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Douglas J. Scheidt
Associate Director and Chief Counsel
Division of Investment Management
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Extension of Rule 482 Relief for Investment Information Delivered to Participants of 403(b) Programs and Other Non-ERISA Plans

Dear Mr. Scheidt:

On behalf of the American Retirement Association and its sister organizations, the American Society of Pension Professionals & Actuaries ("ASPPA") and the National Tax-deferred Savings Association ("NTSA"), we are writing to request the views of the Division of Investment Management (the "Division") regarding the applicability of Rule 482 ("Rule 482") under the Securities Act of 1933 ("Securities Act") to disclosure of certain investment-related information to participants and beneficiaries of participant-directed tax-sheltered annuity programs described by section 403(b) of the Internal Revenue Code of 1986, as amended (the "Code") (known as "403(b) programs") and certain other participant-directed retirement savings plans and programs that are not subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (together the non-ERISA 403(b) programs and other plans and programs described in this letter are "Non-ERISA Plans").

In a no-action letter issued to the U.S. Department of Labor ("DOL") on October 26, 2011 (the "DOL Letter"),[1] the Division agreed that it would treat specified investment-related information provided by a plan administrator, or a person designated by a plan administrator to act on its behalf, that is required by and complies with the requirements under DOL Rule 404a-5(d) (the "DOL Rule") (such information, "DOL Required Investment Information"),[2] as if it were a communication that satisfies Rule 482 under the Securities Act. We request that you extend your

[1] *Department of Labor*, SEC Staff No-Action Letter (Oct. 26, 2011) available at http://www.sec.gov/divisions/investment/noaction/2011/dol102611-482.htm.

[2] *See* Rule 404a-5 under ERISA, 29 CFR §2550.404a-5. *See also* interpretative guidance subsequently issued by the DOL, including Field Assistance Bulletin Nos. 2012-02R (July 30, 2012) and 2013-02 (July 22, 2013).

position in the DOL Letter concerning Rule 482 to certain information furnished to participants and beneficiaries in Non-ERISA Plans, under the conditions described by this request.

The American Retirement Association and its four sister organizations, ASPPA, NTSA, the National Association of Plan Advisors ("NAPA") and the ASPPA College of Pension Actuaries ("ACOPA"), make up the premier national organization for retirement plan professionals in the industry. Based in the Washington, D.C. area, ASPPA is a non-profit professional organization with two major goals: to educate all retirement-plan and benefits professionals, and to create a framework of policy that gives every working American the ability to have a comfortable retirement. NTSA, initially formed in 1989, is a non-profit association dedicated to the 403(b) and 457(b) marketplace and includes practitioners, agencies, corporate and employer members. Our large and broad-based membership gives ASPPA and NTSA unique insight into current practical applications of retirement plans, with a particular focus on the issues faced by small-to medium-sized employers, including governmental and tax-exempt employers as well as private sector employers. The organizations' memberships are diverse but united by a common dedication to the employer-based retirement plan system.

In support of this request, we provide below information about non-ERISA 403(b) programs and other Non-ERISA Plans and a discussion of our reasons for this request.

1. Description of 403(b) Programs and Other Non-ERISA Plans

403(b) Programs. 403(b) programs are a type of tax-deferred retirement savings program that certain employers may make available to employees of public schools, 501(c)(3) tax-exempt organizations, and churches (including certain tax exempt organizations controlled by or associated with churches) and certain members of the clergy.[3] 403(b) programs can be invested in an insurance company annuity contract pursuant to Code section 403(b)(1) or invested in a custodial account invested in mutual funds pursuant to Code section 403(b)(7), or a retirement income account set up for church employees pursuant to Code section 403(b)(9) that may be

[3] As discussed, infra, some 403(b) programs are subject to ERISA and others are not. In this request, the former will be referred to as "ERISA 403(b) programs", and the latter "non-ERISA 403(b) programs". The term "403(b) programs" may include both ERISA and non-ERISA 403(b) programs.

invested in either annuities or mutual funds.[4] (In this letter, references to "403(b) programs" include plans pursuant to Code section 403(b)(1), 403(b)(7) and 403(b)(9).)

