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ERISA §404(c) Best Practices: Myths versus Facts

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Introduction: Why Comply With Section 404(c)?

September 2007 marks twenty years since the first preamble to §404(c) of the Employee Retirement Income Security Act ("ERISA") was released to the public, and October 2007 fifteen years since the issuance of the final preamble and regulation under §404(c). Between that time and the release of the Pension Protection Act of 2006, we have witnessed a lackluster effort to comply with the regulatory requirements.

According to Larkspur Data Resources, a company that provides a service to evaluate plans' §404(c) vulnerability, the most recent data reveals that of 623,993 defined contribution plans, 171,188, or approximately 27 percent of the total that permit participant direction, chose not to comply with §404(c).[1] What this means is that roughly a third of defined contribution plans file their annual Internal Revenue Service Form 5500 without electing the entry that states, "ERISA section 404(c) Plan - This plan, or any part of it is intended to meet the conditions of 29 C.F.R. §2550.404c-1." [2]

After fifteen years, one must wonder why not all participant-directed plans have elected to meet the conditions of §404(c). Are there valid reasons that some have and others have not adopted a §404(c) defense, and are those reasons rooted in facts or myths? And for those that intend to comply with §404(c), what are some of the esoteric compliance requirements that plans fail to address in order to establish a §404(c) defense?

At its core, §404(c) offers a plan sponsor and its fiduciaries a defense for losses or lack of gains realized by participants who exercise independent discretionary investment control over their individual account balances. Specifically, the regulation states:

> "Section 404(c) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) provides that if a pension plan that provides for individual accounts permits a participant or beneficiary to exercise control over assets in his account and that participant or beneficiary in fact exercises control over assets in his account, then the participant or beneficiary *shall not be deemed to be a fiduciary by reason of his exercise of control and no person who is otherwise a fiduciary shall be liable for any loss, or by reason of any breach, which results from such exercise of control.*" [3] (Emphasis added)

The fiduciary relief provided by §404(c) is adopted by plan sponsors on a voluntary basis. As an alternative, a plan sponsor may ignore the relief provided by §404(c) and accept

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the liability for participant losses. While roughly a third of defined contribution sponsors elect to operate their plans without adhering to §404(c), this author knows of none that have a formal opinion on file suggesting they should not comply and the reasons therefor, leaving the plan sponsor vulnerable to the full burden of consequences for participant losses. For those plan sponsors that choose to operate a noncompliant §404(c) plan with participant direction, obtaining a legal opinion supporting that decision for the record is advisable.

As an alternative to §404(c), a plan sponsor may choose to defend the decision to delegate investment discretion to participants under the general fiduciary requirements of ERISA §404(a). However, this approach offers no guidelines nor any specified statutory relief. Thus, when considering the choice between a known and an unknown, complying with §404(c) is clearly a safer bet for the following reasons:

- There is no guesswork with §404(c). The regulations provide details of every action required to secure the defense.

- A defense under ERISA §404(a) is not pre-approved by the Department of Labor as is §404(c). The plan sponsor that chooses to defend its actions using a "facts and circumstances" approach under §404(a) is attempting to move the judiciary to legislate from the bench a different process to secure relief than what has already been vetted by the administrative agency appointed the task by Congress.

- Compliance with §404(c) is assurance of the defense. Section §404(c) defines what information is sufficient to make an informed decision, while §404(a) does not. Ultimately, the challenge to defend the plan sponsor under §404(a) turns on the ability of the plan counsel to prove that participants have sufficient information to make an informed decision. If the evidence fails to meet the requirements of §404(c), why would it meet the requirements of §404(a)? Further, why would the DOL issue one of the most extensive regulations since the passage of ERISA if it could be preempted by meeting the general guidelines under ERISA §404(a)?

There is no ambiguity with §404(c) but there is inconvenience, which raises a question for the risk management strategist: "Do we want to pay now or risk paying a lot more later?"

Why Plan Sponsors Choose the Unknown

There are many reasons plan sponsors give for electing not to comply with §404(c), and the following represent the most common:

- Compliance is expensive;
- Compliance is time consuming;
- Compliance is inconvenient or burdensome;
- There is no policing effort, so why bother?
- It is impossible to comply; and/or
- Close is good enough.

Although these excuses represent the reasoning of many who have failed to comply with §404(c), there is no record of any plan sponsor using any of these before a court as a

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defense, and for good reason: none of these excuses support the general fiduciary obligation to act solely in the best interests of the participants and beneficiaries.[4]

Consider the challenge a fiduciary would have in convincing a judge that giving a participant sufficient information to make an informed decision is too expensive, or takes too much time, or is too inconvenient and burdensome. Likewise, a defense that “The DOL is not policing this effort, so if it is not important to them, why should it be important to me?” is unlikely to persuade a court. And the excuse that “It is impossible to comply, so I selectively chose what I could do and will rely on the court to recognize that a good, sincere effort is good enough,” falls vastly short of meeting the standard of prudent behavior by a fiduciary. The decision to implement a §404(c) compliance process on the same principles as “horseshoes and hand-grenades,” i.e., assuming that close is good enough, adopts a philosophy that has never been endorsed by the DOL, much less the courts.

In total, these excuses may work on the street, but they fail miserably as defenses to actions alleging that participants were prevented from making an informed decision.

Why Plan Sponsors Choose the Known, Yet Fail to Comply

There are some plan sponsors that have intended to comply but fail to secure compliance with §404(c). This may happen to sponsors who approach compliance as an event and not a process. A §404(c) compliant plan requires an ongoing effort by the fiduciaries to audit or monitor their compliance efforts. Failure to monitor ongoing compliance is often a result of a plan sponsor's false sense of security in the service provider selected or a belief that a sincere effort is sufficient to support a §404(c) defense. Unfortunately, sincere people can be sincerely wrong.

In the end, it is the plan sponsor who controls the §404(c) compliance effort and it is the plan sponsor who is liable for damages associated with a failed attempt to comply, not the service providers who support the effort, unless the service provider has been contracted to provide §404(c) oversight. Without a contractual agreement in place establishing the parameters of each party's responsibility and their role in the compliance effort, the plan sponsor has nothing more than empty promises and all the liability.

