

WHAT IS ERISA 404(c) PROTECTION?

If a plan meets the requirements of ERISA Sec. 404(c), then plan fiduciaries will not be liable for losses on participant investment transactions if the participants exercised control with respect to the transactions, and any losses were directly a result of the participant's investment instructions. ERISA Sec. 404(c) may apply to profit sharing plans, money purchase pension plans, and 401(k) plans.

ERISA 404(c) CHECKLIST

The answer to all of the following questions must be "Yes," in order for a plan to meet the requirements of ERISA Sec. 404(c).

Has the plan provided the participant with the required participant information?

Yes

No

In order to satisfy the information requirement of ERISA Sec. 404(c), the plan must provide participants with plan information that, generally, would be sufficient to enable the participant to make informed investment decisions. Information that must be provided includes the following. [Note: Most of the following items required under ERISA Sec. 404(c) became mandatory information required as part of participant fee disclosures pursuant to ERISA Sec. 404(a)(5).]

1. An explanation that the plan is intended to be a 404(c) plan.
2. An explanation that the fiduciaries may be relieved of liability.
3. A description of each investment alternative available under the plan, which can be general when plan permits any investment, but should encourage participants to review information on the investment.
4. Each designated alternative must include a general description of the investment objectives and risk and return characteristics, and information regarding the type and diversification of asset sin the portfolio of the designated alterative.
5. The identity of any designated investment manager.
6. An explanation of the circumstances under which participants may give investment instructions including limitations on such instructions; restrictions on transfer; limitations on voting rights; and information related to fund transfers.
7. A description of transaction fees and expenses chargeable against the participant's account.
8. Information on indemnification of the plan fiduciary responsible for giving information on request.
9. Information regarding investments in employer securities including a description of the procedure to provide for confidentiality and identity of the fiduciary charged with monitoring compliance with the confidentiality requirement.
10. A copy of most recent prospectus provided to the plan if the investment is subject to the Securities Act of 1933 (this can be given immediately before or after investment).
11. After investment, participants must be provided with plan materials related to the exercise of voting, tender, or similar rights. If there are plan provisions regarding the exercise of such rights, participants must receive a description of or reference to such provisions. While the plan is not required to pass through such rights, Section 404(c) relief is not available to the extent that plan fiduciaries exercise the rights.

If requested by the participant, does the plan provide the information that must be available upon participant request?

Yes

No

Participants must be provided certain information upon request. This material must be based on the latest information available to the plan, and includes the following.

1. A narrative of the annual operating expenses of each designated investment alternative, including investment manager fees, administrative fees, and transaction costs, which reduce the rate of return to the participant. The aggregate amount of such expenses must be expressed as a percentage of average net assets of the designated investment alternative. If the information is already in the prospectus, providing the prospectus is sufficient.
2. Copies of prospectuses, financial statements and reports, and other materials related to the investment alternatives to the extent the information is provided to the plan.
3. Regarding the designated investment alternatives: (a) a list of assets comprising the portfolio of the alternative that includes plan assets and the value of the assets, and (b) if the asset is a fixed rate investment contract, the name of the issuer of the contract, the term of the contract, and the rate of return on the contract.
4. The value of shares or units and past and current investment performance of each available alternative, net of expenses.
5. The value of the shares or units held in the particular participant's account.

Does the plan provide the necessary participant information in a timely manner?

Yes

No

The plan must provide the required participant information before assets are invested. The plan must provide other information in sufficient time for the participant to consider the information prior to making an investment decision.

Does the plan carry out participant investment instructions?

Yes

No

The plan must follow the participant's investment instructions, unless the instructions would cause the plan to create a prohibited transaction, or would generate income taxable to the plan. The fiduciary is not relieved of liability when a participant instruction, if implemented, would:

1. Not be in accordance with the plan document.
2. Cause the indicia of ownership of plan assets to be outside the U.S.
3. Jeopardize the plan's tax qualified status.
4. Plausibly result in a loss in excess of a participant's account balance.
5. Result in a prohibited transaction.

Since the fiduciary is not relieved of fiduciary responsibility in the above events, it can decline to carry out investment instructions that would cause them.

Do participants have the ability to change their investments as often as the volatility of the investments may require (and at least quarterly)?

Yes

No

Plans must give participants the opportunity to change their investments as often as the volatility of the investments may require, and at least every three months.

Does the plan offer a broad range of investment alternatives?

Yes

No

The investment line up for the plan must be sufficient enough to permit participants a reasonable opportunity to materially affect the potential risk and returns on their investments. The participants must also have an opportunity to choose from at least three investments that meet the following criteria.

- Are diversified
- Have materially different risk and return characteristics
- In the aggregate, enable the participant to achieve aggregate risk and return characteristics at any point within the range "normally appropriate for the participant"
- Each of which, when combined with the other alternatives, tends to minimize, through diversification, the overall risk of the portfolio.

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