403(b) programs may be funded by employee salary deferrals, employer contributions, or both. Depending on how an employer structures a 403(b) program, eligible employees ("participants")[5] may invest their contributions in annuity contracts or in custodial accounts invested only in mutual funds. Although some employers may limit the investment options under a 403(b) program to investments offered by one insurance company or custodial account vendor, it is common for employers to allow multiple insurance company and custodial account vendors ("Investment Vendors") to offer a wide variety of annuity contract and mutual fund investment options to employees under their 403(b) program, and permit participants to make exchanges among these different Investment Vendors and investment options (any investment options offered under annuity contracts, and mutual funds available through a custodial account, are "Investment Options").[6]

403(b) programs are subject to requirements under the Code that are similar (with modifications) to the tax qualification requirements imposed on 401(k) and other participant-directed plans qualified under section 401 of the Code ("tax-qualified plans"). As here relevant, regulations issued by the Department of the Treasury/Internal Revenue Service in 2007, 26 C.F.R. § 1.403(b)-0 et seq. (the "2007 Treasury Regulations"), require (among other things) that 403(b) programs (whether or not subject to ERISA) are maintained pursuant to a "written defined contribution plan" that contains certain terms and conditions for eligibility, benefits, limitations, the form and timing of distributions and contracts available under the program, and designates a party responsible for program administration. The deadline for employer sponsors of 403(b)

[4] Though less common, a retirement income account set up for church employees pursuant to Code section 403(b)(9) and certain governmental 403(b) programs grandfathered by IRS Rev. Rul. 82-102 are not restricted to investments in either annuities or mutual funds.

[5] In this letter, references to participant include any beneficiary permitted under the terms of a 403(b) program or other retirement plan or program to direct how to invest an account balance.

[6] Other Non-ERISA Plans may make other investment alternatives available to plan participants to the extent allowed by law. With respect to such Other Non-ERISA Plans, the term "Investment Option" includes any such other lawful investment alternative, provided that it meets the definition of "designated investment alternative" in the DOL Rule. See Rule 404a-5(h)(4).

programs to adopt written plans was December 31, 2009 (however, the plans were required to be effective no later than January 1, 2009).[7]

Some, but not all, 403(b) programs are subject to the fiduciary responsibility and other provisions under ERISA. In this regard, a 403(b) program that is "established or maintained" by an employer (such as a tax-exempt organization) engaged in commerce or in any industry or activity affecting commerce will generally be a "pension plan" within the meaning of section 3(2) of ERISA, and covered by ERISA. However, 403(b) programs that are "governmental plans" (see ERISA section 3(32)) and "church plans" (see ERISA section 3(33)) are excluded from coverage by ERISA under ERISA sections 4(b) (1) and (2). Also, under a DOL "safe harbor" regulation, a 403(b) program is not subject to ERISA if funded entirely with employee contributions, and the employer's involvement with the program is so limited that the employer is not deemed to "establish or maintain" the program. *See* 29 C.F.R. § 2510.3-2(f).[8] In Field Assistance Bulletin No. 2007-02 (July 24, 2007), the DOL explained that, even though differences between the tax rules for 403(b) programs and those governing other ERISA-covered pension plans may have diminished as a result of the "written plan" and other new requirements imposed under the 2007 Treasury Regulations, the safe harbor regulation at 29 C.F.R. section 2510.3-2(f) remains operative and compliance with those regulations would not necessarily cause a 403(b) program to become subject to ERISA.[9]

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[7] *See* Internal Revenue Service "Retirement Plans FAQs regarding Tax Sheltered Annuity Plans," available at http://www.irs.gov/Retirement-Plans/Retirement-Plans-FAQs-regarding-403(b)-Tax-Sheltered-Annuity-Plans. The written plan requirement does not mean that the plan must be contained in a single document. For example, the plan can consist of multiple documents that contain the various plan provisions regarding salary reduction agreements, contracts that fund the plan, eligibility rules, how the plan will pay benefits and the nondiscrimination rules. *Id.*

[8] Specifically, the safe harbor at 29 C.F.R. section 2510.3-2(f) states that a program for the purchase of annuity contracts or custodial accounts in accordance with provisions set forth in section 403(b) of the Code and funded solely through salary reduction agreements or agreements to forego an increase in salary, is not "established or maintained" by an employer under section 3(2) of ERISA, and, therefore, is not an employee pension benefit plan subject to Title I of ERISA, provided that certain factors are present. These factors are: (1) that participation of employees is completely voluntary, (2) that all rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary of such employee, or by an authorized representative of such employee or beneficiary, (3) that the involvement of the employer is limited to certain optional specified activities, and (4) that the employer receive no direct or indirect consideration or compensation in cash or otherwise other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer's duties pursuant to the salary reduction agreements. If an employer, or a person acting in the interest of an employer, receives other consideration from an annuity contractor, the employer could be deemed to have "established or maintained" a plan.