Plan sponsors must understand that they have ultimate responsibility for §404(c) compliance, but that they are unlikely to be capable of addressing all the compliance issues alone. In addition, they must understand that complying with §404(c) is a prudent course of action that is defensible, and that service providers who assist or contract to support a §404(c) compliant plan must be paid for their expertise and time.

Finally, plan sponsors must understand that §404(c) compliance is an evolving process rather than an event, and it is a process that is not going away. This process must be documented and must be sensitive to technological changes, new case law, modification or changes to existing regulations, and the addition of new regulations. In essence, a plan sponsor must comply with the 1992 regulation but also comply with current best practices.[5] In other words, a fiduciary must raise the defense under the current prevailing circumstances.[6]

What the Labor Department Thinks About §404(c)

Numerous DOL officials have unofficially expressed confusion over why all participant-directed plans do not elect to comply with §404(c) as opposed to electing, by commission

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or omission, to raise an uncertain defense under ERISA §404(a). However, if this informal DOL position is not sufficient incentive to encourage the adoption of a formal §404(c) defense, one needs to look no further than the amicus curiae brief filed by the Secretary of Labor requesting that the Court deny a motion to dismiss the action in the infamous Tittle v. Enron Corp. 401(k) litigation.[7] In its brief the Secretary made clear the DOL's position on the benefits of complying with §404(c): "The only circumstances in which ERISA relieves the fiduciary of responsibility for a participant-directed investment is when the plan qualifies as a 404(c) plan." The brief goes on to explain that a person who is otherwise a fiduciary is not liable for losses to the plan resulting from the participant's selection of investments in his own account, "provided that the participant exercised control over the investments and *the plan met the detailed requirements of a Department of Labor regulation*." (Emphasis added)

From this statement, it is safe to conclude that in order to use the fiduciary defense under §404(c) a plan sponsor must adopt all of the requirements of §404(c), including a vast array of disclosure requirements designed to provide a participant with sufficient information to make an informed decision.[8]

Of course, for those that choose not to comply with §404(c) it begs the question, "Is it prudent to provide less than sufficient information to a participant to make an informed decision?" The DOL might respond to this question with the same statement it made in its amicus curiae brief in *Tittle*:

> "ERISA's fiduciary obligations do not permit fiduciaries to ignore grave risks to plan assets, stand idly by while participants' retirement security is destroyed, and then blithely assert that they had no responsibility for the resulting harm."

In addition, the courts support this perspective as historic case law shows that fiduciaries who fail to disclose information, whether deliberately or by accident, may be held accountable for participant investment results. In one early case, Globe Woolen Co. v. Utica Gas & Elec. Co., the court stated: "A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word."[9] And while a trustee "is free to stand aloof, while others act, if all is equitable and fair," he must disclose the truth or take some other prudent action to protect plan assets "if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye."[10]

Clearly, an "ERISA fiduciary that knows or should know that a beneficiary labors under a material misunderstanding of plan benefits that will inure to his detriment cannot remain silent—especially when that misunderstanding was fostered by the fiduciary's own material representations or omissions."[11] But where plan assets are in danger and participants have been misinformed, silence and inaction are never options.[12]

With what appears to be administrative and judicial support for full disclosure, why choose to defend noncompliance with §404(c) under the general fiduciary requirements of ERISA §404(a) when those same requirements may be used against the fiduciary? For example, why elect the difficult task of proving the prudence of providing a participant with less than sufficient information to make an informed decision when there are specific requirements outlined in §404(c) that define sufficient information? In other words, why choose a defense with an unknown outcome when there is a known defense that provides the only regulatory approved defense against a fiduciary breach for participant losses?

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Myths Versus Facts

Regardless of whether one agrees or disagrees with the merits of §404(c) compliance, a plethora of myths continue to circulate in the industry, some of which are addressed below. While the myths and facts that follow are not all inclusive, they do address the primary fallacies that have challenged the well documented facts.

Myth: My service provider takes care of all my §404(c) compliance responsibilities.

Facts: It takes a village to raise a §404(c) defense, and that village typically includes the plan sponsor, recordkeeper, adviser and/or consultant, and ERISA counsel. The need for a village approach is especially important since comprehensive §404(c) compliance must be evaluated on a transactional basis.[13]

Unlike other annually required statutory testing obligations under ERISA §401(a), §404(c) compliance is a year-round evaluation obligation which no service provider can address alone. What compounds the problem for service providers attempting to single-handedly implement a §404(c) compliance process is their inability to compel the plan sponsor to adopt a process, adhere to the process, and monitor the process. If a service provider could compel a plan sponsor to adopt, adhere to, and monitor its §404(c) compliance obligations, then service provider guarantees would be commonplace. However, §404(c) compliance guarantees are nonexistent because the guarantor is unable to control the effort needed to meet §404(c) compliance obligations. The fact that no service provider, to the author's knowledge, has developed or widely promoted a §404(c) compliance guarantee demonstrates a lack of confidence in service providers' ability to control the compliance process.

Unfortunately, unrealistic expectations continue to be communicated by the industry to plan sponsors, creating a false sense of security. The confusion and indifference that exist over the prescribed requirements of §404(c) are perpetuated by either industry dilettantes or those who are either apathetic towards risk mitigation or have inadequate depth of knowledge on the subject matter.

Prudence demands that a plan sponsor retain the services of experts, and experts are obligated to consult with their clients on fiduciary responsibilities that focus their attention on the best interests of the participants. Compliance with §404(c) is arguably in the best interest of the participants. To ignore or haphazardly address §404(c) is to provide participants with insufficient information to make an informed decision. To mitigate fiduciary risk and to empower the participants to make prudent decisions a plan sponsor must demand, and service providers must deliver, comprehensive §404(c) compliance, and to do so requires a coordinated effort among service providers and the plan sponsor.

