

Some Practical Suggestions for Preparing for Conversion to Summary Prospectuses

The Securities and Exchange Commission recently adopted final rules that will substantially change future mutual fund disclosure practices. These new rules provide for enhanced and reordered disclosure in the current statutory prospectus as well as an option to deliver a new summary prospectus in lieu of the statutory prospectus. For more information on the new content requirements for the statutory and summary prospectuses, see *SEC Adopts Summary Prospectus and Form N-1A Changes* in our December 2008 *Investment Management Developments*. Below, we summarize some of the more important operational, compliance, technical and legal requirements that fund personnel may need to consider sooner rather than later in order to prepare for compliance with the new summary prospectus rules. We have also provided a chart summarizing these requirements at the end of this article, but the chart should be used only in conjunction with the narrative below.

Compliance Date

Investment companies that file a registration statement after March 31, 2009, whether for an annual update or new series, have the option of complying with the new rules and delivering summary prospectuses rather than full statutory prospectuses. Post-effective amendments to existing registration statements containing changes responsive to the new rules must be filed pursuant to Rule 485(a) under the Securities Act of 1933 (the Securities Act). A Rule 485(a) filing would be subject to SEC review and comment. After January 1, 2010, all registration statements filed must comply with the new Form N-1A rules, although use of a summary prospectus is always optional. And while delivery of a summary prospectus rather than an amended statutory prospectus is not mandated under the new rules, the SEC has indicated that it may consider this action in the future. Summary prospectuses must be filed with the SEC no later than the date that they are first used, as compared to the current filing requirement of the fifth day after first use.

What to do in the coming year to prepare

If your fund intends to use summary prospectuses, there are several areas, in addition to the registration statement content and delivery requirements, that may need to be considered.

General

The most important – and likely most time consuming – area that may need to be addressed is a fund’s operational and technological capabilities. This area is particularly crucial because delivery of a summary prospectus satisfies the prospectus delivery obligations under Section 5(b)(2) of the Securities Act *only* if, among other things:

- > the summary prospectus is provided no later than the time of delivery of the security and is not bound together with any other materials; and
- > the summary prospectus, statutory prospectus, statement of additional information (SAI) and most recent annual and semi-annual shareholder reports are provided online.

Funds may need to coordinate with their internal or external marketing/production departments to ensure that the summary prospectus is delivered on time, packaged appropriately and that finalized fund documents are provided on the fund’s website. Note that if a fund files an updated statutory prospectus with the SEC, the revised prospectus must be online on the effective date of the fund’s amended registration statement.

Delivery Requirements

Subject to certain exceptions, summary prospectuses generally may not be bound with other materials. Exceptions to this requirement are made for funds that are available as an investment option in a variable annuity or variable life insurance contract. In that case, summary prospectuses for these funds may be bound with the statutory prospectus for the insurance contract, as well as summary prospectuses and statutory prospectuses for other investment options available under the contract. If your fund was in the practice of stitching privacy policies, account applications or other materials into prospectuses, this practice may not be continued with respect to summary prospectuses. The SEC has also indicated that wrappers (*i.e.*, additional cover pages) are not permitted to be bound to summary prospectuses. These materials may be sent to investors along with the summary prospectus, however, so long as the summary prospectus is given “greater prominence” than other materials. The SEC has indicated that the “greater prominence” standard is satisfied “if the placement of the summary prospectus is more prominent than accompanying materials, *e.g.*, the summary prospectus is on top of a group of paper documents that are provided together.” Fund companies may want to consult with legal counsel or their compliance departments regarding the “greater prominence” standard.

Website Requirements

The summary prospectus, statutory prospectus, SAI and most recent annual and semi-annual shareholder reports (fund documents) that are required to be provided online to satisfy the prospectus delivery obligations must meet certain technological criteria.

- > Fund documents must be accessible on or before the time that the summary prospectus is sent and a current version must remain on the website for at least 90 days after the date that the mutual fund security is delivered.
- > Fund documents must be presented in a format that is human-readable, as well as capable of being downloaded and printed on paper.

- > Persons accessing the fund documents online must be able to:
 - move between the table of contents and each section of the document by a single mouse click; and
 - move directly between each section of the summary prospectus and any section of the statutory prospectus and SAI that provides additional detail concerning that section of the summary prospectus. Alternatively, funds may use links located at both the beginning and end of the summary prospectus, or that remain continuously visible to persons accessing the summary prospectus in a separate panel or frame, and tables of contents of both the statutory prospectus and the SAI.

In addition, downloaded copies of the statutory prospectus or SAI must give users the ability to move directly back and forth between each section heading in a table of contents of that document and the section of the document referenced in that section heading. The links must be embedded in the documents downloaded by the viewer so that they still work after downloading. In addition, the table of contents of the statutory prospectus and SAI must conform to the requirements of the new Rule 481(c), or have the same section headings required by that rule.

Fund personnel may want to consider in-depth conversations with their IT personnel and/or financial printers to determine how to best meet these technological requirements. Specific persons responsible for instituting, testing, maintaining and monitoring the technological requirements (internal IT departments, external services providers or financial printers) probably will need to be designated. Funds may also want to assess the best way to handle incoming questions from shareholders regarding technological issues that may arise.