[9] 403(b) programs, whether or not subject to ERISA, also are subject to different regulation under federal securities laws than tax-qualified plans. In this regard, the registration exemption under section 3(a)(2) of the Securities Act,

In connection with the implementation of the written plan requirement under the 2007 Treasury Regulations, employer sponsors of 403(b) programs (or recordkeepers acting on behalf of the employers[10]) enter written agreements with Investment Vendors to address administrative requirements for the transmittal of contributions made by payroll deduction, information sharing to facilitate contract exchanges, and compliance with the terms of the written plan and other requirements applicable to 403(b) programs. It is common, however, that employers do not have these agreements with Investment Vendors of so-called "frozen options" that were available under a 403(b) program before January 1, 2009, but not available for new employer contributions or employee salary reduction contributions on or after January 1, 2009. In this regard, historically, 403(b) programs have been operated as a collection of individual contracts with respect to which employees could engage in a range of actions without the consent or involvement of the employer. Therefore, many employers did not maintain written agreements with insurance company and custodial account vendors until the implementation of the written plan requirements under the 2007 Treasury Regulations.[11]

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which generally exempts offers and sales of interests in tax-qualified plans, is not available to 403(b) programs. The Commission, as a matter of administrative practice, has not required the registration of offers and sales of interests in 403(b) programs. *See* SEC Release 33-6188, Section II.A.5 (Feb. 1, 1980); Cleveland Clinic Foundation (July 13, 1979). Also participants of 403(b) programs are generally deemed to be the "investors" in the annuity contracts and mutual funds they select for their individual accounts under a 403(b) program, who must receive delivery of prospectuses under section 5 of the Securities Act and annual and semi-annual reports under section 30(e) of the Investment Company Act of 1940. (In comparison, in the case of a tax-qualified plan covered by the Securities Act section 3(a)(2) "plan exemption," delivery of prospectuses and shareholder reports to the plan — or a plan trustee or other representative — may satisfy these information delivery requirements.)

[10] Employer sponsors of 403(b) programs typically engage a third party administration firm ("TPA") to assist the employer with recordkeeping and other administrative responsibilities necessary to maintain the plan in compliance with tax qualification requirements applicable to 403(b) programs under the 2007 Treasury Regulations and may delegate to the TPA authority to enter into written agreements with Investment Vendors that govern plan administration and other requirements on the employer's behalf.

[11] IRS has provided transition relief to employers with respect to Investment Vendors of frozen options. See Section 8 of Rev. Proc. 2007-71. In addition, DOL has provided reporting relief to the plan administrators of ERISA 403(b) programs for such "frozen options" including certain relief from requirements under DOL Rule 404a-5. *See* FAB 2012-12R, Q-2, which provides a DOL non-enforcement provision for plan administrators of ERISA 403(b) programs who conclude that it would be impracticable or impossible to provide the DOL Required Investment Information with respect to Investment Options that are "frozen" under certain conditions. This relief is consistent with FABs 2010-01 and 2009-02, which provided certain other reporting relief to plan administrators of ERISA 403(b) programs for "frozen" Investment Options.

Other Non-ERISA Plans. Public schools and tax-exempt organization employers commonly offer other types of tax-advantaged retirement savings plans[12] in addition to a non-ERISA 403(b) program, and employees may participate in one or more of other plans at the same time that they are eligible to participate in a non-ERISA 403(b) program. These other types of Non-ERISA Plans include —

- governmental deferred compensation plans described by Code section 457(b), which are available to employees of state and local governments and agencies and instrumentalities of these and thus governmental plans as defined under Code section 414(d) and permit deferral of taxation on employee and employer plan contributions and earnings ("governmental 457(b) plans");[13]
- Code section 401(a) plans that are governmental plans under Code section 414(d) ("governmental 401(a) plans");[14]
- non-qualified governmental qualified excess benefit arrangements established pursuant to Code section 415(m) solely to provide benefits exceeding limits under Code section 415 under a governmental 414(d) plan (which would include only governmental 401(a) and 403(b) programs, as those are the only governmental plans subject to the 415 limit) ("415(m) plans");[15]
- 401(a) plans that are church plans under Code section 414(e) which have not made the election to be subject to ERISA under Code section 410(d) ("church 401(a) plans");
- non-qualified deferred compensation plans under Code section 457(b) maintained by entities tax-exempt under Code section 501; these plans must remain unfunded (*i.e.*, assets are not held in trust and remain the property of the employer) and must be limited to highly compensated employees and executives unless the employer is a church ("non-governmental 457(b) plans");[16] and

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[12] These other types of plans will not be subject to ERISA if the plans are either "governmental plans" or "church plans" excluded from coverage by ERISA sections 4(b) (1) and (2). Unfunded 457(b) plans of tax-exempt entities that are for a "select group of management or highly compensated employees" are also exempt from most of ERISA, including the reporting, disclosure, funding and fiduciary requirements.