Best Practice: The plan sponsor should retain ERISA counsel on behalf of the plan fiduciaries to evaluate and issue an opinion on §404(c) compliance. The plan sponsor and not the plan should pay legal fees to potentially establish attorney- client privilege regarding the work product. To efficiently utilize existing resources the plan sponsor and ERISA counsel may consider retaining any of the plan's consultants to expedite the process. Counsel should advise the plan sponsor on the appropriateness of counsel retaining a plan consultant directly as an agent of the law firm. Under such an arrangement the plan consultant would bill the law firm, not the plan sponsor, for its services. In this manner a consultant can efficiently collect and evaluate the data that is conveniently at its disposal and then prepare a report of findings for legal review, which becomes the work product of the law firm. If counsel issues an opinion stating that

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fiduciaries have complied with all the necessary steps to secure §404(c) relief, the plan sponsor has achieved its objective. If counsel determines there are §404(c) deficiencies, corrective action can occur under counsel's supervision and in consideration of budgetary constraints.

Myth: Section 404(c) is a "Safe Harbor"

Facts: The retirement industry has been in a state of confusion ever since §404(c) was released, with many practitioners describing §404(c) as something it is not when they use broad terms such as "safe harbor." However, terms are defined on the basis of what the author intended, not according to the definition of the reader, and the author (the DOL) has defined §404(c) as "statutory relief" which is earned, not promised, according to the preamble to the final regulation. It states:

> "As was the case with the 1987 proposal, a number of commentators on the 1991 proposal suggested that the Department adopt the regulation as a *"safe harbor*" under ERISA section 404(c), thereby providing a fiduciary of a plan which fails to comport with the requirements of this regulation the opportunity to argue that the particular plan and any particular participant-directed transaction executed pursuant to such plan falls within the statutory definition, and, as such, should be afforded the exception to fiduciary liability described in ERISA section 404(c). *After due consideration, the Department has decided not to adopt this suggestion.* The Department continues to believe that it can best satisfy its statutory responsibility under ERISA section 404(c) by describing the basic framework necessary for a participant's or beneficiary's exercise of control, thereby providing guidance and clarification as to the application of ERISA section 404(c), while at the same time affording flexibility in the design of ERISA section 404(c) plans. Finally, as previously explained, non-complying plans do not necessarily violate ERISA; non-compliance merely results in the plan not being accorded the *statutory relief* described in section 404(c)."[14] (Emphasis added).

However, it is not uncommon to read a publication that refers to §404(c) as a "safe harbor" which operates as a safe haven for those that meet the conditions. Practically speaking, a safe harbor is designed by legislators to protect legitimate or excusable violations which impact a party's legal liability on the condition the party performed its action in good faith. A safe harbor framework is designed to offer a simpler and cheaper means of complying with the adequacy requirements of the directive. Unfortunately, good faith is not good enough when a party that claims a §404(c) defense must prove its compliance on a transaction-by-transaction basis. Therefore, unlike the protection experienced upon entering a safe haven, the employer is always out to sea and exposed to danger, with protection from the elements realized only when the crew is able to execute their responsibilities effectively.

As far as an exception or exemption, keep in mind that the DOL does not obligate plan sponsors to comply with §404(c); rather, compliance with the regulatory requirements is optional. If a fiduciary can prove it has met those requirements it is exempt from liability for participant losses. Stated another way, one is liable as a fiduciary for every other fiduciary obligation under ERISA, with the exception of losses or lack of gains a participant experiences as a result of the participant's exercise of independent investment discretion over his individual account balance. Thus, §404(c) does not provide a blanket exception or immunity from an obligation or duty, but conditional immunity from liability based upon the evidence provided.

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Best Practice: Do not rely on §404(c) as a safe harbor. Instead, view §404(c) as a process that requires consistent (not constant) attention. Plan sponsors should evaluate compliance at least annually, and possibly on a quarterly basis, depending on plan demographics, complexity of plan design, and the support of service providers. By monitoring compliance with §404(c) a plan sponsor ensures that breaches will be identified and action can be taken quickly to minimize potential damages and cost of correction. In addition, purchasing a fiduciary insurance policy in light of today's litigious culture is a prudent risk management strategy.

Myth: There are only three basic requirements to comply with under §404(c).

Facts: The popularity of this myth is widely communicated to plan sponsors in an effort to keep it simple. The three requirements include:

- providing a broad range of diversified investment alternatives;
- permitting participants to change their asset allocation with a frequency commensurate with the volatility of the investment option; and
- distributing sufficient information to permit the participant to make an informed decision.

Although these three requirements summarize the spirit of §404(c), one cannot assume this is all that is necessary to secure the relief §404(c) provides. In fact, to raise a successful defense under §404(c), a fiduciary must be prepared to provide proof of comprehensive adherence with the regulation in its entirety. This means the process implemented must address every requirement delineated in the 5,834 words of text which make up the 111 subsections of the regulation, not to mention the 27,335 words of the text in the 1992 preamble. Such meticulous attention to detail is essential if a plan sponsor wishes to successfully utilize the defense §404(c) provides against legal attacks. Furthermore, a "pick and choose" §404(c) compliance approach leaves a plan sponsor vulnerable to losing the statutory relief that only §404(c) provides for participant losses.

Best Practice: Because complying with §404(c) is a process, not an event, and due to the large number of qualifications that must be met on a transactional basis, it is suggested that automating the process will be both time and cost efficient. In addition, the process should be examined by legal counsel to ensure all the requirements have been addressed. To adopt a manual process that has not been vetted by counsel is to assume the process implemented is prudently structured to achieve the desired results, an assumption that may prove incorrect.

Myth: Regulatory compliance is sufficient to secure a §404(c) defense.

Facts: Compliance with §404(c) is a process which evolves as changes occur legislatively, technologically, and with new case law. For example, since §404(c) was released in 1992, we have witnessed legislative changes to electronic communications,[15] summary plan descriptions,[16] and the default rules,[17] which all affect compliance efforts. In addition, the evolving world of technology has played a role in our efforts to comply with §404(c). For example, a "broad range of investments" was originally defined as a minimum of three options[18] at a time when approximately 20 percent of 401(k) plans were daily valued.[19] Today, nearly all 401(k) plans are daily valued, making it difficult to justify a menu of three funds to meet the broad requirements of §404(c) that are drawn from the basic tenets of modern portfolio theory. Finally, even case law impacts §404(c)

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compliance efforts, requiring *ad hoc* modifications to the compliance process to reflect evolving judicial interpretations and rulings.

