



October 26, 2011

Douglas J. Scheidt  
Associate Director and Chief Counsel  
Division of Investment Management  
United States Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Dear Mr. Scheidt:

This is to request a "no-action" letter concerning the applicability of Rule 482 under the Securities Act of 1933 with respect to disclosures required under a regulation issued by the Department of Labor last October, 75 Fed. Reg. 64910 (Oct. 20, 2010). The regulation requires certain retirement savings plans to disclose information on investment alternatives to participants and beneficiaries who may direct the investment of their individual plan accounts. The Department seeks assurance that a plan's compliance with these disclosure requirements, whether by the plan administrator or its designees, will not result in action by the Securities and Exchange Commission (SEC or the Commission) related to Rule 482.

The Department administers and enforces the fiduciary, reporting, disclosure and other provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. 1002 et seq. Through the Employee Benefits Security Administration, it oversees approximately 718,000 private pension plans, including 498,000 participant-directed individual account plans, such as 401(k)-type plans. These plans cover an estimated 86 million active participants and hold approximately \$4.7 trillion in assets. Many of these plans offer investment options issued by investment companies registered under the Investment Company Act of 1940.

The Department's regulation requires plan administrators of participant-directed individual account plans to disclose plan and investment-related information to participants and beneficiaries on or before the date an individual can first direct his or her investments and at least annually thereafter. 29 CFR §2550.404a-5. The Department recently delayed the applicability date for this rule, 76 Fed. Reg. 42541 (July 19, 2011). We expect that plans will need to begin making disclosures under this rule by June 2012. A copy of the regulation and its related extension are enclosed for your convenience.

The regulation generally requires disclosure of specified performance, benchmarking, and fee information for each investment option available under the plan, including those issued by investment companies registered under the Investment Company Act of 1940. For investment options with varying returns, the plan must disclose the “average annual total return of the investment for 1-, 5-, and 10- year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year.” Plans must also make this and other information, including performance data updated on at least a quarterly basis, or more frequently if required by other applicable law, available to participants via an Internet Web site address, which may or may not link to an investment company’s or issuer’s Web site. 29 C.F.R. § 2550.404a-5(d)(1)(v).

The regulation treats money market funds as investments for which the return is not fixed. Thus under the regulation, plans must provide the above-mentioned historical return information for a money market fund along with a statement that past performance is not necessarily indicative of performance in the future. However, unlike SEC Rule 482, the regulation does not require a statement that a money market fund is not insured by the Federal Deposit Insurance Corporation or any other government agency or disclosure of the fund’s current yield. 29 C.F.R. §2550.404a-5(d)(1)(ii)(A).

Investment-related information, including performance data, must be provided in a chart or other comparative format designed to help plan participants review and compare their investment options. This document must include the name and telephone number of the person to contact in order to request additional information about the investments offered under the plan, including a prospectus or similar document. It must also direct participants to the website address where supplemental information is available. 29 C.F.R. § 2550.404a-5(d)(2).

Comments we received on the notice of proposed rulemaking published in 2008 raised questions on how compliance with the Department’s regulation would be treated under the Commission’s advertising rules. Although commenters focused on differences between the proposal’s annual disclosure requirement for performance data and the timeliness requirements in Rule 482(g), other differences exist as well. Based on our review of these comments, it appears that applying Rule 482 to the disclosures required by the Department’s regulation may greatly complicate compliance with the regulation. As you know, we discussed these issues with the Commission’s staff and staff of FINRA. As a result of these consultations, we stated in the preamble to the final regulation that –

The Commission’s staff has advised that it expects to communicate its position to the Department in a staff no-action letter, which will be issued before the applicability date of this final rule. FINRA staff has stated that it will apply the Commission’s advertising rules in a manner that is consistent with the Commission’s staff position published in the no-action letter. The Department and the Commission will, in turn, make the letter available to the public on their respective Web sites.

75 Fed. Reg. 64916. The regulated community's legitimate concerns should be resolved as soon as practicable. We believe a clear no-action statement by the Commission staff will provide the needed assurance and will assist ERISA plan administrators and their service providers. We are aware that a no-action letter will neither relieve any party of its obligations under the anti-fraud provisions of federal securities laws nor affect the Commission's enforcement of such provisions.

Please feel free to contact Jeffrey Turner of my staff at (202) 693-8510 if you require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "A. D. Lebowitz". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Alan D. Lebowitz  
Deputy Assistant Secretary  
for Program Operations

Attachments