

MEMO# 16544

September 15, 2003

DOL ADVISORY OPINION PERMITS USE OF FUND PROFILE UNDER ERISA SECTION 404(C)

[16544] September 15, 2003 TO: PENSION MEMBERS No. 39-03 PENSION OPERATIONS ADVISORY COMMITTEE No. 58-03 SEC RULES MEMBERS No. 122-03 RE: DOL ADVISORY OPINION PERMITS USE OF FUND PROFILE UNDER ERISA SECTION 404(c) The Department of Labor has issued Advisory Opinion 2003-11A,¹ which addresses whether the delivery of a fund profile to participants and beneficiaries would satisfy the prospectus-delivery requirements of ERISA section 404(c). As you are aware, the Securities and Exchange Commission in March 1998 adopted Rule 498 under the Securities Act of 1933 ("Securities Act") allowing mutual funds to use a profile and setting forth applicable requirements.² Section 404(c) of ERISA provides that, in the case of a defined contribution plan that allows a participant or beneficiary to exercise control over his or her account balance, no person who is otherwise a fiduciary shall be liable under ERISA's fiduciary provisions for any loss, or by reason of any breach, which results from the exercise of control by the participant or beneficiary. For an ERISA fiduciary to qualify under this "safe harbor," participants and beneficiaries, among other things, must be provided or have the opportunity to obtain sufficient information to make informed decisions with regard to the investment alternatives available under the plan. The regulations under section 404(c) contain two requirements relating to the delivery of a prospectus. First, in the case of investment alternatives subject to the registration requirements of the Securities Act, such as mutual funds, 29 C.F.R. section 2550.404c-1(b)(2)(i)(B)(1)(viii) requires that an identified plan fiduciary (or persons acting on the fiduciary's behalf) provide to a participant or beneficiary a copy of the most recent prospectus that was provided to the plan, either immediately before the participant or beneficiary's initial investment or immediately following the initial investment. Second, a separate provision in the regulations (29 C.F.R. section 2550.404c-1(b)(2)(i)(B)(2)) requires that a participant or beneficiary be provided, either directly or upon request, various pieces of information based on the latest information available to the plan, including copies of any prospectuses. Observing that the 404(c) regulations do not define the term "prospectus" and that a profile provides a clear summary of key and useful information about a mutual fund, the Department concluded that the term includes a fund profile. The Department also noted that should a participant wish to obtain additional information, a profile provides information on how to obtain a full prospectus. Accordingly, the advisory opinion provides that where the most recent prospectus in the plan's possession is a profile, then the delivery of the profile to plan participants and beneficiaries would satisfy the prospectus

delivery requirement of 29 C.F.R. section 2550.404c- 1(b)(2)(i)(B)(1)(viii). However, where the most recent prospectus is a full prospectus, that prospectus must be delivered. Similarly, where a participant requests a prospectus under 29 C.F.R. section 2550.404c-1(b)(2)(i)(B)(2) and the most recent prospectus is a profile, then the delivery of a profile would meet this requirement. If a participant specifically requests a full prospectus, however, such a prospectus must be provided. Thomas T. Kim Associate Counsel Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 16544, or call the ICI Library at (202) 326-8304 and request the attachment for memo 16544. Attachment (in .pdf format)

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