

PaulHastings StayCurrent

A CLIENT ALERT FROM PAUL HASTINGS

January 2009

SEC Adopts "Summary Prospectus" and Related Rules Designed to Improve Mutual Fund Prospectus Disclosure

FROM THE INVESTMENT MANAGEMENT PRACTICE GROUP

Overview

On January 13, 2009, the Securities and Exchange Commission (the "Commission") adopted a number of new rules as well as rule amendments (collectively, the "Summary Prospectus Rules") designed to simplify mutual fund prospectus disclosure and to provide funds with the option to sell shares by means of a short (3-4 page) summary document ("Summary Prospectus").¹ The Summary Prospectus Rules also contain provisions which eliminate from exchange-traded fund ("ETF") prospectuses information not relevant to most ETF investors. Finally, the Summary Prospectus Rules require that all funds post certain information on their Internet website and require that these website documents provide for complex "linking" capability between, as well as within, documents.

The Summary Prospectus Rules become effective on March 31, 2009, and funds may elect to use these rules (and thereby simplify their prospectuses and use the Summary Prospectus) as of that date. Otherwise, all initial registration statements, all post-effective amendments that are annual updates to registration statements, and all post-effective amendments to registration statements that add a new series filed on or after January 1, 2010, must comply with the Summary Prospectus Rules. The final compliance date for filing amendments to

effective registration statements to comply with these rules is January 1, 2011. As a practical matter, funds having a fiscal year ending September 30, 2009, would be the first to have to comply with the new requirements with respect to their annual updates.²

This Client Alert will summarize the basic elements of these complex new rules. We urge you to contact the Paul Hastings attorney with whom you work, or any of the members of our Investment Management Practice Group listed below, well in advance of the filing date of a fund's prospectus. The process of revising a prospectus, and for establishing the required Internet linkages between and within documents, will not be simple or fast. In addition, great care must be taken when creating a Summary Prospectus to avoid mistakes which could result in negative and costly consequences.

We first provide a summary of the new prospectus simplification rules. We then discuss the changes applicable to ETFs. Finally, we discuss the new Summary Prospectus as well as the "linkage" elements of these rules.

I. New Summary Information Requirement for the Statutory Prospectus

The Summary Prospectus Rules seek to simplify existing mutual fund prospectuses by replacing the existing risk/return summary at the beginning of prospectuses with a new summary section.³ This new summary section (which will be virtually identical to the Summary Prospectus discussed further below) must include the following information, which must be presented in the following numerical order: (1) investment objectives/goals; (2) costs (fee table and example); (3) principal investment strategies, risks, and performance; (4) management - investment advisers and portfolio managers; (5) purchase and sale of fund shares (6) tax information; and (7) financial intermediary compensation.

Each fund in a multi-fund prospectus must be presented separately in the summary section, with the exception that the information required by Item 6 (purchase and sale of fund shares), Item 7 (tax information), and Item 8 (financial intermediary compensation), discussed below, may be combined if such information is identical. If these items are combined, the combined information must be presented immediately after the individual fund summaries and the following statement must be included in each individual fund summary section:

"For important information about [purchase and sale of fund shares,] [tax information,] and [financial intermediary compensation], please turn to [identify section heading and page number of prospectus]."

Funds with multiple share classes can choose to present the summary information separately for each class, to integrate the information for multiple classes, or to use another presentation that is consistent with disclosing the summary information in a standard order at the beginning of the prospectus.

No information may precede the new summary section, except for a cover page and table of contents, nor may the summary section include any additional information not required to be in that summary.⁴ The information included in the summary section does not need to be repeated elsewhere in the prospectus. While the Summary Prospectus Rules do not impose a strict page limit for the new summary section, the Commission suggests that the information should be presented in three to four pages. Undoubtedly, the Commission's disclosure staff will be paying close attention to the page length of these new summaries. We discuss each new item below.

Cover Page (Item 1)

The prospectus (and statement of additional information ("SAI")) cover page is required to list the fund's name as well as the name of each class offered in the prospectus or SAI, along with the exchange ticker symbol adjacent to each class. An ETF must identify the principal U.S. market on which the fund's shares are traded.

Investment Objectives and Goals (Item 2)

This section must disclose a fund's investment objectives or goals. A fund may also identify its type or category (*e.g.*, that it is a money market fund or balanced fund).

