

What 404c Requires

Some fiduciaries have skimmed summaries of 404c and concluded that they are "safe" if the plan offers participants at least three diversified investment choices, along with opportunity to make frequent changes among them. However, the regulation clearly specifies that participants also must have "sufficient information to make informed investment choices." A subsequent Interpretative Bulletin issued by the Department of Labor (96-1) clarifies what this means, as well as the potential loss of 404c protection for companies that offer participant investment advice.

Here is a 404c compliance checklist:

- Have all eligible participants been clearly informed that the plan intends to comply with 404c?
- Have participants been given the name, address and phone number of the plan fiduciaries responsible for providing investment information?
- Does the plan have a written Investment Policy Statement (IPS) and does it explicitly state that the plan intends to comply with 404c?
- Has the plan's annual Summary Plan Description been checked against specific requirements of 404c? Has this process been documented in the plan's compliance file? Have plan documents been reviewed by an ERISA compliance attorney?
- Does the plan have a published schedule of participant information and education events? Is a document file maintained, containing copies of all communications with plan participants? At every meeting with plan participants, is a list of attendees recorded and filed?
- Have any restrictions on transferring to or from an investment choice been clearly communicated to participants?
- Have all transaction fees and commissions that affect the participant been disclosed? Specifically, have participants been given a description of the annual operating expenses of each designated investment alternative?
- The DOL has defined four specific categories of participant communication that do not constitute "investment advice" for purposes of limiting 404c protection. They are:
 - 1) plan information
 - 2) general financial and investment information
 - 3) asset allocation models
 - 4) interactive investment materials, such as worksheets, PC illustrations, etc. The common denominator of all four is that they don't steer the participant in any particular investment direction. Does the plan's investment advice meet this test?
- If an asset allocation model identifies a specific investment alternative available under the plan, have participants been advised that investment alternatives with similar risk and return characteristics also are available?
- If calculators are used in investor education, are they based on generally accepted investment theories? Do they clearly disclose the "what if" assumptions on which they are based, such as retirement age, income levels, inflation rates, rates of return, and all plan investment alternatives?
- Has the plan taken a survey of participants to determine their level of investment knowledge? Are plan communications written in a style and language that participants can clearly understand?
- Are plan fiduciaries aware of specific duties that may not be delegated or protected under 404c, including prudent selection and monitoring of investment menu choices?
- Does the plan have a formal process for evaluating investment managers' adherence to fund objectives, including a written evaluation report?
- Does the plan have fiduciary liability insurance from a carrier such as American International Group (AIG); Lloyd's of London, Reliance Insurance, Travelers Property Casualty, or Chubb Executive Risk? The cost of this coverage typically is about 5% of the coverage limit purchased - \$25,000 per year for a \$5 million policy. Premiums can double or triple for participant-directed plans that offer either of two investment choices:
 - 1) company stock
 - 2) a self-directed brokerage option.

The 404c regulation is published by the DOL here:
http://www.dol.gov/dol/allcfr/ebsa/Title_29/Part_2550/29CFR2550.404c-1.htm

For more information, see DOL Interpretative Bulletin 96-1 located here:
http://www.dol.gov/ebsa/reg/fedreg/final/96_14093.htm