC No-Act. LEXIS 484 (Apr. 5, 1995); Aetna Life Ins. & Annuity Co., SEC No-Action Letter, 1997 SEC No-Act. LEXIS 41 (Jan. 6, 1997).

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