Fee Table (Item 3)

The fund's fee table and example is moved forward to immediately follow the fund's investment objectives. Funds offering breakpoints must include a brief narrative, including the minimum investment required to reach the first breakpoint, alerting investors to the availability of those discounts. The fee table heading is revised to read "expenses that you pay each year as a percentage of the value of your investment." In addition, the fund's most recent portfolio turnover rate, accompanied by a narrative, must also be included.

The fee table must show gross fund expenses. Funds with expense reimbursements or fee waivers, however, may place two additional captions directly below "Total Annual Fund Operating Expenses" if the expense reimbursements or fee waiver is in effect for no less than one year from the effective date of the fund's registration statement (one caption may show the amount of the reimbursement/waiver, and a second caption may show the fund's net expenses after reimbursement/waiver).⁵ Required disclosure accompanying these captions include the period for which the expense reimbursement or fee waiver arrangement is expected to continue, including the expected termination date and the termination provisions. The fee table example is calculated off of net expenses in these circumstances, but only for the periods for which these arrangements are expected to continue.

Investments, Risks, and Performance (Item 4)

Following the fee table and example, a fund must disclose its principal investment strategies and risks. This includes the current bar chart and performance table. A fund that makes updated performance information available on a website or at a toll-free (or collect) telephone number must include a statement explaining this and provide the website address and/or telephone number.

Management (Item 5)

This section must include the name of each investment adviser and sub-adviser of the fund, followed by the name, title, and length of service of the fund's portfolio managers.⁶ A fund with three or more sub-advisers will not be required to identify each sub-adviser, rather such fund need only identify a sub-adviser that is responsible for the management of a significant portion of the fund's net assets (typically 30% or more).

Purchase and Sale of Fund Shares (Item 6)

This section must disclose the fund's minimum initial or subsequent investment requirements, the fact that the fund's shares are redeemable, and identify the procedures for redeeming shares (e.g., on any business day by written request, telephone, or wire transfer).⁷

Tax Information (Item 7)

In this section, a fund must state, as applicable, that it intends to make distributions that may be taxed as ordinary income or capital gains or that the fund intends to distribute tax-exempt income. A fund that holds itself out as investing in securities generating tax-exempt income must provide, as applicable, a general statement to the effect that a portion of the fund's distributions may be subject to federal income tax.

Financial Intermediary Compensation (Item 8)

This section requires the following statement (or a comparable equivalent thereof) regarding financial intermediary compensation:

"Payments to Broker-Dealers and Other Financial Intermediaries

If you purchase the Fund through a broker-dealer or other financial intermediary (such as a bank), the Fund and its related companies may pay the intermediary for the sale of Fund shares and related services. These payments may create a conflict of interest by influencing the broker-dealer or other intermediary and your salesperson to recommend the Fund over another investment. Ask your salesperson or visit your financial intermediary's website for more information."

This disclosure may be omitted if not applicable.

II. Exchange-Traded Funds

The Summary Prospectus Rules contain a number of provisions specifically applicable to ETFs.

Purchasing and Redeeming Shares - The Summary Prospectus Rules provide that an ETF with a creation unit size of at least 25,000 shares may exclude from Item 6 information on how to purchase and redeem shares directly from the ETF. All ETFs will still be required to include disclosure on how to buy and sell creation units in their SAI.

In lieu of the disclosure on how to buy and sell creation units, Item 6 must include information as to (i) the number of shares contained in a creation unit; (ii) that individual shares can only be bought and sold on the secondary market through a broker-dealer; and (iii) that shareholders may pay more than net asset value ("NAV") when they buy ETF shares and receive less than NAV when they sell shares because shares are bought and sold at current market prices.

Fee Table - ETFs with a creation unit size of at least 25,000 shares are not required to include creation unit transaction costs in their fee table fees and expenses example (Item 2). Such funds are required to include additional disclosure in their fee table (and shareholder reports) noting that fund shares are sold on the secondary market rather than redeemed at the end of the periods indicated, and that investors shares may be required to pay brokerage commissions that are not reflected in the fee table.

Premium/Discount Information - The Summary Prospectus Rules require all ETFs (regardless of creation unit size) to disclose in their prospectuses information regarding the extent and frequency with which market prices of fund shares have tracked the fund's NAV.⁸ The premium/discount information is also required to appear in the fund's annual reports. Importantly, an ETF may omit disclosure of this

premium/discount information from its prospectus and annual report if the fund provides the information on its website and discloses in its prospectus or annual report an Internet address where investors can locate the information.