According to benefits experts at the law firm of Dorsey & Whitney, "*Compliance changes with new decisions and rulings and* as *'best practice' standards evolve*. What was acceptable compliance a few years ago may no longer be sufficient....As the law and a plan sponsor's situation evolve, to preserve the benefits of section 404(c) a plan sponsor should periodically perform an internal audit and review the legal requirements."[20] (Emphasis added)

The need to monitor the compliance process is supported by the general fiduciary standards of care which apply whether or not a plan sponsor meets the requirements of §404(c). Specifically, the prudent man rule under ERISA §404(a)(1)(B) requires "the care, skill, prudence, and diligence *under the circumstances then prevailing* that a prudent man acting in a like capacity and familiar with such matters *would use in the conduct of an enterprise of a like character and with like aims.*" (Emphasis added). In essence, as the prevailing circumstances change, so must your compliance process and efforts.

Best Practice: Confirm that retained service providers will monitor compliance procedures on an *ad hoc* basis to ensure that compliance efforts reflect current best practices. Further, query the service provider as to the support provided to companies of like character. This is often overlooked but must be considered due to the unique needs of companies with various demographic challenges. For example, the circumstances a prudent man must address are significantly different when dealing with a small engineering company with 30 highly educated employees in one location and $2 million in plan assets, versus a manufacturing company with 30,000 employees in multiple locations and over $500 million in plan assets.

MYTH: Following a checklist will allow you to attain 80 to 95 percent compliance, which is sufficient.

FACTS: A checklist is only the beginning of the process. A checklist of questions which reflects all the regulatory requirements, prevailing circumstances for a like enterprise, and best practices represents the diagnostic stage. Once you have affirmed the correct action and identified compliance breaches, your process must include the necessary steps to resolve §404(c) deficiencies, including the need to disclose information. Furthermore, §404(c) compliance is an "all or none" proposition. The regulation states:

> "This section describes *the kinds of plans that are 'ERISA section 404(c) plans,'* the circumstances in which a participant or beneficiary is considered to have *exercised independent control* over the assets in his account *as contemplated by section 404(c*), and the consequences of a participant's or beneficiary's exercise of control,"[21]

and further:

> "The *standards set forth in this section are applicable solely for the purpose of determining whether a plan is an ERISA section 404(c) plan* and whether a particular transaction engaged in by a participant or beneficiary of such plan is afforded relief by section 404(c)."[22] (Emphasis added)

If the DOL intended partial compliance to be sufficient, it would have defined the circumstances when partial compliance would be acceptable. Instead, the DOL describes "the kinds of plans that are ERISA section 404(c) plans" in the regulation, and the

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regulation establishes the standards for determining whether a plan is a § 404(c) plan. Therefore, regulatory standards require comprehensive compliance with all of the requirements. Nowhere within the regulation is there a caveat that permits options. In fact, the closest example to a caveat in the regulation is the use of the word "may" in several subsections that apply to some administrative flexibilities extended to the plan sponsor. For example,

> • A plan *may* charge participants' and beneficiaries' accounts for the reasonable expenses of carrying out investment instructions;[23]
>
> • A fiduciary *may* decline to implement participant and beneficiary instructions;[24] and
>
> • A plan *may* impose reasonable restrictions on the frequency with which participants and beneficiaries may give investment instructions.[25] (Emphasis added)

From these examples, it is apparent that the flexibility provided is not sufficiently broad to permit selective compliance with §404(c). Thus, applying the scoring principles of "horseshoes and hand grenades" to compliance with §404(c) is not a prudent approach. A good litmus test for this approach is to request the service provider responsible for §404(c) compliance to issue a letter guaranteeing §404(c) compliance. If a guarantee is not available, ask for a formal response identifying what must be done to secure a §404(c) defense. In addition, ask the plan sponsor's ERISA counsel to write a letter stating that the plan has met the regulatory requirements of §404(c) and current industry best practices. If counsel is unwilling to issue such an opinion, then you have your answer.

Clearly, a regulatory compliant best practice approach requires comprehensive adoption of all §404(c) statutory requirements to support a §404(c) defense claim, even if the issue addressed does not apply to the plan. By addressing all the regulatory requirements, the plan sponsor can convincingly support a claim that every requirement was considered, reviewed, and addressed. To ignore any regulatory requirement, no matter how logical, reasonable, and defensible that decision may be, is to risk the loss of fiduciary relief over a technicality. Such a risk is too great when the alternative is nothing more than the adoption of a basic requirement.

Best Practice: Remember that *all* means ***all.*** ERISA §404(c) establishes absolute, not relative, compliance requirements. A plan sponsor's decision to pick and choose which §404(c) requirements to follow is a decision not to comply. In short, follow the law or lose the relief.

Myth: A prospectus is sufficient investment information for participants.

Facts: The prospectus requirement only applies to an investment subject to the Securities Act of 1933. It does not apply to separate accounts offered through insurance providers, collective funds, common funds, or traditionally managed accounts which hold individual securities.

According to 29 C.F.R. §2550.404c-1(b)(2)(i)(B), a participant will not have sufficient investment information unless the participant is provided, by an identified plan fiduciary,[26] with a copy of the most recent prospectus provided to the plan, either immediately before or after the initial investment. This assumes the investment alternative is an investment subject to the Securities Act of 1933.[27]

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In addition, a prospectus is required to be provided to the participant by the identified plan fiduciary, either directly or upon request,[28] to the extent such information is provided to the plan.[29] Apparently, if a plan does not receive a prospectus the plan is not obligated to distribute a prospectus. However, it is important to interpret the term “provided” in a broad sense to mean any information to the extent such information is available. Therefore, even if the plan sponsor does not receive a copy of the prospectus from the recordkeeping firm, this does not mean the plan sponsor should not seek to obtain the prospectus from the investment company.

Said another way, the regulation does not require the prospectus to be provided to the participant only if it is provided by the recordkeeper or some other identified service provider. Rather, the regulation requires that the prospectus be provided to the participant if it is provided to the plan with the understanding that the plan sponsor or fiduciary will make an effort to obtain the necessary information (i.e., prospectus) to establish a §404(c) defense.

To permit the plan sponsor to avoid the obligation to provide sufficient information by simply neglecting to request the information from all sources known to have that information available is to ignore the basic aim of the regulation, which requires the delivery of sufficient information to secure fiduciary relief under §404(c).

