The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 28777

February 26, 2015

SEC Staff Guidance Regarding Applicability of SEC Rule 482 to Certain Information Provided to Participants in Retirement Plans Not Covered by ERISA

[28777]

February 26, 2015

TO: PENSION COMMITTEE No. 3-15
SEC RULES COMMITTEE No. 7-15
ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 1-15 RE: SEC STAFF GUIDANCE REGARDING APPLICABILITY OF SEC RULE 482 TO CERTAIN INFORMATION PROVIDED TO PARTICIPANTS IN RETIREMENT PLANS NOT COVERED BY ERISA

The staff of the Securities and Exchange Commission's (SEC) Division of Investment Management issued a no-action letter to the American Retirement Association (ARA) agreeing to treat certain information furnished to participants and beneficiaries in 403(b) plans (and certain other specified retirement savings plans) that are not subject to the Employee Retirement Income Security Act of 1974 (ERISA) as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act of 1933. [1] The letter follows on the no-action letter issued in 2011 to the Department of Labor (DOL) relating to the participant disclosure requirements under 29 C.F.R. §2550.404a-5 ("DOL Rule"). [2]

Background

In the 2011 letter to DOL ("DOL Letter"), the SEC staff agreed to treat specified investment-related information provided by a plan administrator, or a person designated by a plan administrator to act on its behalf, to participants and beneficiaries in ERISA-covered participant-directed individual account plans, that is required by and complies with the disclosure requirements set forth in the DOL Rule ("DOL Required Investment Information") as if it were a communication that satisfies the requirements of Rule 482 under the Securities Act of 1933. As described in the DOL Letter, the no-action relief was necessary because of differences between the requirements of the SEC's Rule 482 and the DOL Rule. [3]

The ARA requested relief from the SEC staff similar to that granted in the DOL Letter, so

that participants in certain non-ERISA-covered plans could receive the DOL Required Investment Information even though such plans are not subject to the DOL Rule. The ARA noted that the DOL Rule is designed to facilitate a comparison of investment options by participants in participant-directed plans and that providing the DOL Required Investment Information to participants in non-ERISA-covered plans will similarly facilitate an "apples to apples" comparison of the investment options, and associated fees, available to them.

Conditions for Relief

Based on the facts and representations in the ARA's letter, the staff agreed to provide the requested relief. Key representations in the no-action letter include that:

- Each "Investment Vendor" (defined as insurance companies and custodial account vendors offering annuity contracts and funds to 403(b) plan participants) will provide the DOL Required Investment Information to participants in the non-ERISA 403(b) plan pursuant to a written agreement [4] with the employer (or its designee) that requires the Investment Vendor to provide the DOL Required Investment Information for each "Investment Option" (i.e., annuity contracts and mutual funds) that the Investment Vendor offers under the non-ERISA 403(b) plan and also, to the extent available to the Investment Vendor, all fee and expense information as specified in 29 C.F.R. §2550.404a-5(c)(2)(i)(A) and (c)(3)(i)(A) (plan-related administrative and individual expenses; together, the "Information"). Each written agreement will specify a date on or before which the Investment Vendor will provide the Information to all current participants in the non-ERISA 403(b) plan.
- Each Investment Vendor under the non-ERISA 403(b) plan will (i) provide the Information to participants initially on or before the date specified in the written agreement with the employer (or its designee), (ii) update the Information at least annually, (iii) update on at least a quarterly basis, or more frequently if required by other applicable law, the performance information to be disclosed at an Internet web site address listed pursuant to the DOL Required Investment Information, and (iv) require the contact person designated by the Investment Vendor as a source of additional information in the DOL Required Investment Information to provide upon request the information specified in the DOL Rule.
- The Information will be furnished to (i) new participants in the non-ERISA 403(b) plan prior to their initial investment, and (ii) each participant at least annually in accordance with the timing requirements in the DOL Rule.
- Information provided by an Investment Vendor as DOL Required Investment Information will include no information other than information that would be required to comply with the DOL Rule if the non-ERISA 403(b) plan were subject to the DOL Rule. [5], [6]

Scope of Relief

Although the facts and representations in the ARA no-action letter mainly involve 403(b) plans that are not covered by ERISA, the staff indicates that the views expressed in the letter also extend to retirement savings plans that similarly are not subject to ERISA and that are governmental 457(b) plans, governmental 401(a) plans, 415(m) plans, church 401(a) plans, non-governmental 457(b) plans, and 409A plans or 457(f) plans of governmental or tax-exempt entities. [7] The letter explains that, with respect to these other types of plans, the term "Investment Option" includes any other lawful investment alternative (i.e., not limited to annuity contracts and mutual funds), provided that it meets

the definition of “designated investment alternative” in the DOL Rule.

Unlike the DOL Letter, the ARA no-action letter does not provide that the information provided to plan participants need not be filed pursuant to Rule 497 under the Securities Act of 1933 or Section 24(b) of the Investment Company Act of 1940, with the SEC or the Financial Industry Regulatory Authority (FINRA). [8]

The Institute has a pending request before the SEC staff for no-action relief similar to that granted in the ARA letter, but based on slightly different factual representations that represent common practices of Institute members. The SEC staff included the paragraph extending the relief to other retirement savings plans not covered by ERISA in response to our previous concerns about the need for similar relief beyond 403(b) plans. We are assessing the terms and conditions of the ARA no-action letter to determine whether this addition is sufficient or if we need to continue pursuing the pending request for relief. If you have comments or questions relating to the ARA letter or the Institute’s pending request, please contact the undersigned at 202-326-5821.

Elena Barone Chism
Associate General Counsel

endnotes

[1] A copy of the no-action letter is available at http://www.sec.gov/divisions/investment/noaction/2015/american-retirement-sssociation-021815-482.htm.

[2] For an explanation of the 2011 DOL Letter, see Memorandum to SEC Rules Committee No. 93-11, Advertising Compliance Advisory Committee No. 12-11, and Pension Members No. 59-11 [25602], dated October 31, 2011.

[3] SEC Rule 482 permits an open-end investment company registered under the Investment Company Act (a “mutual fund”) to include, among other things, uniformly calculated performance information in sales material. The DOL 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. 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 Rule’s requirements as to specific legends and presentation of information differ somewhat from Rule 482’s requirements.

[4] The no-action letter states that Investment Vendors may satisfy this “written agreement” condition by providing written notice to the employer (or its designee) on or after the date of the no-action letter that the Investment Vendor is complying with this condition as a term of an existing written agreement.

[5] The no-action letter notes that the DOL Required Investment Information would be in addition to any information that a participant in a non-ERISA 403(b) plan may be required to receive under the federal securities laws, such as a prospectus and annual and semi-annual shareholder reports.

[6] This condition includes the caveat that the DOL Required Investment Information may be accompanied by a plan enrollment form that includes, among other things, instructions as to how a participant in a non-ERISA 403(b) plan may direct his or her investments among the Investment Options. The no-action letter states that, to the extent that Investment Vendors provide participants in non-ERISA 403(b) plans with information other than information provided by such Investment Vendors as DOL Required Investment Information, except as set forth above ("Other Information"), the ARA has not requested, and the staff does not express, any views on the applicability of Rule 482 to such Other Information.

[7] Section references are to the Internal Revenue Code.

[8] FINRA issued guidance in January 2012 confirming that no filing of the DOL Required Investment Information would be required. See Memorandum to Advertising Compliance Advisory Committee No. 5-12, Pension Members No. 4-12, and SEC Rules Committee No. 6-12, [25817], dated January 19, 2012.
