

Employee Benefits and Executive Compensation

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Summary Prospectus May Be Used to Satisfy “Prospectus Delivery” Requirements of Section 404(c) of ERISA

The U.S. Department of Labor (the “DOL”) recently issued Field Assistance Bulletin No. 2009-03 (“FAB 2009-03”), which provides that plan fiduciaries may use a mutual fund’s “Summary Prospectus” to satisfy the prospectus delivery requirement of Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

Background: Section 404(c) of ERISA

Section 404(c) of ERISA provides in part that, in the case of an individual account plan that allows a participant to control the investment of his or her account (such as a 401(k) plan with participant directed investments), plan fiduciaries will not be held liable for losses that result from such participant’s exercise of investment control. A number of requirements, however, must be satisfied before a plan fiduciary will be protected under Section 404(c). Among these is the requirement that participants must be provided with, or have the opportunity to obtain, sufficient information to make informed decisions about investment alternatives available under the plan. For example, if the plan offers a mutual fund as an investment alternative, the regulations under Section 404(c) require that a participant be provided with a copy of the most recent prospectus provided to the plan, either immediately before or immediately following the participant’s initial investment in the mutual fund.

SEC Allows Summary Prospectus

In January 2009, the Securities and Exchange Commission (the “SEC”) amended its Rule 498 by allowing the use of a “Summary Prospectus” for disclosure purposes. The amended rule provides that furnishing a mutual fund investor with a Summary Prospectus is sufficient to meet the SEC’s disclosure requirements, provided that the fund’s more complete “Statutory Prospectus” is provided online at a specified website. This is a significant change from the SEC’s old disclosure rule, under which a “profile” was permitted to be provided in connection with an offer of mutual fund shares, but the investor was required to receive the mutual fund’s Statutory Prospectus upon the delivery of the security or confirmation of the transaction.

If you have any questions, please contact any of Katten’s Employee Benefits and Executive Compensation attorneys.

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Summary Prospectus May Be Used to Comply with Section 404(c) Regulations

The preamble to the regulations under Section 404(c) states that the prospectus delivery requirement is intended to ensure that, immediately before or immediately after a participant's initial investment in a mutual fund, such participant has the opportunity to review the prospectus. Although the Section 404(c) regulations do not define the term "prospectus," the DOL takes the position in FAB 2009-03 that the term "prospectus" includes a Summary Prospectus. Therefore, delivery of a Summary Prospectus to plan participants, automatically or upon request, satisfies the prospectus delivery requirements of the Section 404(c) regulations.

Additional Comments

The DOL's announcement that a Summary Prospectus may be used to comply with the prospectus delivery requirement under the Section 404(c) regulations may serve to streamline this aspect of Section 404(c) compliance. Plan fiduciaries, however, should remember that prospectus delivery is just one of a number of other requirements that must be met in order to rely upon Section 404(c).

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