

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Melanie Franco Nussdorf
202.429.3009
mnussdor@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

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Lyssa Hall
Acting Director
Karen Lloyd
Office of Exemption Determinations
Employee Benefit Security Administration
U.S. Department of Labor
Room N-5700
200 Constitution Avenue NW
Washington, DC 20210

Received
Office of Exemption Determinations
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U.S. DEPARTMENT OF LABOR

Dear Lyssa and Karen:

This is to request an advisory opinion that for purposes of the prospectus delivery requirement in PTE 77-4, a fiduciary may use a current summary prospectus. As you know, PTE 77-4 does not define the term "prospectus." However, for purposes of two individual exemptions (PTE 2010-26 and PTE 2009-22), the Department concluded that delivery of a summary prospectus satisfied the exemptions' prospectus delivery requirement. The Department also concluded that a summary prospectus may be used to satisfy the prospectus delivery requirement for section 404(c) purposes. See DOL Adv. Opin. 2003-11A and FAB 2009-03.¹

Field Assistance Bulletin 2009-03 is instructive regarding why a summary prospectus should be adequate for purposes of PTE 77-4. Although this FAB technically addresses only section 404(c) of ERISA, its reasoning is at least as compelling in the PTE 77-4 context. In particular, the FAB states:

"On September 8, 2003, the Department issued Advisory Opinion 2003-11A finding that the use of a mutual fund Profile under former Rule 498 of the Securities Act would satisfy the prospectus delivery obligations imposed on plan fiduciaries under the ERISA §404(c) regulations. Although the Department took no position in the advisory opinion with respect to the application of the federal securities laws to a plan fiduciary's

¹ See also DOL Adv. Opin. 94-35A, which approved the delivery of material similar to a statutory prospectus, but not technically a prospectus. This advisory opinion predates the summary prospectus rules.

prospectus delivery obligations, it did express the view that while the Department has not defined the term 'prospectus' in the §404(c) regulations or elsewhere, the term 'prospectus' includes a Profile under the §404(c) regulations. The Department observed that a Profile, designed to comply with section 10(b) of the Securities Act, provides a clear summary of key information about a mutual fund, which is information of the sort that the Department intended a participant or beneficiary in a §404(c) plan to receive with respect to a plan investment. The advisory opinion concludes that the delivery of a Profile by an identified plan fiduciary or designee satisfies the requirements of 29 CFR §§ 2550.404c-1(b)(2)(i)(B)(1)(viii) and (B)(2)(ii) to furnish a prospectus both automatically and upon request to plan participants and beneficiaries.

“On January 26, 2009, the Securities and Exchange Commission (Commission) published rules for an enhanced disclosure framework for mutual funds including a new Summary Prospectus rule. The new Summary Prospectus rule (Rule 498 of the Securities Act) is an optional means of compliance with the prospectus delivery requirements under section 5(b)(2) of the Securities Act, which requires the delivery of a statutory prospectus, i.e., a prospectus that meets the requirements of section 10(a) of the Securities Act, to an investor upon the purchase of mutual fund shares. This differs markedly from the status, for federal securities law purposes, of the Profile, which under former Rule 498 of the Securities Act, was permitted to be provided in connection with an offer of mutual fund shares. However, in order to comply with section 5(b)(2) of the Securities Act, an investor deciding to purchase fund shares based on the information in a Profile was then required to receive the fund's statutory prospectus with delivery of the security or confirmation of the transaction. As part of the final rules for enhanced disclosure and the new Summary Prospectus delivery option, the Commission eliminated the Profile.

“Under the new Summary Prospectus rule, a person may satisfy the mutual fund statutory prospectus delivery obligations by sending or giving a Summary Prospectus and by providing the statutory prospectus online at a specified Web site address; funds selecting this delivery option must also send the statutory prospectus free of charge to any requestor in paper or by email. The Commission has stated that the new rules, in practice, will require any fund that is relying on the Summary Prospectus to meet its obligations under section 5(b)(2) of the Securities Act to post both its Summary Prospectus and statutory prospectus on the Internet at all times.

“The Summary Prospectus must include at the beginning or on the cover page the mutual fund's name, the share classes to which the Summary Prospectus relates, the ticker symbol for each such class, and a required legend containing a Web site address, the approximate date of the Summary Prospectus' first use, e-mail address and toll-free telephone number where investors may obtain the statutory prospectus and other information free of charge. In addition, the Summary Prospectus must contain the key information required to appear at the beginning of the statutory prospectus under the new rules, including information regarding the investment objectives or goals of the fund, fee and expense information, principal investment strategies, the risks associated with an investment in the fund, fund performance, investment advisers and sub-advisers, portfolio managers, purchase and sale of fund shares, tax information and financial intermediary

compensation. As stated by the Commission, the Summary Prospectus rule is intended to create a disclosure regime that is tailored to the unique needs of mutual fund investors in a manner that provides ready access to the information that investors need, want, and choose to review in connection with a mutual fund purchase decision.”

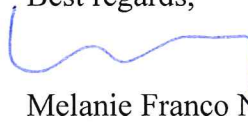
DOL FAB 2009-03 (footnotes omitted)

In addition, the Department noted in FAB 2009-03 that:

“The Summary Prospectus is a short-form document, written in plain English in a clear and concise format, and its required contents provide a summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. Moreover, if a participant or beneficiary wishes additional information, the Summary Prospectus provides an Internet address that leads directly to the statutory prospectus as well as a toll free (or collect) telephone number and e-mail address for obtaining free of charge in paper or by email the statutory prospectus and other information.”

We respectfully suggest that the Department’s reasoning in FAB 2009-03 is even more powerful in the PTE 77-4 context, when the recipient is a plan fiduciary rather than a plan participant as is the case in section 404(c). Accordingly, we urge the Department to rule favorably on this request. If the Department determines to deny the request, we request an opportunity to meet with you and to withdraw the request.

Best regards,



Melanie Franco Nussdorf