If the plan offers investment alternatives that are not subject to the Securities Act of 1933, then a prospectus requirement does not apply. However, the DOL has made clear that information similar to that prescribed by Securities Act of 1933 is required to be distributed to a participant for non-Securities Act investments to ensure the participant has sufficient information to make an informed decision. This conclusion is drawn from the many disclosure similarities between §404(c) and the SEC's section 10(a) prospectus and section 10(b)[30] prospectus profile requirements. Furthermore, a prospectus, for those investments which are subject to the Securities Act of 1933, is insufficient to address all the disclosure requirements of §404(c), especially when asset based fees are deducted from plan assets in excess of the operating expense ratio of the mutual fund.

To help ferret out the differences, the following is a list of those requirements that are similar and those that are exclusive to §404(c).

What §404(c) requirements and a prospectus have in common

- A general description of the investment objectives and risk and return characteristics.[31] This would include a description of the principal investment strategies, type of risk taken, and analysis of performance.

- Identification of any designated investment adviser or manager.[32]

- A description of any transaction fees, expenses, and the annual operating expenses. Expenses are to be expressed as a percentage of the average net assets of the investment alternative.[33] A prospectus includes a fee table with an example that shows the cost of investing a hypothetical $10,000 over a 1-, 3-, 5-, and 10-year period.

- A copy of the most recent prospectus provided immediately following or prior to the initial investment.[34] The prospectus delivered to the participant must be current. The SEC requires that the date of the prospectus be prominently displayed on the cover of the prospectus. If a profile is used to acquire a security, the SEC requires the delivery of the most recent prospectus with the purchase confirmation or within 3 business days of a request.

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- Information concerning the value of shares or units of the investments,[35] including net asset values for both the beginning and end of each period.

- Information concerning the past and current investment performance, net of expenses on a reasonable and consistent basis.[36] Near the front of the 10(a) and 10(b) prospectus is a bar chart showing the fund's annual total returns for each of the last 10 years (or for the life of the fund if less than 10 years old). All funds that have had annual returns for at least one calendar year must include this chart. The prospectus must also include a table that sets forth returns--both before and after taxes--for the past 1-, 5-, and 10-year periods. The table must also include the returns of an appropriate broad-based index for comparison purposes. Also, toward the back of the prospectus is audited data on the fund's financial performance for each of the previous 5 years.

Beyond the prospectus, §404(c) also requires the following information:

- information relating to the type and diversification of assets comprising the portfolio;[37]

- the name, address, and phone number of the plan fiduciary responsible for providing the information;[38]

- any materials provided to the plan relating to the exercise of voting, tender, or similar rights which are incidental to the investment;[39]

- a description of or reference to plan provisions relating to the exercise of voting, tender or similar rights;[40]

- copies of any financial statements to the extent such information is provided to the plan;[41]

- copies of any reports to the extent such information is provided to the plan;[42]

- copies of any other materials relating to the investment alternatives to the extent such information is provided to the plan;[43]

- a list of the assets comprising the portfolio of each investment alternative;[44] and

- the name of the issuer of the contract, the term of the contract and the rate of return on the contract for each asset which is a fixed rate investment contract issued by a bank, savings and loan association, or insurance company.[45]

According to the DOL, these regulatory disclosure requirements apply not only to the initial investment decision but also to subsequent decisions with regard to the same investment.[46] This obligation to provide sufficient information reflects the understanding that investment decisions made by participants will directly affect the funds available to the participants at retirement.[47] Therefore, the DOL stresses that participants should be assured of having access to that information necessary to make meaningful investment decisions.[48]

Further, the DOL makes clear that the obligation to provide information to participants applies to those investments which are intended to satisfy the broad range requirements as well as other investments made available to the participants.[49] To emphasize the importance of distributing meaningful information to participants for investments that are or are not subject to the Securities Act of 1933, the DOL makes clear its expectations in

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the Preamble:

> "The Department is persuaded that *merely referring participants* and beneficiaries to a source for investment information *and requiring them to obtain the information is insufficient* to ensure that participants and beneficiaries are in a position to make informed investment decisions. While, as discussed below, there is nothing in the regulation which precludes a plan fiduciary from designating another person or persons to actually furnish the required information, the *regulation contemplates* that *the identified plan fiduciary will remain responsible for ensuring disclosure*."[50] (Emphasis added)

The challenge for those plan sponsors who use investment alternatives that are not subject to the Securities Act of 1933 is to develop customized disclosure materials that closely mimic the prospectus requirements.

Best Practice: If you offer investments subject to the Securities Act of 1933, your disclosure obligation is a prospectus plus the additional §404(c) requirements. If you offer investments which are not subject to the Securities Act of 1933, use the prospectus as a guideline and develop customized profiles, and also disclose information required by the additional requirements outlined in §404(c). Further, have ERISA counsel review the customized profiles and state in writing that the profiles meet the disclosure requirements of §404(c).

Myth: Disclosing the operating expense ratio of the investment is all the disclosure on expenses that is required.

Facts: The DOL has emphasized that participants must have sufficient information to make an informed decision. With regard to expenses, particularly implicit expenses, §404(c) requires a description of the amount as well as a description of the services rendered for the fees charged.[51] The preamble provides the following insights on the subject:

> "With respect to each investment alternative available under the plan, a description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with the purchase or sale of interests in such investment alternative (e.g., commissions, sales loads, deferred sales charges, redemption or exchange fees). With respect to investment alternatives which are not designated alternatives, the description need only state whether, or to what extent, transaction fees and expenses incurred in connection with the purchase or sale of interests in the investment alternative will be charged against the account of the participant or beneficiary . . . *This requirement relates to the disclosure of fees and expenses directly assessed against the participant's or beneficiary's account*, not expenses, fees or commissions incurred by the investment alternative attendant to the operation and management of the investment alternative."[52] (Emphasis added)

Further, the preamble states:

> "A *narrative description* of the annual operating expenses of each designated investment alternative, such as investment management fees, administrative fees and transaction costs, which reduce the rate of return to the participants or beneficiaries, and the aggregate

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> amount of such expenses expressed as a percentage of average net assets of the designated investment alternative (paragraph (b)(2)(i)(B)(2)(i)).”[53] (Emphasis added)

The description and narrative mandate is not satisfied by identifying the amount in a profile or prospectus, especially when the regulatory expense disclosure requirements include topics not included in a prospectus. By definition a description is a written or verbal explanation, whereas a narrative represents an act of telling. When applied to disclosing sufficient information it would be difficult to argue that the regulation is merely interested in a number without tying specific services to each number that makes up the whole.

