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McDermott: SEC No-Action Letter Permits Non-ERISA Retirement Plans to Issue Participant Fee Disclosures Without Violating Securities Laws.

In a no-action letter dated February 18, 2015, the U.S. Securities and Exchange Commission (SEC) extended relief from the application of Rule 482 of the Securities Act of 1933 to certain retirement plans that are exempt from the Employee Retirement Income Security Act of 1974, as amended (ERISA) (e.g., certain deferral only 403(b) plans, governmental 457(b) plans, church plans).

When the U.S. Department of Labor (DOL) issued final regulations in 2010 pertaining to participant-level fee disclosures for tax-qualified retirement plans that provide for participant-directed investments, it was identified that the DOL-required disclosures might be inconsistent with certain disclosure requirements under SEC Rule 482. Rule 482 provides parameters around information provided by an investment company that could be classified as advertisements (e.g., investment performance data). Because of the potential conflict between the DOL regulations and Rule 482 (pertaining to such items as timing of updated investment information as well as various narrative disclosures), the SEC issued a no-action letter in October 2011 stating "[the SEC] agrees to treat information provided by a Plan Administrator to Plan Participants…that is required by and complies with the disclosure requirements set forth in the DOL Rules as if it were a communication that satisfies the requirements of Rule 482…" This alleviated the tension created when an ERISA plan attempted to comply with both set of rules and concluded that it could simply follow the DOL final regulations instead without violating Rule 482.

Although the DOL disclosure regulations apply only to ERISA plans, many plan sponsors offering retirement plans not subject to ERISA find that participants benefit from the same investment disclosure information. However, those same plan sponsors found that they were not exempt from the application of Rule 482, because the October 2011 no-action letter does not extend to non-ERISA plans. Consequently, the SEC has now issued a comparable no-action letter to equally cover participant-level fee disclosure statements issued to participants in non-ERISA plans (including, but not limited to, non-ERISA 403(b) plans, governmental and non-governmental 457(b) plans, governmental 401(a) plans, 415(m) plans, church 401(a) plans, governmental or tax-exempt 457(f) plans, and governmental or tax-exempt 409A plans).

In order to avail itself of the protection of the SEC no-action letter, a non-ERISA plan must comply with the following:

- Each investment vendor must enter into a written agreement with the plan sponsor that the vendor will provide the DOL required investment information on each investment option it offers under the particular non-ERISA plan, as well as the respective fee and expense information, to the extent it is available.
- The written agreement must state the date on or before which the investment vendor will provide the information to the non-ERISA plan participants.
- The investment vendor must agree to update the investment information at least annually, update the performance information at least quarterly (disclosed on an internet website address listed

pursuant to the DOL requirements) and identify a designated contact person as a source of additional information to address participant requests for information specified in the DOL disclosure regulations.
- The investment information must be provided to new participants before their first investment and to all other participants at least annually.
- The investment information cannot include any other information that is not otherwise required to comply with the DOL disclosure regulations.
- Assuming the above conditions are satisfied, the SEC will treat the DOL disclosure as not violating Rule 482.

Sponsors of non-ERISA plans might want to consider providing fee disclosures to participants now that the SEC has extended relief from Rule 482. Since the relief for ERISA and non-ERISA plans is now aligned, many sponsors of non-ERISA plans may be able to utilize standard fee disclosure services provided by recordkeepers without violating SEC rules.

Last Updated: March 23 2015
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