

MEMO# 27565

September 16, 2013

DOL Opines on Use of Summary Prospectus to Satisfy PTE 77-4 Conditions

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TO: PENSION MEMBERS No. 44-13

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 32-13

BROKER/DEALER ADVISORY COMMITTEE No. 44-13

OPERATIONS COMMITTEE No. 46-13

TRANSFER AGENT ADVISORY COMMITTEE No. 70-13 RE: DOL OPINES ON USE OF SUMMARY PROSPECTUS TO SATISFY PTE 77-4 CONDITIONS

The Department of Labor (DOL) recently issued Advisory Opinion 2013-04A (the Opinion) approving the use of a summary prospectus to satisfy section II(d) of Prohibited Transaction Exemption (PTE) 77-4, [\[1\]](#) which requires delivery of a mutual fund's prospectus to an independent second fiduciary. PTE 77-4 generally provides relief from ERISA's prohibited transaction provisions, and the taxes imposed by section 4975 of the Internal Revenue Code, for an employee benefit plan's purchase or sale of shares of an open-end investment company registered under the Investment Company Act of 1940 (a mutual fund), when an investment advisor for the mutual fund or its affiliate is a plan fiduciary and not an employer of employees covered by the plan. [\[2\]](#)

Reliance on PTE 77-4 requires compliance with several conditions. One condition, contained in section II(d) of the exemption, requires that a second plan fiduciary, who is independent and unrelated to the fiduciary/investment advisor or any affiliate thereof, receive a current prospectus issued by the investment company, and full and detailed written disclosure of the investment advisory and other fees charged to or paid by the plan and the investment company. This disclosure must include the nature and extent of any differential between the rates of such fees, the reasons why the fiduciary/investment advisor may consider such purchases to be appropriate for the plan, and whether there are any limitations on the fiduciary/investment advisor with respect to which plan assets may be invested in shares of the investment company and, if so, the nature of such limitations. The Opinion was issued in response to an inquiry as to whether delivery of a summary prospectus may be used to satisfy the prospectus delivery requirement.

In its analysis, DOL discusses the Security and Exchange Commission's (SEC) 2009 issuance

of revised disclosure provisions for mutual funds, including the summary prospectus rule, which permits a fund to satisfy its prospectus delivery obligations under section 5(b)(2) of the Securities Act of 1933 by providing investors with a summary prospectus containing the same key information, in the same order, as the summary at the front of the statutory prospectus. [3] The Opinion notes that, subsequent to the SEC's adoption of the summary prospectus rule, DOL concluded in Field Assistance Bulletin 2009-03 that providing a summary prospectus to participants and beneficiaries satisfied the prospectus delivery obligations under DOL's 404(c) regulations because "the required contents of the [s]ummary [p]rospectus provide key information about a mutual fund that will assist participants and beneficiaries in making informed investment decisions." [4] The Opinion also discusses DOL Advisory Opinion 94-35A, in which the Department opined that, with respect to a mutual fund that was registered under the Investment Company Act of 1940 but not under the Securities Act of 1933, the prospectus delivery requirement of section II(d) of PTE 77-4 could be satisfied by providing the second fiduciary with the Form N-1A and certain additional information. [5]

Finally, the Opinion notes that, although PTE 77-4 does not define the term "prospectus," under SEC rules, a summary prospectus must provide investors with key information about a fund's investment objectives, fees, investment strategies, risks and performance, and must include a legend containing an internet address and website for obtaining a statutory prospectus for the relevant mutual fund free of charge. The Opinion concludes that "[u]nder such circumstances, it is the Department's view that the delivery of a summary prospectus to a second fiduciary satisfies the prospectus distribution requirement solely for purposes of section II(d) of PTE 77-4."

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endnotes

[1] The advisory opinion is available here: <http://www.dol.gov/ebsa/pdf/AO2013-04A.pdf>.

[2] PTE 77-3 provides relief for in-house plans of open-end investment companies, i.e., where the fund advisor is an employer of employees covered by the plan.

[3] For a the description of the SEC 2009 summary prospectus delivery rule, see [Memorandum](#) to Accounting/Treasurers Committee No. 2-09, Bank, Trust and Recordkeeper Advisory Committee No. 2-09, Board of Governors No. 2-09, Broker/Dealer Advisory Committee No. 5-09, ETF Advisory Committee No. 1-09, Exchange-Traded Funds (ETF) Committee No. 1-09, Investment Company Directors No. 2-09, Operations Members No. 3-09, Pension Members No. 4-09, SEC Rules Members No. 7-09, Small Funds Members No. 6-09, Technology Committee No. 2-09, Transfer Agent Advisory Committee No. 7-09, Variable Insurance Products Advisory Committee No. 2-09 [23197], dated January 21, 2009.

[4] For the Institute's summary of Field Assistance Bulletin 2009-03, see [Memorandum](#) to Pension Members No. 41-09, SEC Rules Members No. 95-09, Bank, Trust and Recordkeeper Advisory Committee No. 41-09, Transfer Agent Advisory Committee No. 69-09, Small Funds Committee No. 17-09, Broker/Dealer Advisory Committee No. 51-09 [23772], dated September 9, 2009.

[5] The additional information required includes: (1) a table listing management fees, all other expenses broken down by category and total portfolio expenses; (2) a chart showing the effect of such fees on an investment in the fund over one, three, five and 10 years; and (3) a list of per share income and capital changes for a share outstanding throughout the year.

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