Best Practice: Provide participants with a description of the amount charged for every service rendered. This is especially important in light of current concerns over undisclosed revenue sharing. More importantly, it is rare that a 401(k) plan offers a menu of investment alternatives where the undisclosed revenue sharing, in whatever form or description that may be, is the same amount across all investment options. This means that two participants sitting side by side with the same account balance may pay substantially different amounts of plan costs based upon the investments they select to hold in their individual account.

This discrepancy can easily be construed as a violation of the DOL's Field Assistance Bulletin 2003-3, and may also lead to a claim of fiduciary breach under ERISA §404(a)(1)(A) for failing to act solely in the best interests of the participants by charging a reasonable expense for the services rendered.[54] Furthermore, failure to report revenue sharing for services required to be identified on the Schedule C, line (g), when paid from plan assets[55] when the cost for those services exceeds $5000 can be construed as an act of concealing material nonpublic information. Concealment of such information causes a plan to fail to comply with § 404(c),[56] as well as failure to accurately reflect the characteristics and operations of the plan as required under the Reporting and Disclosure rules applicable to Form 5500.

Other Issues

In addition to the common myths that surround legitimate efforts to secure a §404(c) defense, there are also more esoteric issues that must be addressed. These are rarely discussed or considered, yet they are every bit as important as the better documented issues. These often ignored issues include:

Need for written procedures

There is no debate that if you claim a §404(c) defense, you must provide evidence to prove you are in compliance with the regulation. Because of the length and complexity of the regulation, it would be an overwhelming task to mount a compliance defense without a documented process. This is the number one reason that plan sponsors fail to secure the fiduciary relief §404(c) provides, and it is the easiest failure to correct. Written procedures provide the necessary documentation that a process is in place.

Designating investments

Most 401(k) plans offer a fixed number of look-through funds such as mutual funds, common funds, collective funds, managed accounts, pooled accounts, or separate accounts.[57] Whatever number of investment alternatives are selected and offered to participants become the designated options.[58] Section 404c-1(e)(4) provides a specific definition of a designated investment: “A designated investment alternative is a specific

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investment identified by a plan fiduciary as an available investment alternative under the plan."

Ironically, according to §404(c) a "designated fund" requires more disclosure than does a nondesignated fund. For example, if an investment alternative is designated, the fiduciary is obligated to provide a list of assets comprising the portfolio if a failure to disclose would deprive the participant of the opportunity to make an informed decision.[59]

Best Practice: A useful strategy to minimize disclosure obligations includes the designation of four broadly diversified investment alternatives such as passively managed Total Bond Market Index, Total Stock Market Index, Total International Stock Market Index, and a benefit sensitive Stable Value or Money Market fund. Offering these broadly diversified alternatives makes it unlikely they will experience a material change in the underlying holdings, with the possible exception of the stable value or money market fund. This approach will minimize the disclosure responsibilities of the plan sponsor and may add weight to the defense of a non-designated fund which is alleged to be imprudent.

Relying on electronic delivery of information

With advancements in technology many service providers have made prospectuses, investment profiles, and other disclosure materials (both required and optional) available online. This convenient approach saves time and money, but offers little to support a §404(c) defense unless the plan implements the safe harbor regulation under 29 C.F.R. §2520.104b-1. A safe harbor is available if the requirements of the regulation are followed which obligate the plan sponsor to give the participant the opportunity to affirmatively elect to receive information electronically. If a plan sponsor relies on electronic communications to meet its §404(c) responsibilities it must also comply with §104b-1.

Best Practice: Request written confirmation from the plan recordkeeper that the plan meets all the requirements of 29 C.F.R. §2520.104b-1 to secure the §404(c) defense. If the recordkeeper responds that the plan is not currently in compliance with the electronic communication regulation, request that the recordkeeper provide a description of its services to bring the plan into compliance with §104b-1.

Establishing a prohibited transaction policy

It is ironic that the DOL would include the prohibited transaction provisions of ERISA §406 in §404(c). Why would the DOL find it necessary to include wording in §404(c) that restricts prohibited transactions when prohibited transactions are already restricted? For example, a plan can comply with §404(c) yet fail to meet the prudent man rules applicable to selecting and monitoring investment managers or visa versa. However, by design the DOL intended to condition compliance with §404(c) upon compliance with ERISA §406. If the fiduciary defense provided is conditioned upon comprehensive compliance with §404(c), then a plan sponsor must logically, practically, and prudently address every regulatory requirement, including compliance with the prohibited transaction rules of ERISA §406.

Best Practice: This would suggest that a plan sponsor establish a written prohibited transaction policy which addresses both §404(c) and §406. By establishing a well crafted prohibited transaction policy, and having every fiduciary acknowledge receiving the policy and attest they have complied with the policy at each committee meeting, the plan sponsor has created another piece of evidence that supports a documented effort to comprehensively address every aspect of §404(c).

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Disclosing material nonpublic information

Many 401(k) plans today retain outside independent investment advisers as defined under ERISA §3(21), and in some cases investment managers as defined under ERISA §3(38). These advisers and managers normally provide detailed investment analysis of the investment menu on a quarterly basis to the investment committee. This information, which is not typically shared with participants, may be considered material nonpublic information. Furthermore, many corporate custodians, trustees, and recordkeepers produce two distinctly different sets of investment profiles for the plan. One set is given to the participants and the other exclusively to the investment committee members. In both cases, material nonpublic information is distributed to the plan which is not given to the participants. Another example of material nonpublic information pertains to revenue sharing and the allocation of fees by investment alternative. By failing to give participants this information, it can be argued the fiduciaries have withheld sufficient information that would permit participants to exercise independent investment control and make informed decisions.[60]

Best Practice: Any information prepared for the named fiduciary or investment committee should be summarized and made available to the participants regardless of the source from which the investment information is received, including the actual expenses assessed to each investment alternative by services provided.