[13] http://www.irs.gov/Retirement-Plans/IRC-457(b)-Deferred-Compensation-Plans.

[14] http://www.irs.gov/Retirement-Plans/Governmental-Plans-Under-Internal-Revenue-Code-Section-401-a.

[15] http://www.irs.gov/Retirement-Plans/Governmental-Plans-under-Code-%C2%A7401%28a%29-Qualified-Excess-Benefit-Arrangements.

[16] http://www.irs.gov/Retirement-Plans/Non-Governmental-457b-Deferred-Compensation-Plans.

- non-qualified deferred compensation plans of governmental or tax-exempt entities that do not meet the 401(a), 403(b), 457(b) or 415(m) requirements are subject to Code sections 409A and, except for certain church plans, 457(f) ("409A plans" and "457(f) plans").

All of these plans may be participant-directed defined contribution plans that permit participants to direct investments among the same types of Investment Options that are available under 403(b) programs, *e.g*., annuity contract and mutual fund options. It is not unusual that employees of the same employer are able to select from similar – or even the same – Investment Vendors and Investment Options under a non-ERISA 403(b) program and one of these other Non-ERISA Plans.[17]

2. DOL Rule/403(b) Model Disclosure

On October 20, 2010, the DOL adopted regulations that require the "plan administrators" of ERISA-covered participant-directed plans to disclose certain plan and investment-related information, including performance information, to plan participants.[18] The DOL Rule is designed to ensure that these participants are provided with sufficient information regarding their plan and the designated investment alternatives that are available under the plan to make informed decisions when managing their plan accounts. Thus, the DOL Rule requires the plan administrator to furnish to each plan participant prior to or on the date on which the participant can first direct his or her investment and at least annually thereafter, information about (a) the administrative and individual expenses that may be charged to participants' accounts and the services to which such charges relate, and (b) certain investment-related information for each designated investment option offered under the plan, including performance data and information about fees and expenses including "shareholder type fees" such as commissions, sales loads, deferred sales charges and other fees that are not included in the total operating expenses of a designated investment

[17] In the case of unfunded nonqualified defined contribution plans, even though participant accounts are hypothetical, and the assets – if there are any – are owned by the employer or held in a grantor trust for which the employer is grantor and exposed to the claims of the grantor's creditors, the plan may permit participants to provide investment instructions with respect to hypothetical participant accounts that generate earnings or losses as if invested similarly to the employer's 401(k) plan or 403(b) program.

[18] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 FR 64910 (Oct. 20, 2010) (adopting Rule 404a-5) [29 CFR § 2550.404a-5] ("DOL Rule Adopting Release"). The term "plan administrator" for purposes of the disclosure requirements in the DOL Rule, is defined in Section 3(16)(A) of ERISA. *See* Rule 404a-5(a).

alternative.[19] The required investment-related information for each designated investment option, including performance and fee and expense information, must be presented in a chart or other comparative format.[20]

A joint task force including representatives of the National Education Association, NTSA and ASPPA (the "Task Force") developed the 403(b) Model Disclosure for use by public schools and other employers who offer 403(b) programs. The purpose of this form is to provide participants in non-ERISA 403(b) programs with the ability to easily compare detailed information regarding the investment options available to them under the 403(b) programs offered by their employers, especially if an employer allows multiple Investment Vendors to offer a wide variety of Investment Options. It is anticipated that an employer sponsor will require each Investment Vendor who is a recipient of employee payroll reduction contributions under the employer's non-ERISA 403(b) program to complete the 403(b) Model Disclosure for the Investment Options offered by the Investment Vendor. Importantly, the Task Force sought to ensure that the 403(b) Model Disclosure will provide information that non-ERISA 403(b) program participants need to make investment decisions, including information that allows comparisons among the multiple Investment Vendors and Investment Options offered under a non-ERISA 403(b) program and the fees that Investment Vendors may receive in connection with the participants' investments in the 403(b) program.

