

RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT

October 26, 2011  
Our Ref. No. 20081112953  
Department of Labor  
File No. 132-3

Your letter dated October 26, 2011 requests that we state our views regarding the applicability of Rule 482 (“Rule 482”) under the Securities Act of 1933 (“Securities Act”) to disclosures required by Rule 404a-5 (“DOL Rule”) under the Employee Retirement Income Security Act of 1974 (“ERISA”). We agree to treat information provided by a plan administrator<sup>1</sup> or any person designated by a plan administrator to act on its behalf (“Plan Administrator”) to plan participants or beneficiaries that is required by and complies with the disclosure requirements set forth in the DOL Rule, as specified below, as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act.

**I. Background**

On October 20, 2010, the Department of Labor (“Department”) adopted the DOL Rule which requires the disclosure of certain plan and investment-related information, including performance information, to participants and beneficiaries in participant-directed individual account plans (“Plan Participants” and “Plans,” respectively) by Plan Administrators.<sup>2</sup> The DOL Rule is designed to ensure that Plan Participants are provided with sufficient information regarding the Plan and designated investment alternatives (“Investment Options”), in a comparative format, to make informed decisions when managing their accounts. In developing the investment-related disclosure requirements, the staff of the Department consulted with the Commission staff on certain provisions of the DOL Rule, including those relating to the presentation of the performance of Investment Options with respect to which the return is not fixed (“Variable Rate Investment Options”).

A Plan may designate securities issued by an investment company registered under the Investment Company Act of 1940 (“Investment Company Act”) as an Investment Option. Under the DOL Rule, a Plan Administrator must furnish investment-related information for each Investment Option offered under a Plan, including performance information, to a Plan Participant prior to or on the date on which the Plan Participant can first direct his or her investment and at

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<sup>1</sup> See n.2, *infra*.

<sup>2</sup> Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 FR 64910 (Oct. 20, 2010) (adopting Rule 404a-5) [29 CFR § 2550.404a-5] (“DOL Rule Adopting Release”). The term “plan administrator” is defined in Section 3(21) of ERISA and, for purposes of the disclosure requirements in the DOL Rule, includes a “plan administrator” as defined in Section 3(16)(A) of ERISA. See Rule 404a-5(a).

least annually thereafter.<sup>3</sup> The DOL Rule requires that the investment-related information for all Investment Options under a Plan be presented in a chart or other comparative format.<sup>4</sup> The comparative chart must provide contact information for the purpose of obtaining a prospectus (for Investment Options registered under the Securities Act or the Investment Company Act) or similar document (for Investment Options that are not so registered).<sup>5</sup>

With respect to an Investment Option that is a Variable Rate Investment Option, the DOL Rule generally requires disclosure, in a comparative format, of the average annual total return (“total return”) of the investment for the one-, five- and ten- calendar year periods ending on the date of the most recently completed calendar year (or for the life of the investment, if less than one of the specified periods).<sup>6</sup> A Plan Administrator, after the initial disclosure to Plan Participants, is required to disclose the total return for any Variable Rate Investment Option at least annually to Plan Participants (“DOL Timeliness Requirement”).<sup>7</sup> In addition, the comparative chart must specify an Internet Web site address<sup>8</sup> in order to provide Plan Participants with access to supplemental investment-related information, including more current performance information.<sup>9</sup> Performance information available at the Web site address must be updated on at least a quarterly basis, or more frequently if required by other applicable law.<sup>10</sup> The comparative chart must contain a statement that an investment's past performance is not necessarily an indication of how the investment will perform in the future.<sup>11</sup> The comparative chart also must contain a statement that fees and expenses are only one of several factors that

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<sup>3</sup> See Rule 404a-5(d)(1). The required investment-related disclosure, among other information, includes the name, performance data, comparative benchmark, and fees and expenses of the Investment Option.

<sup>4</sup> See Rule 404a-5(d)(2)(i).

<sup>5</sup> See Rule 404a-5(d)(2)(i)(A).

<sup>6</sup> See Rule 404a-5(d)(1)(ii)(A). Under the DOL Rule, total return generally is calculated using the standardized total return method of computation specified by the Commission in Form N-1A (or Form N-3 or N-4 if appropriate). See Rule 404a-5(h)(3).

<sup>7</sup> See Rule 404a-5(d)(1).

<sup>8</sup> The preamble to the DOL Rule confirms that a Plan Administrator is responsible for ensuring availability of the Internet Web site address to Plan Participants. The preamble, however, discusses that a Plan Administrator, service providers to the Plan or issuers of Investment Options may be responsible for establishing and maintaining the Web site depending on the arrangements the parties have entered into to provide or receive such services. See DOL Rule Adopting Release, at 64918.

<sup>9</sup> See Rule 404a-5(d)(1)(v)(E). The comparative chart also must contain a statement that additional investment-related information, including more current performance information, is available at the specified Web site and explain how to request paper copies of such information. See Rule 404a-5(d)(2)(i)(B) and Rule 404a-5(d)(2)(i)(C).

<sup>10</sup> See Rule 404a-5(d)(1)(v)(E).

<sup>11</sup> See Rule 404a-5(d)(1)(ii)(A).