Permissible reasons to decline a participant's investment instructions

Section 404(c) permits the plan sponsor to impose restrictions or limitations on a participant's exercise of control. The preamble and regulation provide a list of permissible restrictions but indicate the list is not all-inclusive. Nevertheless, few 401(k) plans would have trouble meeting the requirements by plan design, since it is highly unlikely that any 401(k) plan would, by design, permit a participant to engage in any of the following transactions:

- violate the governing plan documents;[61]
- maintain the indicia of ownership of plan assets outside the jurisdiction of the district courts of the United States;[62]
- jeopardize the plan's tax qualified status under the Internal Revenue Code;[63]
- incur a loss in excess of a participant's account balance;[64]
- engage in a direct or indirect sale, exchange, or lease of property between a plan sponsor and the plan, except for the acquisition or disposition of any qualifying employer security;[65]
- engage in the acquisition or sale of any employer security, with some exceptions;[66]
- engage in a direct or indirect loan to a plan sponsor or any affiliate;[67]
- engage in a direct or indirect acquisition or sale of any employer real property;[68]
- commit a prohibited transaction;[69] or
- generate income that would be taxable to the plan.[70]

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Although this specific list of restrictions is outlined in §404(c), the plan sponsor may add other restrictions as long as those restrictions are reasonable and do not restrict participants' ability to exercise independent investment control over their individual account balance. More importantly, should a plan sponsor bother identifying these restrictions if, by design, a participant could never engage in any of these transactions? Most 401(k) plans offer a limited menu of mutual funds with no means available for a participant to engage in a transaction that would violate any of the restrictions mentioned unless a self-directed brokerage account were available. Why, then, would the plan sponsor tell participants they cannot do something that is not permitted by law or plan operation?

In the words of William Shakespeare, “I dare not fight; but I will wink and hold out mine iron.”[71] In other words, it is unnecessary to fight a battle that can be won by simply showing you have complied with little inconvenience. By including language which informs participants that a plan fiduciary may decline to process an investment instruction that would violate the DOL's regulatory restrictions, the plan sponsor gains substantiating evidence to support its effort to comply with §404(c).

Best Practice: First, review the plan document to ensure that all investment alternatives are permitted by the governing plan documents. Next, since the plan sponsor has the burden of proving compliance, it is highly recommended that each of these restrictions be incorporated within the Summary Plan Description. Although the restrictions will undoubtedly never apply, the fact that they are included provides important evidence of a meticulous effort to comply with §404(c). Keep in mind that the regulation does not endorse selective compliance; therefore, do not risk losing the fiduciary relief over a minor technicality.

High risk money market funds

A high risk money market fund seems to be a contradiction in terms. A low risk investment is typically defined as one that is unlikely to incur any loss of principal, and money market funds are known to be low risk, liquid investment options. Along with many of the benefit sensitive stable value funds, money market funds offer participants a means to realize a return without risk of loss of principal, although they may experience a loss in purchasing power if the money market does not keep pace with inflation. In addition, a money market fund typically meets the regulatory guidelines of §404(c). Specifically, the regulation states: “Participants and beneficiaries are permitted to direct their investments ... into an *income producing, low risk, liquid fund*, subfund, or account as frequently as they are permitted to give investment instructions....”[72] (Emphasis added)

Additionally, a money market or stable value fund represents an asset class which complies with the broad range rules. However, what makes the money market, in particular, troublesome is the potential for losses to occur within the fund itself. Although it is rare for a money market to have a par value below one dollar from the rolling twelve-month period ending September 2002 through the rolling twelve-month period ending May 2005, the category average of all money market funds did not produce an annualized return greater than 1.5 percent.[73] In fact, of the 33 rolling twelve-month periods analyzed, in 22 the gross annualized return was between one-half and one percent. If implicit expenses exceeded one-half percent during that time frame, a participant would have experienced a loss in principal on funds held in a money market account.

In light of this reality, is it prudent for a plan sponsor to offer a money market fund that produces negative returns with accompanying loss of principal? Further, if a plan sponsor

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offers a money market fund that experiences a loss, does the plan sponsor lose the protection of §404(c), since the investment alternative fails to produce income as required in the regulation? These two questions should persuade an investment committee to consider a benefit sensitive stable value fund if their 401(k) plan includes implicit fees of one-half percent or greater, or if their money market account experienced returns averaging less than one-half percent during the market cycle analyzed.

Best Practice: A plan sponsor has two options. It may either: (1) have the company pay all add-on expenses directly so the only implicit fee is the internal operating expense ratio of the money market fund; or (2) offer a benefit sensitive stable value fund with no liquidation or surrender fees, since stable value funds did not experience the low rate of return that money markets experienced during the same time frame.

Conclusion

This review of the unique peculiarities of §404(c) should provoke discussion regarding the documented process the plan sponsor currently has in place. Regardless of whether a plan sponsor is supportive of or skeptical toward §404(c), it remains the only approved process to establish a meaningful defense against claims for participants' investment losses or lack of gains. It cannot be stressed enough that every sponsor of a 401(k) plan with participant direction should become knowledgeable about the salient characteristics of a §404(c) compliant plan in order to better evaluate the requirements to secure the fiduciary defense §404(c) provides.

For additional discussion of ERISA §404(c), see the report Fiduciary Concerns: Self-Directed Accounts, Investment Discretion, and Asset Valuation.

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Footnotes

[1] Interview of Robert Morris, chief operating officer of Larkspur Data Resources, Inc., April 19, 2007. Mr. Morris may be reached at (800) 282-4567. According to Larkspur's Web site, http://www.planriskprofile.com, “It may be surprising, but our research has uncovered over 300,000 plans (large and small), covering 25 million individuals that have the same major flaw that was involved in the Enron case.”

[2] I.R.C. Form 5500, question 8a, code 2F.

[3] 29 C.F.R. §2550.404c-1(a)(1).

[4] *See* ERISA § 404(a)(1)(A).

[5] Compliance changes with new decisions and rulings and as “best practice” standards evolve. What was acceptable compliance a few years ago may no longer be sufficient. As the law and a plan sponsor's situation evolve, to preserve the benefits of §404(c) a plan sponsor should periodically perform an internal audit and review the legal requirements. *Are You Protected? Demonstrating Compliance with Section 404(c) of ERISA*, Don Carlson and Timothy Goodman, Dorsey & Whitney LLP, Feb. 12, 2004.

