

## Department of Labor Allows Summary Prospectus Delivery to 401(k) Plan Participants

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Following the lead of the Securities Exchange Commission (SEC), the Department of Labor (DOL) confirmed (in Field Assistance Bulletin 2009-3, released September 8, 2009) that it will consider delivery of a Summary Prospectus that meets SEC requirements as also meeting DOL rules for delivery of investment prospectuses to plan participants. This should make compliance with DOL regulations requiring delivery of mutual fund prospectuses to plan participants easier and cheaper.

On January 1, 2009, SEC Release 33-8998 adopted revised rule 498, effective March 31, 2009, which allows investment providers (such as mutual funds) to supply a Summary Prospectus in most instances where a full prospectus was previously required. Briefly, a Summary Prospectus need only contain items 2 through 8 of SEC Form N-1A—summaries of investment objectives, fees, investments, risks, and performance, plus information on management, the purchase and sale of shares, taxes, and financial intermediary compensation. Thus, the Summary Prospectus should be only a few pages long. When the Summary Prospectus is used, the full prospectus need only be maintained on a Web site accessible to the investor or provided on request.

Under ERISA section 404(c), plan fiduciaries can be relieved of liability for participant investment decisions in their individual accounts in plans such as 401(k) plans and profit-sharing plans if the participant can exercise control of the account investments. One key to demonstrating participant control is giving the participant sufficient information to make informed investment decisions among the investment choices offered by the plan. To that end, DOL 404(c) regulations (section 2550.404(c)-1(b)(2)(B)(1)(viii)) require a plan to automatically provide the prospectus of an investment subject to the Securities Act of 1933 (such as the mutual funds most plans offer as investments) either immediately before or immediately after the participant first directs investment into a particular fund, and whenever the participant requests a copy of the prospectus.

Although a prospectus can be delivered electronically, DOL regulations (section 2520.104b-1(c)(2)) require affirmative consent to electronic delivery for anyone other than an employee who can effectively access documents on an electronic system at his or her workplace and

must access the electronic system as an integral part of his or her duties. Therefore, many plans and plan investment or service providers continue to mail prospectuses rather than track consent or determine who qualifies for electronic delivery and who does not.

### Effect on Employers and Their Plans

Although not required, compliance with the DOL 404(c) regulations can protect 401(k) plan fiduciaries from being held responsible for losses participants incur from investments that participants direct in their own accounts. Compliance with the DOL 404(c) regulations should be reviewed periodically and simplified whenever possible.

The DOL previously stated that an investment “Profile” authorized by the SEC could be used in lieu of a prospectus.<sup>1</sup> However, few investment providers routinely prepared such a Profile, largely because it could not be substituted for the full prospectus in many situations. The newly authorized Summary Prospectus should see far broader use, which plan fiduciaries and service providers can employ to reduce the administrative costs involved in distributing prospectuses.

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<sup>1</sup> Adv. Opin. 2003-11A (September 8, 2003).