Plan Participants should consider when making investment decisions.<sup>12</sup>

Under the DOL Rule, money market funds<sup>13</sup> are considered a Variable Rate Investment Option and their performance information must include total return for the one-, five- and ten-calendar year periods ending on the date of the most recently completed calendar year (or for the life of the investment, if less than one of the specified periods).<sup>14</sup> The DOL Rule does not require that the performance information for a money market fund -- or any other Variable Rate Investment Option presented alongside the money market fund in a comparative format -- include its current yield in addition to total return. The DOL Rule does not require a money market fund to disclose that it is not insured by the Federal Deposit Insurance Corporation or any other government agency.

## II. Analysis

Rule 482 permits an open-end investment company registered under the Investment Company Act ("fund") to include, among other things, uniformly calculated performance information in advertisements and other sales materials ("advertisements"). Under Rule 482, among other things, performance information included in an advertisement for a fund generally must meet the following requirements: (A)(i) total return is current to the most recent calendar quarter ended before the advertisement is submitted for publication, and (ii) total return current to the most recent month ended seven business days prior to the date of use is provided telephonically or through a Web site address identified for that purpose; or (B) total return is current to the most recent month ended seven business days prior to the date of use of the advertisement ("Rule 482 Timeliness Requirements").<sup>15</sup> Under Rule 482, any quotation of a money market fund's total return in an advertisement must be accompanied by a quotation of the fund's current yield.<sup>16</sup> Rule 482 also requires certain specific legends in advertisements,<sup>17</sup> specifies the manner of presentation,<sup>18</sup> and prohibits an advertisement from being accompanied by an application to purchase shares (collectively, "Other Rule 482 Requirements").<sup>19</sup>

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<sup>12</sup> See Rule 404a-5(d)(1)(iv)(4). The comparative chart also requires a statement that the cumulative effect of fees and expenses can substantially reduce the growth of a Plan Participant's account and that the Department's Web site contains an example demonstrating such effect. See Rule 404a-5(d)(1)(iv)(5).

<sup>13</sup> Rule 2a-7 under the Investment Company Act defines the term "money market fund."

<sup>14</sup> See Rule 404a-5(d)(1)(ii)(A).

<sup>15</sup> See Rule 482(g).

<sup>16</sup> See Rule 482(e)(2).

<sup>17</sup> See 482(b)(1), (b)(3) and (b)(4).

<sup>18</sup> See Rule 482(b)(5).

<sup>19</sup> See Rule 482(c).

The DOL Timeliness Requirement for performance information presented in a comparative chart may provide for performance information that is less current than that required under the Rule 482 Timeliness Requirements. The DOL Rule does not require a comparative chart to present a money market fund's current yield, but only total return. Finally, the DOL Rule's requirements as to specific legends and presentation of information in the comparative format differ somewhat from the Other Rule 482 Requirements.<sup>20</sup>

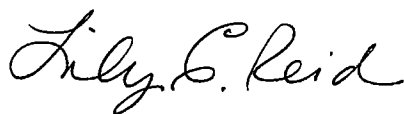
The DOL Rule mandates the disclosure of specific investment-related information to facilitate a comparison of available Investment Options, and that the Plan Administrator must disclose this information in a comparative format. The DOL Timeliness Requirement applies to the presentation of performance information for all Variable Rate Investment Options. The DOL Rule requires that any comparative chart include a statement that additional investment-related information (including more current performance information) is available at the listed Internet Web site address for the Investment Options. With respect to money market funds, under the DOL Rule, performance information for money market funds would be presented in the same manner as, and compared to, other Variable Rate Investment Options, none of which is required by the DOL Rule to disclose current yield for purposes of the comparative presentation. In light of the purposes and policies behind the DOL Rule, it is our view that disclosure provided by a Plan Administrator to Plan Participants, specified above, that is required by and complies with the DOL Rule should not be viewed as inconsistent with the Rule 482 Timeliness Requirements or the Other Rule 482 Requirements.

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<sup>20</sup> The information provided in compliance with the DOL Rule may be accompanied by a plan enrollment form that includes, among other things, instructions as to how a Plan Participant may direct his or her investments among the Investment Options.

### III. Conclusion

Based on the facts and representations in your letter, and the purposes and policies underlying the DOL Rule, we agree to treat information provided by a Plan Administrator to Plan Participants, specified above, that is required by and complies with the disclosure requirements set forth in the DOL Rule as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act. We also are of the view that such information need not be filed pursuant to Rule 497 under the Securities Act and Section 24(b) of the Investment Company Act with the Commission or certain national securities associations, such as the Financial Industry Regulatory Authority (“FINRA”).<sup>21</sup> We note that FINRA staff has informed us that it intends to interpret FINRA’s rules applicable to the information provided by a Plan Administrator to Plan Participants that is required by and complies with the disclosure requirements under the DOL Rule in a manner that is consistent with our positions in this letter.



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<sup>21</sup> Rule 497 under the Securities Act requires Rule 482 advertisements to be filed with the Commission. Rule 482 advertisements are considered filed with the Commission if filed with a national securities association registered under Section 15A of the Securities and Exchange Act of 1934 that has adopted rules and procedures for reviewing investment company advertisements, such as FINRA. *See* Rule 497(i). In addition, Section 24(b) of the Investment Company Act generally requires funds, among others, to file any advertisement, pamphlet, circular, form letter, or other sales literature with the Commission. Under Rule 24b-3 under the Investment Company Act, investment companies are deemed to satisfy this requirement by filing sales literature with the same entities specified in Rule 497(i).