[6] ERISA § 404(a)(1)(B).

[7] Civil Action No. H-01-3913 (S.D. Tex., filed Aug. 30, 2002).

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[8] 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments.

[9] Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489 (N.Y. 1918).

[10] *Id.*

[11] Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 381 (4th Cir. 2001) (citation omitted); *see also* Davis v. Bowman Apple Products Co., No. CIV.A. 500CV00033, 2002 WL 535068, at *6-7 (W.D. Va. Mar. 29, 2002) (citing *Griggs* for "duty to correct"). *See* 29 C.F.R. 2550.404a-1(b)(1)(i): "With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, *the fiduciary knows or should know are relevant to the particular investment or investment course of action involved*, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties." (Emphasis added)

[12] *Id.*

[13] See the preamble to the final regulation 57 Fed. Reg. 46907, 46908, 46922, 46923, 46924, 46927 (Oct. 13, 1992).

[14] 57 Fed. Reg. 46907 (Oct. 13, 1992).

[15] 29 C.F.R. § 2520.104b-1.

[16] 29 C.F.R. § 2520.102-3(d).

[17] Pension Protection Act of 2006, P.L. 109-280 (Aug. 17, 2006); § 404(c)(5).

[18] 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(1).

[19] "Technology has already eliminated practical aspects of this problem to a great extent. Increasingly, 401(k) and other defined contribution plans are offering daily valuation of funds. A Hewitt Associates study found that 22% of defined contribution plans now offer daily valuation and daily transfer of existing balances. And since daily valuations are already calculated, offering daily transfers is fairly straightforward technologically, and might not result in additional fees, Prudential's Fetting says." *Desperately Seeking Safe Harbor*, Tina Ruyter, http://www.plansponsor.com/magazine_type1/?RECORD_ID=11970, (July 1993).

[20] Don Carlson and Timothy Goodman, *Are You Protected? Demonstrating Compliance with Section 404(c) of ERISA* (Feb. 12, 2004), available at http://www.dorsey.com/files/tbl_s21Publications/PDFUpload141/599/EmpBen021204.pdf.

[21] 29 C.F.R. § 2550.404c-1(a)(1).

[22] 29 C.F.R. § 2550.404c-1(a)(2).

[23] 29 C.F.R. §2550.404c-1(b)(2)(ii)(A).

[24] 29 C.F.R. §2550.404c-1(b)(2)(ii)(B).

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[25] 29 C.F.R. §2550.404c-1(b)(2)(ii)(C).

[26] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1).

[27] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(viii).

[28] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(2).

[29] 29 C.F.R. §2550.404c-1 (b)(2)(i)(B)(2)(ii).

[30] New Rule 498 - Investment Company Act Release No. 22529 (Feb. 27, 1997) (62 FR 10943), correction (62 FR 24160) ("Profile Proposing Release").

[31] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(ii), and 404c-1(b)(2)(i)(B)(1)(ii).

[32] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(iii).

[33] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(v), and § 404c-1(b)(2)(i)(B)(2)(i).

[34] 29 C.F.R. §2550.404c-1 (b)(2)(i)(B)(1)(viii), § 404c-1(b)(2)(i)(B)(2)(ii).

[35] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(2)(iii), § 404c-1(b)(2)(i)(B)(2)(iv), and § 404c-1(b)(2)(i)(B)(2)(v).

[36] *Id.*

[37] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(ii).

[38] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(vi).

[39] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(ix).

[40] *Id.*

[41] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(2)(ii).

[42] *Id.*

[43] *Id.*

[44] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(2)(iii).

[45] *Id.*

[46] 57 Fed. Reg. 46909 (Oct. 13, 1992).

[47] 57 Fed. Reg. 46910 (Oct. 13, 1992).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] 29 CFR §2550.404c-1(b)(2)(i)(B)(1)(v).

[52] 57 Fed. Reg. 46911 (Oct. 13, 1992).

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[53] 57 Fed. Reg. 46912 (Oct. 13, 1992), 29 CFR §2550.404c-1(b)(2)(i)(B)(2)(i).

[54] "...if a method of allocation has no reasonable relationship to the services furnished or available to an individual account, a case might be made that the fiduciary breached his fiduciary duties to act prudently and "solely in the interest of participants" in selecting the allocation method." Field Assistance Bulletin 2003-3, (May 19, 2003).

[55] In the case of a plan that invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, solely by reason of such investment, be deemed to include any assets of such investment company. ERISA 401(b)(1).

[56] 29 CFR §2550.404c-1(c)(2)(ii).

[57] 29 C.F.R. §2550.404c-1(e)(1)

[58] According to a survey by Deloitte Consulting, *Annual 401(k) Benchmarking Survey, 2005/2006 Edition*, available at http://www.iscebs.org/PDF/srvy401kresults_06.pdf, 401(k) plans offer an average of 17 investment choices.

[59] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(ii).

[60] 29 C.F.R. §2550.404c-1(b)(2)(i)(B)(1)(ii), 404c-1(c)(2)(ii).

[61] 29 CFR §2550.404c-1(d)(2)(ii)(A).

[62] 29 CFR §2550.404c-1(d)(2)(ii)(B).

[63] 29 CFR §2550.404c-1(d)(2)(ii)(C).

[64] 29 CFR §2550.404c-1(d)(2)(ii)(D).

[65] 29 CFR §2550.404c-1(d)(2)(ii)(E)(1).

[66] 29 CFR §2550.404c-1(d)(2)(ii)(E)(4)(ii).

[67] 29 CFR §2550.404c-1(d)(2)(ii)(E)(2).

[68] 29 CFR §2550.404c-1(d)(2)(ii)(E)(3).

[69] 29 CFR §2550.404c-1(d)(3).

[70] 29 CFR §2550.404c-1(b)(2)(ii)(B)(2).

[71] William Shakespeare, Henry V, H: 1.

[72] 29 C.F.R. §2550.404c-1(b)(2)(ii)(C)(3)(ii).

[73] Morningstar® Principa® as of December 31, 2006.

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