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BENEFITS BRIEF

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DOL Delays Issuance of TDF Regulation

The Department of Labor (DOL) announced today that it would once again reopen the comment period on its proposed target date fund (TDF) disclosure regulation, thus further delaying the issuance of the final regulation.[1] DOL reopened the comment period in response to the Securities Exchange Commission's (SEC) reopening the comment period for its own TDF rulemaking effort after it received recommendation from the SEC's Investor Advisory Committee (Committee) regarding how the SEC's proposed rule could be improved. Although DOL's proposed regulation has not been changed since it was first published in November of 2010, this will be the second time DOL has reopened its comment period in reaction to actions by the SEC. Plan sponsors, services providers, and market participants have until July 3, 2014 (just 30 days) to submit their comments to DOL. DOL invites comments on both the Committee's recommendations and the proposed regulation as currently drafted.

Background on DOL Rulemaking Activities

As described in Groom's November 2010 Memorandum (DOL Proposes Target Date Fund Disclosure Requirements), DOL's proposed regulation will likely amend the participant disclosure regulation promulgated under ERISA section 404(a)(5) and the qualified default investment alternative regulation promulgated under ERISA section 404(c)(5) by requiring plan fiduciaries to include specific disclosure for TDFs including:

1. an explanation of the TDF's asset allocation and glide path (including a chart, table or other graphical representation that illustrates the glide path);
2. an explanation of the point in time when the TDF will reach its most conservative asset allocation; and
3. a statement that TDFs may lose money including losses near and following retirement and that TDFs do not guarantee adequate retirement income.

Throughout its TDF regulatory process, DOL attempted to coordinate its efforts with the SEC, which is also developing disclosure regulations for TDFs organized as mutual funds.[2] Thus, DOL previously reopened the comment period on its proposed regulation in May of 2012[3] in response to the SEC reopening the comment period for its regulation.[4] Similarly, DOL's current reopening of the comment period results from the SEC's request for additional comments related to its own rulemaking efforts.

[1] The original proposal can be found at 75 FR 73987 (Nov. 30, 2010).
[2] Securities Act Release no. 9126 (June 16, 2010). *See* June 25, 2010 Memorandum SEC Proposes Additional Disclosures For Target Date Funds.
[3] Both sets of comments can be found at: http://www.dol.gov/ebsa/regs/cmt-1210-AB38.html
[4] Securities Act Release no. 9126 (June 16, 2010). *See* June 25, 2010 Memorandum SEC Proposes Additional Disclosures For Target Date Funds.

Background on SEC Rulemaking Activities

The SEC intends to adopt a regulation that will provide enhanced information to investors concerning TDF mutual funds and reduce the potential for investors to be confused or misled regarding TDFs and similar funds (e.g., life cycle funds). As with the DOL's proposal, the SEC's proposed TDF regulation would require a table, chart or graph depicting a TDF's glide path. However, the Committee, an advisory body to the SEC created by The Dodd–Frank Wall Street Reform and Consumer Protection Act, reviewed the SEC's proposed rule. Subsequently, late last year, the Committee recommended that the SEC develop a TDF glide path illustration that would be based upon a standardized measure of a fund's risk as a replacement for, or supplement to, the SEC's proposed TDF glide path chart. The Committee suggested that this risk based system could take into account factors such as the volatility of returns or maximum exposure to loss, which are risks that can be directly relevant to the primary concerns of those approaching retirement. In part, the Committee's recommendation was founded on the premise that a standardized measure of risk should be created that would allow investors to compare TDFs across multiple fund families.

In response to the Committee's recommendations, the SEC reopened the comment period on its regulation[5] seeking comments on the Committee's recommendation and inviting additional comments on any other matters that may have an effect on its proposed TDF regulation. Specifically, the SEC is asking its regulated community to comment on the following:

1. how fund managers are currently managing the risks associated with TDFs;
2. how best to quantify those risks;
3. how best to illustrate those risks to investors; and
4. what is the likely response, by investors and fund managers, to the disclosure of such risks.

The deadline for submitting comments to the SEC is June 9, 2014.

Summary and Next Steps

With its announcement, DOL seeks comments on the Committee's recommendations in the context of DOL's proposed regulation and any other issues related to its proposed regulation. Plan sponsors, service providers, and other market participants should consider taking advantage of this opportunity. Notably, many TDFs and similar products offered in retirement plans do not fall within the SEC's jurisdiction over mutual funds. Thus, DOL now offers another opportunity to submit comments, including those related to the Committee's recommendation. For example, one might comment that a consistent measure of risk as recommended by Committee may provide benefits to retail investors, who have the ability to pick and choose from the entire universe of mutual fund families. However, in a 401(k) plan under which participant choice is limited to the investments selected by a plan fiduciary (and such investments that are TDFs may me collective trusts or managed accounts rather than mutual funds), such information may not be necessary or, alternatively, the benefits of such information may not outweigh the cost of providing it.

[5] 79 FR 19564 (April 9, 2014)