III. New Prospectus Delivery Option for Mutual Funds

Finally, the Summary Prospectus Rules replace the old "profile prospectus" with a new, three to four page Summary Prospectus. In adopting the new Summary Prospectus, the Commission attempted to address the significant issues that prevented the wider use of the old profile prospectus. The Commission attempted to address these issues by providing that the delivery of the Summary Prospectus completely satisfies the prospectus delivery requirements of the 1933 Act and by permitting incorporation by reference.⁹

As described in more detail below, the new Summary Prospectus can be used to satisfy the prospectus delivery requirements of the 1933 Act provided, among other things, that the Summary Prospectus, the complete statutory prospectus, SAI, and most recent annual and semi-annual reports to shareholders are all available online or on paper if requested.¹⁰ Funds must take care when developing the new Summary Prospectus. Failure to comply with all of the requirements of the Summary Prospectus Rules when issuing a Summary Prospectus may, in certain circumstances, cause a fund to violate the prospectus delivery requirements of the 1933 Act, resulting in substantial potential liability to the fund, its adviser and its distributor.¹¹ Funds may chose to use the Summary Prospectus for only certain types of investors while continuing to use the statutory prospectus of other investors.

Content Requirements - In general, the Summary Prospectus must be identical to the summary section of the statutory prospectus, with the same information presented in the same order as described above.¹² The Summary

Prospectus must be a separate, stand alone document; it cannot be bound with other Summary Prospectuses. Like the summary section of the statutory prospectus, a Summary Prospectus may describe multiple classes of a single fund, but it may only describe one fund. The following information must be included on the cover page or at the beginning of the Summary Prospectus:

- the fund's name and the share classes to which the Summary Prospectus relates;
- the exchange ticker symbol of the fund's securities or, if the Summary Prospectus relates to one or more classes of the fund's securities, adjacent to each such class, the exchange ticker symbol of such class of the fund's securities;
- if the fund is an ETF, it must also identify the principal U.S. market or markets on which the fund shares are traded;
- a statement identifying the document as a "Summary Prospectus"; and
- the approximate date of the Summary Prospectus's first use.

Additionally, a Summary Prospectus must contain the following legend:

"Before you invest, you may want to review the Fund's prospectus, which contains more information about the Fund and its risks. You can find the Fund's prospectus and other information about the Fund online at [_____]. You can also get this information at no cost by calling [_____] or by sending an e-mail request to [_____]."¹³

The address to the fund's website must be specific enough to lead directly to the referenced document; it cannot be a homepage address. An address to a page with links to the referenced document will suffice.

Delivery Requirements - In general, the Summary Prospectus Rules provide that the

prospectus delivery requirements of the 1933 Act are satisfied if (1) a Summary Prospectus is sent or given no later than the time of the carrying or delivery of the fund security; (2) the Summary Prospectus is not bound together with any materials;¹⁴ (3) the Summary Prospectus that is sent or given satisfies the requirements of Rule 498 at the time of the carrying or delivery of the fund security; and (4) other conditions set forth in the Summary Prospectus Rules, including requirements that a fund provide the Summary Prospectus, statutory prospectus, and other information on the Internet, (with required linkages), are satisfied.¹⁵

The Summary Prospectus must be given greater prominence than any other materials accompanying the document (with the exception of other Summary Prospectuses or statutory prospectuses). The Commission suggests that the "greater prominence" requirement would be satisfied if, *e.g.*, the Summary Prospectus is on top of a group of paper documents that are provided together. In addition, the statutory prospectus and other information must be provided in paper or by e-mail upon request, within three business days.

Requirements to Update - In lieu of the quarterly update requirements originally set forth in the proposing release, the Commission has instead required a fund that makes updated performance information available on a website or at a toll-free (or collect) telephone number to include a statement in the Summary Prospectus explaining this and providing the website address and/or telephone number. In addition, a Summary Prospectus must be updated with the same frequency as a fund's statutory prospectus.¹⁶

Website Accessibility of Materials and Linkage

In order to use a Summary Prospectus to satisfy the prospectus delivery requirements of the 1933 Act, a fund must have the current Summary Prospectus, statutory prospectus, SAI, and most recent annual and semi-annual reports to shareholders accessible, free of charge, at the website address specified on the cover page or

at the beginning of the Summary Prospectus. These documents must be accessible on or before the time that the Summary Prospectus is sent or given. Additionally, current versions of the documents must remain on the website for at least 90 days.¹⁷