The 403(b) Model Disclosure includes three components to be delivered to non-ERISA 403(b) program participants. The first component (titled "403(b) Model Disclosure Form") is designed to provide non-ERISA 403(b) program participants with key information needed when selecting an Investment Option, including the services to be provided to the participant, the fees to be charged to the participant, commissions payable to the persons who provide services to the

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[19] *See* 29 C.F.R. § 2550.404a-5(c) and (d). The required investment-related disclosure, among other information, includes the name, performance data, comparative benchmark, and fees and expenses of the Investment Option. 29 C.F.R. § 2550.404a-5(d).

[20] *See* 29 C.F.R. § 2550.404a-5(d)(2)(i). DOL Field Assistance Bulletins 2012-12R (July 30, 2012) and 2013-02 (July 22, 2013) provide additional interpretative guidance under the DOL Rule with respect to a range of questions raised by plan administrators and service providers. For example, FAB 2012-12R, Q-2, addresses the delivery of information under ERISA 403(b) programs, Q-15 requires that investment-related information is provided for any "closed" investment option (*i.e.*, that is not accepting new money); Q-16 provides additional guidelines for the use of an additional benchmark for an investment option; Q-23 clarifies that annual total return information furnished as of the most recently completed calendar month or quarter will satisfy the DOL Rule, so long as the same ending date is used for all plan investment options; and Q-31 provides additional guidance for disclosing the total annual operating expenses of a fund of funds. FAB 2013-02 provides transitional relief for the timing of the delivery of the DOL Required Investment Information.

program, and other payments to third parties. This part of the 403(b) Model Disclosure describes to participants the commissions and/or other marketing or service payments that are related to the participant's purchase of (or deposits in) an Investment Option, information that the Commission has specifically identified as important to a participant's selection among investment products under a 403(b) program.[21]

The second section of the 403(b) Model Disclosure specifically incorporates the comparative chart provided in the DOL Rule (titled "DOL Model Comparative Chart"), which provides a series of tables designed to present the DOL Required Investment Information. These tables provide —

- performance information for each Investment Option that does not have a fixed or stated rate of return presented as the average annual total return ("total return") of the investment for the one-, five- and ten- calendar year periods (or for the life of the investment, if less than one of the specified periods) together with the performance of a relevant benchmark,

- the stated annual rate of return for Investment Options that have a fixed or stated rate of return and the applicable term,

- fee and expense information for each Investment Option, and

- information about annuity options provided under the non-ERISA 403(b) program.

These tables follow the safe harbor format provided by the DOL in an appendix to the DOL Rule.[22] Certain statements required by the DOL Rule are also presented, *e.g.*, a statement that additional investment-related information (including more current performance information) for each Investment Option is available at the listed Internet Web site address, a statement that an Investment Option's past performance is not necessarily an indication of how the investment will perform in the future, a statement that the cumulative effect of fees and expenses can substantially reduce the growth of retirement savings, and a statement that fees and expenses are only one of several factors to consider when making investment decisions.[23]

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[21] *See* "Evaluating Your Retirement Options" at www.sec.gov/investor/pubs/teacheroptions.htm. This investor publication for teachers describes 403(b) programs and the choices that a teacher makes if he or she invests in a 403(b) program. The publication advises that one of three key questions should be "Does my financial professional make more money for selling one product or another?" and explains: "[r]egardless of how much you trust your financial professional, it always is legitimate to ask how – and how much – he or she receives for selling a particular product."

[22] DOL Rule Adopting Release, at 75 Fed. Reg. at 64942-45.

[23] *See* 29 C.F.R. § 2550.404a-5(d)(1)(ii), (d)(1)(iv)(A)(4) and (5), and (d)(2)(i)(B).

The third component of the 403(b) Model Disclosure (titled "How to Read the 403(b) Model Disclosure Form") would be delivered to non-ERISA 403(b) program participants together with the 403(b) Model Disclosure Form and DOL Model Comparative Chart. It provides a "plain english" explanation of the 403(b) Model Disclosure, including an explanation of the importance of the information that is provided on the form and where to look on the form to obtain additional information about the non-ERISA 403(b) program and the available Investment Options. It also explains that participants may receive multiple copies of the 403(b) Model Disclosure Form, each describing different investment options that may be available under the non-ERISA 403(b) program, including (possibly) multiple forms from the same Investment Vendor.

