

MEMO# 25602

October 31, 2011

SEC Staff Guidance Regarding the Applicability of SEC Rule 482 to DOL Rule 404a-5 Disclosure Documents

[25602]

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TO: SEC RULES COMMITTEE No. 93-11
ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 12-11
PENSION MEMBERS No. 59-11 RE: SEC STAFF GUIDANCE REGARDING THE APPLICABILITY OF SEC RULE 482 TO DOL RULE 404a-5 DISCLOSURE DOCUMENTS

The staff of the Securities and Exchange Commission's Division of Investment Management recently issued a letter to the Department of Labor agreeing to treat information provided by a plan administrator to plan participants that is required by and complies with the disclosure requirements set forth in a regulation under section 404(a)(5) of ERISA ("DOL Rule 404a-5") as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act of 1933. [\[1\]](#) The staff also stated their view that such information need not be filed pursuant to Rule 497 under the Securities Act or Section 24(b) of the Investment Company Act of 1940 with the SEC or certain national securities associations, such as the Financial Industry Regulatory Authority ("FINRA"). The letter also notes that FINRA staff intends to interpret its rules with respect to this DOL-required information in a manner that is consistent with the SEC staff's position. The letter is briefly summarized below.

Background and Analysis

The letter explains that DOL adopted Rule 404a-5, [\[2\]](#) which requires the disclosure of certain plan and investment-related information, including performance information, to participants and beneficiaries in participant-directed individual account plans by plan administrators. SEC Rule 482 permits an open-end investment company registered under the Investment Company Act ("mutual fund") to include, among other things, uniformly calculated performance information in sales material. The letter points out that the DOL requirement that a plan administrator disclose the total return for plan investment options, including mutual funds, at least annually to plan participants may provide for performance

information that is less current than that required under Rule 482. [3] It also points out that, unlike Rule 482, the DOL rule does not require a money market fund's current yield to be presented (instead total return must be presented). Finally, the DOL's rule's requirements as to specific legends and presentation of information differ somewhat from Rule 482's requirements.

The letter discusses the fact that the DOL rule mandates the disclosure of specific investment-related information in a comparative format to facilitate a comparison of investment options available under a retirement plan and concludes that, based on the purposes and policies underlying the DOL rule, the staff determined to treat information provided by a plan administrator to plan participants that is required by and complies with the disclosure requirements set forth in DOL Rule 404a-5 as if it were a communication that satisfies the requirements of Rule 482.

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endnotes

[1] See Department of Labor (October 26, 2011), available at <http://www.sec.gov/divisions/investment/noaction/2011/dol102611-482.htm>

[2] See [Memorandum](#) to Pension Members No. 49-10, Transfer Agent Advisory Committee No. 76-10, Bank, Trust and Recordkeeper Advisory Committee No. 49-10, Broker/Dealer Advisory Committee No. 56-10, and Operations Committee No.37-10 [24702], dated November 11, 2010.

[3] Rule 482 has several requirements regarding the timeliness of performance information in sales material, including that total return is current to the most recent calendar quarter ended before the sales material is submitted for publication.