Shareholder Requests for Hard Copies

Funds are required to send fund documents to persons requesting them within three business days. If a paper copy is requested, it must be mailed by first-class mail. If an electronic copy is requested, an e-mail with an electronic copy, or a URL or link to the website where the documents can be viewed, printed and downloaded must be sent. The link must be maintained with current versions for six months after it is sent. The e-mail to the requestor must note the six-month period and remind the requestor to access and save the documents prior to the end of the six-month period. Marketing/distribution personnel or external service providers should be made familiar with this timeframe. Fund companies with a concern that outside e-mail services may not be able to accept attachments of the size of the electronic copies of their fund documents, due to firewalls and other security measures, may prefer to use the URL or link alternative.

Electronic delivery of documents also presumes that affirmative consent to electronic delivery was previously obtained from the requestor. The SEC's Adopting Release noted that funds may rely on previously obtained consents to receive electronic delivery of statutory prospectuses for the electronic delivery of summary prospectuses.

Compliance Procedures

To take advantage of the safe harbor provision regarding Internet availability of fund documents, even if these documents are not available, funds must: 1) have reasonable

procedures in place to ensure that specified materials are available; and 2) take prompt action to ensure that the specified materials become available as soon as practicable following the earlier of the time at which they know, or reasonably should have known, that the documents were not available. Fund companies may consider working with their compliance departments and legal counsel to develop written compliance procedures aimed at monitoring and maintaining in working order fund documents that must be available on the Internet.

Procedures also may need to be developed to address certain content changes to prospectuses required by the new Form N-1A. For example, Form N-1A now requires that funds that provide updated performance information on their website or through a toll-free telephone number must disclose that fact in the “investments, risks and performance” section of the prospectus. Disclosure control procedures will need to be updated to ensure that the appropriate parties are made aware of any change to a fund’s policies regarding the publication of performance information so that the prospectus may be modified or supplemented appropriately.

Overall, it is probably a good idea for fund personnel to develop written policies and procedures for IT, marketing/distribution and other areas involved in the prospectus drafting and dissemination process with respect to the delivery and website maintenance and other new requirements.

Fund Agreement Platforms

Several fund agreements may need to be updated and possibly renegotiated if a fund intends to use summary prospectuses. For example, funds may want to consider reviewing their website services (or comparable) agreement with the help of counsel to determine if any of the changes necessary to satisfy the technology, Internet availability and monitoring requirements discussed above are already covered by the agreement. Other agreements with service providers also may need to be reviewed to determine if they cover those requirements as well.

Various additional agreements, such as advisory agreements, shareholder services agreements, transfer agency agreements and distribution agreements, often reference a fund’s prospectus. These agreements may also need to be reviewed to ensure that the use of the summary prospectus, as well as any new procedures developed in response to the summary prospectus, do not inadvertently run contrary to any provision in an existing agreement. Those same agreements also may need to be reviewed to determine if any amendments need to be made or side letters negotiated to take into account the fund’s use of a summary prospectus.

Finally, a fund’s organic documents (*i.e.*, declaration of trust, bylaws, etc.) may also contain references to the fund’s prospectus. These documents may also need to be reviewed to ensure there are no conflicts.

Some industry observers have raised questions regarding the extent to which fund intermediaries and distribution platforms will be required to comply with the operational and technical aspects of the summary prospectus delivery rules. For example, platforms that offer third-party funds generally offer investors the opportunity to view and download the statutory prospectus on the platform’s website. At this point, it is unclear what the requirements will be regarding the availability of other fund documents on intermediaries’ sites.

Summary Prospectus and Form N-1A Amendments: Operational and Technological Highlights

	Amended Form N-1A	Summary Prospectus
Compliance	<ul style="list-style-type: none"> > May use amended form after March 31, 2009. > Must file after January 1, 2010. > Initial filing under new rules must be through a 485(a) filing. 	<ul style="list-style-type: none"> > Use of summary prospectus is optional. > If used, must be filed with the SEC no later than the date first used.
Delivery		<ul style="list-style-type: none"> > Must provide no later than time of delivery of the security.
	<ul style="list-style-type: none"> > Must provide physical or electronic copies within three business days of request. > May send a link or URL to document (in an e-mail) if the link or URL will be kept current for at least six months and the e-mail so states. 	
Paper Copies		<ul style="list-style-type: none"> > Must not bind with any other materials. > Must place on top of all other materials in the mailing.
Electronic Copies	<ul style="list-style-type: none"> > Must give users the ability to move between each table of contents and the section of the document referenced on both the statutory prospectus and SAI. 	<ul style="list-style-type: none"> > Must be in "human readable" format. > Must be printable in "human readable" format. > Must be capable of being saved in electronic form. > Must give users the ability to move between each section of the summary prospectus and the related sections in the statutory prospectus and SAI. > Must preserve links within saved document (but not those linking to other documents).
Website	<ul style="list-style-type: none"> > Summary prospectus, statutory prospectus, SAI, and most recent annual and semi-annual shareholder reports must be provided online if using summary prospectus to satisfy prospectus delivery obligations. > Cannot use SEC's EDGAR website as primary link to fund documents. 	

Investment Management Practice Group

For more information about the matters discussed in this Alert, please contact your regular Drinker Biddle lawyer or any member of our Investment Management Group.

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