The final component of the 403(b) Model Disclosure (titled "Instructions for Completing the 403(b) Model Disclosure Form"), which is not provided to participants, provides instructions for using the form to the individuals who will complete the form. It explains that it is expected that the employer and Investment Vendors to a non-ERISA 403(b) program will determine between them who will deliver the 403(b) Model Disclosure to participants and how it will be delivered. In keeping with the policies of the DOL Rule, employer sponsors of non-ERISA 403(b) programs are expected to arrange for delivery of the 403(b) Model Disclosure to participants before they first invest and also require the forms to be updated annually.

The American Retirement Association, ASPPA and NTSA anticipate that the 403(b) Model Disclosure document could be used as a template for providing comparative information about Investment Options (including the DOL Required Investment Information) to participants of other Non-ERISA Plans. In this regard, where employers may offer another Non-ERISA Plan in addition to a non-ERISA 403(b) program, use of comparable disclosure materials would minimize confusion and assist plan participants in comparing among plans and Investment Vendors and Investment Options.

Importantly, the 403(b) Model Disclosure (or any substantially similar format for providing the DOL Required Investment Information pursuant to other Non-ERISA Plans) would supplement the information currently available to participants of Non-ERISA Plans because these participants will still receive all information that a participant is required to receive under the federal securities laws, such as a prospectus and annual and semiannual reports. Therefore, use of the 403(b) Model Disclosure (or similar format providing the DOL Required Investment Information) would not result in a provision of less information to participants of Non-ERISA Plans than is required by current law and regulation.

3. Discussion

Rule 482 permits an investment company registered under the Investment Company Act (a "fund")[24] to include, among other things, uniformly calculated performance information in advertisements and other sales materials ("advertisements"). Under Rule 482, performance information included in an advertisement for a fund generally must meet certain requirements relating to the timeliness of the performance information calculations ("Rule 482 Timeliness Requirements").[25] As here relevant, Rule 482 also requires that a quotation of a money market fund's total return in an advertisement must be accompanied by a quotation of the fund's current yield, requires certain specific legends in advertisements, specifies the manner of presentation, and prohibits an advertisement from being accompanied by an application to purchase shares (collectively, "Other Rule 482 Requirements").[26]

In connection with the DOL Rule, the DOL received questions on how compliance with the DOL Rule would be treated under the Commission's advertising rules, including Rule 482, and consulted with Commission staff to address these questions. As explained by the Division in the DOL Rule No-Action Letter, requirements under the DOL Rule relating to the timeliness of performance information presented in a comparative chart may provide for performance information that is less current than that required under the Rule 482 Timeliness Requirements. In addition, the DOL Rule does not require a comparative chart to present a money market fund's current yield, but only total return,[27] and the DOL Rule's requirements as to specific legends and

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[24] Mutual funds that are available through custodial accounts under a 403(b) program or other Non-ERISA Plans are open-end investment companies registered under the Investment Company Act. Annuity contracts offered under 403(b) programs or other Non-ERISA Plans offer variable investment options that are a series of separate accounts (or divisions of a separate account) maintained by the insurance company issuing the annuity contract. These separate accounts (or divisions of a separate account) may be registered under the Investment Company Act as investment trusts or management investment companies.

[25] Specifically, Rule 482 requires that either (A)(i) total return is current to the most recent calendar quarter ended before the advertisement is submitted for publication, and (ii) total return current to the most recent month ended seven business days prior to the date of use is provided telephonically or through a Web site address identified for that purpose; or (B) total return is current to the most recent month ended seven business days prior to the date of use of the advertisement. *See* Rule 482(g).

[26] *See* Rule 482 (e)(2), (b)(1), (b)(3), (4), (5) and (c).

[27] With respect to money market funds, under the DOL Rule, performance information for money market funds would be presented in the same manner as, and compared to, other Variable Investment Options, which are not required by the DOL Rule to disclose current yield for purposes of the comparative presentation. See 29 C.F.R. § 2550.404a-5(d)(1)(ii).

presentation of information in the comparative format differ somewhat from the Other Rule 482 Requirements.