Online materials must be legible, in a user-friendly format that permits users to move back and forth between the Summary Prospectus, the statutory prospectus and the SAI. Persons accessing the statutory prospectus or SAI online must be able to move directly back and forth between each section heading in a table of contents of such document and the appropriate section of the other document. With respect to the Summary Prospectus, funds have two linkage options (i) each section of the Summary Prospectus must link to any other section of the statutory prospectus and SAI that provides additional detail concerning that section of the Summary Prospectus (one mouse click), or (ii) the Summary Prospectus must have links at the beginning and end of the Summary Prospectus (or that remain continuously visible) to the table

of contents of both the statutory prospectus and the SAI (which must themselves satisfy the linkage requirements described above) (two mouse clicks). Investors must be able to download and retain an electronic version of the online information.¹⁸

Requirement to Send Documents upon Request

A fund using a Summary Prospectus to satisfy the prospectus delivery requirements of the 1933 Act must send, upon request and at no cost, by first class mail, a paper copy of the statutory prospectus, SAI and most recent annual and semi-annual shareholder report within three business days. Persons requesting electronic copies of such materials must also receive such materials within three business days, although a link to the document may be provided in lieu of the actual document (one mouse click). In such a case, the link must be active for six months.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Chair

Michael R. Rosella
212-318-6800
mikerosella@paulhastings.com

Julie Allecta
415-856-7006
julieallecta@paulhastings.com

Wendell M. Faria
202-551-1758
wendellfaria@paulhastings.com

Michael Glazer
213-683-6207
michaelglazer@paulhastings.com

Jacqueline A. May
212-318-6282
jacquelinemay@paulhastings.com

Mitchell E. Nichter
415-856-7009
mitchellnichter@paulhastings.com

Rey Pascual
404-815-2227
reypascual@paulhastings.com

Vice Chair

David A. Hearth
415-856-7007
davidhearth@paulhastings.com

Domenick Pugliese
212-318-6295
domenickpugliese@paulhastings.com

Gary D. Rawitz
212-318-6877
garyrawitz@paulhastings.com

Arthur L. Zwickel
213-683-6161
arthurzwickel@paulhastings.com

¹ SEC Release No. 33-8998, *Enhanced Disclosure and New Prospectus Delivery Option For Registered Open-End Management Investment Companies*, <http://www.sec.gov/rules/final/2009/33-8998.pdf> (the "Adopting Release"). For ease of presentation, we will generally omit detailed cross-references to various sections of Rule 498 of the 1933 Act or the Adopting Release. The Summary Prospectus Rules apply only to registration statements of open-end management investment companies filed on Form N-1A.

² The Commission has stated that all post-effective amendments to existing registration statements filed to comply with the Summary Prospectus Rules must be filed pursuant to Rule 485(a) of the Securities Act of 1933, as amended (the "1933 Act"). As a result, all post-effective amendments filed to comply with the Summary Prospectus Rules will be subject to a 60 day review period by the Commission. The Commission, however, will consider requests to file certain post-effective amendments pursuant to Rule 485(b) of the 1933 Act in appropriate circumstances, such as where a fund complex has already filed one fund under Rule 485(a) that implements the new requirements and agrees to conform later filings to the comments received in the earlier filing.

³ This new summary section must comply with the Commission's "plain English" rules. See General Instruction B.4 (c) of Form N-1A; Rule 421(d).

⁴ A limited exception is made which allows funds that are used as investment options for retirement plans and variable insurance contracts to modify or omit information relating to the purchase and sale of fund shares. See General Instruction C.3.(d)(i) of Form N-1A.

⁵ These additional line items may not be used if the expense reimbursement or fee waiver arrangement may be terminated without agreement of the fund's board of directors (*e.g.*, unilaterally by the fund's investment adviser) during the one-year period. If a fee waiver or expense reimbursement arrangement, in fact, terminates less than a year after the effective date of a fund's registration statement, the fund generally would be required to supplement or "sticker" its prospectus to reflect the termination. See Instruction 3(e) to Item 3 of Form N-1A.

⁶ A fund will not be required to identify a sub-adviser whose sole responsibility is limited to day-to-day management of cash instruments unless the fund is a money market fund or other fund with a principal investment strategy of regularly holding cash instruments.

⁷ Funds used as investment options for retirement plans and variable insurance contracts may modify or omit the information regarding the purchase and sale of fund shares that to the extent it is not relevant in such context. See General Instruction C.3.(d)(i) of Form N-1A.

