

September 2003

Mutual Fund Summary May Satisfy ERISA Section 404(c)

On September 8, 2003, the Department of Labor (the "DOL") issued an opinion letter permitting simplified compliance with the disclosure requirements for participant-directed individual account plans, such as 401(k) plans. DOL Advisory Opinion 2003-11A ("Advisory Opinion") represents a welcome clarification of the DOL's thinking on acceptable disclosure materials under Section 404(c) of the Employee Retirement Income Security Act ("ERISA").

Background — ERISA 404(c)

ERISA Section 404(c) provides that if an individual account plan, such as a 401(k) plan, permits participants to direct investments in their accounts, plan fiduciaries will not be liable under ERISA for any losses resulting from the participant's exercise or control. The DOL regulations interpreting ERISA Section 404(c) require that participants and beneficiaries be provided (or have the opportunity to obtain) sufficient information to make informed decisions with regard to investment alternatives under the plan. The regulations also require that in the case of a mutual fund, or other investment alternative subject to the registration requirements of the Securities Act of 1933 ("Securities Act"), a participant or beneficiary be provided (either immediately before or immediately after the individual's initial investment in an investment alternative) a copy of the "most recent prospectus" for such investment alternative that was provided to the plan. In addition, the regulations also require that a participant or beneficiary be provided copies of latest prospectuses, financial statements and reports, and any other materials relating to investment alternatives available under the plan. This information is required to be provided to the participants and beneficiaries by the identified plan fiduciary, or the person(s)

designated by the plan fiduciary to act on his or her behalf.

Background — SEC Prospectus

In the Advisory Opinion, the DOL was asked its opinion regarding the use of mutual fund "Profiles" to satisfy the Section 404(c) requirements. According to the Securities and Exchange Commission ("SEC") rules, there are two types of prospectus under the Securities Act of 1933 ("Securities Act"): (1) Section 10(a) provides for much of the same information that is required in the registration statement under which securities are offered and can be lengthy, and (2) Section 10(b) permits a summary prospectus and has set out specific requirements for its content. The SEC adopted Rule 498 under which a summary prospectus was intended to be used with mutual funds and participant directed defined contribution plans. A Profile provides clear and concise information regarding an investment in an easy to read format that avoids use of excessive detail, technical and legal terms and long sentences.

Advisory Opinion Facts

The Advisory Opinion considered one mutual fund company and its "Profile" which was represented as meeting the Section 10(b) prospectus requirements. The company proposed to send plan participants a Profile either immediately before or immediately after the participant's initial investment in a mutual fund. In addition, a Section 10(a) prospectus would be provided upon request.

Advisory Opinion

The Advisory Opinion states that, in the opinion of the DOL, the "prospectus" requirement under the ERISA Section 404(c) regulations is satisfied by the delivery of

a Profile to a participant or beneficiary because a Profile contains the type of information that the DOL intended a participant or beneficiary in a Section 404(c) plan to receive, and because the Profile explains how to obtain a detailed prospectus designed to comply with Section 10(a) of the Securities Act in the event a participant or beneficiary wants additional information regarding the investment. The Advisory Opinion also clarifies that the requirement under the Section 404(c) regulations that a participant or beneficiary be provided, either directly or upon request, copies of prospectus and other materials, which are based on the latest information available to the plan, will be satisfied by the delivery of a Profile if the Profile contains the most recent information on the investment alternative. If, however, the Section 10(a) prospectus contains the most recent information on the investment alternative, the plan will be required to provide the Section 10(a) prospectus instead.

The Advisory Opinion took no position on the Securities Act compliance by the plan and mutual fund in the delivery of the summary prospectus. So, employers with 404(c) plans will want to review Securities Act compliance with the mutual fund provider.

In light of this Advisory Opinion, employers may wish to obtain copies of the most recent Profiles of the mutual funds offered to the employer's plan for distribution to participants and beneficiaries at the times required by the Section 404(c) regulations. Also, employers should maintain regular communication with the plan's mutual fund providers to ensure that the employer is providing participants and beneficiaries the prospectus (either in Profile form or by way of a Section 10(a) prospectus) that contains the most recent information on the mutual funds.

If you have any questions about the application of a summary prospectus and 404(c) plans generally, please contact the Seyfarth Shaw employee benefits group attorney with whom you work or any employee benefits group attorney listed on the website at www.seyfarth.com.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3850
Houston, Texas 77002-2731
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

101 California Street, Suite 2900
San Francisco, California 94111-5858
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax

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