In the DOL Rule No-Action Letter, the Division recognizes that the requirements adopted under the DOL Rule, including requirements for the presentation of the DOL Required Investment Information in a comparative format and certain presentation requirements, are designed to facilitate a comparison of Investment Options by participants of participant-directed plans. Based on the purposes and policies behind the DOL Rule and the Division's review of the requirements under the DOL Rule that differ from requirements under Rule 482, the Division concluded that disclosure provided to plan participants that is required by and complies with the DOL Rule should not be viewed as inconsistent with the Rule 482 Timeliness Requirements or the Other Rule 482 Requirements. The Division also agreed to treat information provided by a plan administrator to participants, as required by and complying with the DOL Rule, as if it were a communication that satisfies Rule 482 under the Securities Act and also took the position that such information need not be filed pursuant to Rule 497 under the Securities Act or Section 24(b) of the Investment Company Act with the Commission or certain national securities organizations such as FINRA.[28]

The presentation of investment-related information in the 403(b) Model Disclosure to participants in Non-ERISA Plans raises the same issues under Rule 482 that are raised by the presentation of the DOL Required Information to participants of plans covered by ERISA, but the DOL Rule No-Action Letter only applies to the extent that materials conforming to the DOL Rule are provided to participants of plans that are subject to ERISA.

This different treatment does not serve the best interest of participants of Non-ERISA Plans. In this regard, it may be difficult for these participants to sort through the currently available prospectus materials provided by Investment Vendors pursuant to existing Commission regulation and FINRA requirements to obtain an "apples to apples" comparison of the Investment Options, the fees that the participant may pay in connection with different Investment Options, and the fees that Investment Vendors may receive. Moreover, participants in non-ERISA 403(b) programs and other Non-ERISA Plans often bear more responsibility with respect to investment decisions for their plan account balances than in the case of ERISA-covered plans, under which the plan sponsor or another responsible plan fiduciary also has certain investment responsibility. The 403(b) Model Disclosure was developed by the Task Force to provide to participants of non-ERISA 403(b) programs the ability to compare information regarding Investment Vendors and Investment Options, and is specifically designed to be used in circumstances where participants may be able to select among a wide number of different Investment Vendors and Investment Options. The

[28] The American Retirement Association, ASPPA and NTSA are not requesting relief from requirements under Rule 497 under the Securities Act and Section 24(b) of the Investment Company Act to file materials with the Commission or certain national securities organizations such as FINRA.

American Retirement Association, ASPPA and NTSA believe that furnishing disclosure materials similar to the 403(b) Model Disclosure also will be helpful to participants of other participant-directed Non-ERISA Plans.

Accordingly, we respectfully request that the Division extend its no-action position in the DOL Rule No-Action Letter by agreeing to treat DOL Required Investment Information furnished to Non-ERISA Plans, and the participants of Non-ERISA Plans, as if it were a communication that satisfies the requirements of Rule 482 of the Securities Act. For purposes of this request, Non-ERISA Plans would include 403(b) programs, governmental 457(b) plans, governmental 401(a) plans, 415(m) plans, church 401(a) plans, non-governmental 457(b) plans, and 409A plans or 457(f) plans of governmental or tax-exempt entities, that are not subject to ERISA. In support of this request, we make the following representations as to the furnishing of DOL Required Investment Information.

- Each Investment Vendor under a Non-ERISA Plan must enter into a written agreement to provide the DOL Required Investment Information as further described below, except employers are not required to obtain a written agreement for those Investment Vendors that solely provide "frozen" Investment Options. For this purpose, a "frozen" Investment Option means an Investment Option that received no new employer or employee contributions under a Non-ERISA Plan on or after January 1, 2009.

- An Investment Vendor that solely provides "frozen" Investment Options and does not enter into a written agreement with the employer (or its designee) to provide the DOL Required Investment Information may not rely on the relief requested herein. (For purposes of the following conditions, references to Investment Vendor excludes an Investment Vendor that solely provides "frozen" Investment Options and does not enter into a written agreement to provide the DOL Required Investment Information).

- Each Investment Vendor will provide the DOL Required Investment Information to participants in a Non-ERISA Plan[29] pursuant to a written agreement with the employer (or its designee)[30] that requires the Investment Vendor to provide the DOL Required

[29] Information provided by an Investment Vendor as DOL Required Investment Information shall not include information about an Investment Option prior to the effective date of the registration statement for that Investment Option.

[30] Investment Vendors may satisfy this "written agreement" condition by providing written notice to the employer (or its designee) on or after the date of this no-action letter that the Investment Vendor is complying with this condition as a term of an existing written agreement.

Investment Information for each Investment Option that the Investment Vendor offers under the Non-ERISA Plan and also, to the extent available to the Investment Vendor,[31] all fee and expense information as specified in Rules 404a-5(c)(2)(i)(A) and 404a-5(c)(3)(i)(A) under ERISA (together, the "Information"). Each written agreement will specify a date on or before which the Investment Vendor will provide the Information to all current participants in the Non-ERISA Plan.