⁸ The disclosure must include the number of trading days during the most recently completed calendar year and quarters since that year on which the market price of the ETF shares was greater than the fund's NAV (premium) and the number of days it was less than the fund's NAV (discount). ETFs must present premiums or discounts as a percentage of NAV. Market price is defined as the closing price on the principal market on which ETF shares trade or within the range between the highest offer and the lowest bid if that price more accurately reflects the current market value of the fund's shares at the time the fund calculates its NAV. See Item 11(g)(2) of Form N-1A.

⁹ The Summary Prospectus Rules permit a fund to incorporate by reference any information from the fund's reports to shareholders that the fund has incorporated by reference into its statutory prospectus. If a fund incorporates any such information by reference, the Summary Prospectus must include a legend specifying the type of document (*e.g.*, statutory prospectus) from which the information is incorporated and the date of the document, as well as how to obtain such document free of charge. See *generally*, Rule 498 under the 1933 Act.

¹⁰ The Commission noted in the final release that a person who provides investors with a Summary Prospectus in good faith compliance with Rule 498 will be able to rely on Section 19(a) of the 1933 Act against a claim that the Summary Prospectus did not include information that is disclosed in the fund's statutory prospectus, whether or not the fund incorporates the statutory prospectus by reference into the Summary Prospectus. Section 19(a) protects a defendant from liability for actions taken in good faith in conformity with any rule of the Commission.

¹¹ The Summary Prospectus Rules provide that certain instances of non-compliance will constitute mere rule violations, which would not result in failure to satisfy the prospectus delivery requirements of the 1933 Act. Other instances of non-compliance, however, will constitute failure to satisfy prospectus delivery requirements of the 1933 Act. There are significant differences in legal import between the two types of violations.

¹² A fund, however, may omit from the Summary Prospectus the explanation required in the statutory prospectus of the reasons for any change in the comparative securities market index used for by the fund.

¹³ The Internet address at which the information is available may not be the Commission's EDGAR system, and the address must be specific enough to lead investors directly to the statutory prospectus and other required information, rather than to a home page or other section of a website on which the materials are posted. See Rule 498(b)(1)(v)(B).

¹⁴ A Summary Prospectus for a fund that is available as an investment option in a variable annuity or variable life insurance contract may be bound together with the statutory prospectus for the contract and Summary Prospectuses and statutory prospectuses for other investment options available under the contract. See Rule 498(c)(2) and (d)(2).

¹⁵ Conforming changes were made to sales literature and advertising rules to permit communications used after delivery of a Summary Prospectus to be considered to be "supplemental sales literature," just as if they had been used after delivery of the statutory prospectus.

¹⁶ The Summary Prospectus must be filed with the Commission on EDGAR no later than the date that it is first used, rather than (as proposed) the fifth business day after the date that it is first used. If, pursuant to Rule 497, a mutual fund files a "sticker" to its statutory prospectus that changes any information in the summary section, the Summary Prospectus should either be "stickered" or amended to reflect the information in the statutory prospectus "sticker."

¹⁷ Generally, information must remain on the website through a date that is at least 90 days after (i) the date that the mutual fund security is carried or delivered (in the case of reliance on Rule 498 to satisfy the prospectus delivery requirements of the 1933 Act) or (ii) the date that the communication is sent or given (in the case of reliance on Rule 498 to deem a communication to be supplemental sales literature).

¹⁸ Under Rule 498, a safe harbor exists for funds that occasionally fail to meet the Internet availability requirements, despite their best efforts as a result of various forces majeure. To take advantage of this safe harbor, a fund must have reasonable procedures in place to ensure that the Summary Prospectus, statutory prospectus, SAI, and shareholder reports are available in the required manner and must take prompt action to ensure that those materials become available in the manner required, as soon as practicable, following the earlier of the time at which the fund knows, or reasonably should have known, that the documents are not available in the manner required.

18 Offices Worldwide

Paul, Hastings, Janofsky & Walker LLP

www.paulhastings.com

StayCurrent is published solely for the interests of friends and clients of Paul, Hastings, Janofsky & Walker LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2009 Paul, Hastings, Janofsky & Walker LLP.

IRS Circular 230 Disclosure: As required by U.S. Treasury Regulations governing tax practice, you are hereby advised that any written tax advice contained herein or attached was not written or intended to be used (and cannot be used) by any taxpayer for the purpose of avoiding penalties that may be imposed under the U.S. Internal Revenue Code.