- Each Investment Vendor under the Non-ERISA Plan will (i) provide the Information to participants initially on or before the date specified in the written agreement with the employer (or its designee), (ii) update the Information at least annually, (iii) update on at least a quarterly basis, or more frequently if required by other applicable law, the performance information to be disclosed at an Internet web site address listed pursuant to the DOL Required Investment Information, and (iv) require the contact person designated by the Investment Vendor as a source of additional information in the DOL Required Investment Information to provide upon request the information specified in the DOL Rule.[32]

- The Information will be furnished to (i) new participants in the Non-ERISA Plan prior to their initial investment, and (ii) each participant at least annually in accordance with the timing requirements in the DOL Rule.[33]

- Information provided by an Investment Vendor as DOL Required Investment Information will include no information other than information that would be required to comply with the DOL Rule if the Non-ERISA Plan were subject to the DOL Rule.[34]

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[31] Investment Vendors usually will have information about all of the administrative expenses and individual expenses required to be disclosed pursuant to Rules 404a-5(c)(2)(i)(A) and 404a-5(c)(3)(i)(A) under ERISA because the participant account balances from which such expenses are paid must be held by one or more Investment Vendors, but it cannot be ruled out that an Investment Vendor will not have information about expenses (if any) when paid by a participant other than from the participant's account with the Investment Vendor.

[32] *See* Rule 404a-5(d)(4).

[33] *See* Rules 404a-5(c)(2)(i)(A), 404a-5(c)(3)(i)(A), 404a-5(d)(4)(1) of the DOL Rule, and DOL Field Assistance Bulletin 2013-02 (July 22, 2013).

[34] The DOL Required Investment Information may be accompanied by a plan enrollment form that includes, among other things, instructions as to how a participant in a Non-ERISA Plan may direct his or her investments among the Investment Options. To the extent that Investment Vendors provide participants in Non-ERISA Plans with information other than information provided by such Investment Vendors as DOL Required Investment Information,

In further support of this request, we note that, generally, Rule 482 is intended to provide a means for funds to advertise investment performance information and other information, and includes standardized formulas in order to permit perspective investors to compare performance claims of competing funds and to prevent misleading claims by funds.[35] The 403(b) Model Disclosure, designed to comply with the DOL Rule, similarly is intended to provide a standardized approach that allows participants to compare competing investment options available under a non-ERISA 403(b) program. Further, the Commission staff has in the past interpreted the requirements of Rule 482 flexibly in regards to retirement plan arrangements, including 403(b) programs, while still giving effect to the policy aims of the rule. For example, the staff granted no-action positions that allowed "summary prospectus" materials delivered to participants of retirement plans — including participants of 403(b) programs — to be treated as satisfying the requirements under Rule 482. *See* Aetna Life Insurance and Annuity Company (Jan. 6, 1997) (relief for summary documents provided in connection with offers and sales of funds under variable annuity contracts); Fidelity Institutional Retirement Services Co., Inc. (Apr. 5, 1995) (relief for informational materials that supplemented information provided to participants of plans investing in mutual funds). *See also* Prudential Investments Retirement Services (Apr. 17, 1998) (no-action position under Section 5(b)(1) of the Securities Act where, in materials provided to plan sponsors and participants investing through a mutual fund asset allocation program, total return information presented for funds would be calculated to include a program-level fee in lieu of standardized total return calculated as required by Rule 482). Similarly, by extending the relief provided by the DOL Rule No-Action Letter to the furnishing of DOL Required Investment Information to non-ERISA 403(b) programs and other Non-ERISA Plans, the Division would recognize and address information needs of participants of 403(b) programs and other Non-ERISA Plans, while still giving effect to the policy intentions of Rule 482.

For the foregoing reasons, and subject to the conditions outlined above, we request that Division agree to treat DOL Required Investment Information furnished to participants of Non-ERISA Plans as if it were a communication that satisfies Rule 482 under the Securities Act.

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except as set forth above, ("Other Information"), the American Retirement Association, ASPPA and NTSA do not requested the Division's views on the applicability of Rule 482 to such Other Information.

[35] *See* Proposed Amendments to Investment Company Advertising Rules, 67 Fed. Reg. 36712, 36714 at n. 21 and accompanying text (May 24, 2002) (Release No. 33-8101).

We thank you for your assistance and consideration. If you have any questions please contact Craig Hoffman at (703) 516-9300 or Roberta Ufford at (202) 861-6643.

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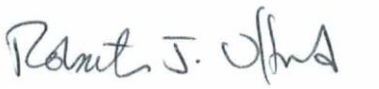

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