

Participant Fee Disclosure Regulations – Part IX: ERISA §404(c) Changes

1/31/2011

This is Part IX in the series of technical updates relating to the October 2010 participant fee disclosure regulations. The new regulations make both substantive and cosmetic changes to the 404(c) landscape. This Technical Update will provide a brief background regarding 404(c) and will discuss the changes the regulations have made.

Q-1: What is 404(c)?

ERISA §404(c)(1) provides in part that if a defined contribution plan permits participant investment direction, and a participant in fact exercises control over the assets of his or her account, then plan fiduciaries are not liable for any loss which results from the participant's exercise of control. This section protects the fiduciary from being liable for the participant's investment actions.

The same protection extends to beneficiaries who can direct investments. Throughout this Technical Update, any reference to participants also includes beneficiaries.

Q-2: What must happen for a plan fiduciary to have the benefit of 404(c) protection?

The DOL has issued detailed regulations on this provision. In brief, the plan must give participants a reasonable opportunity to give written investment instructions to a plan fiduciary, which generally will follow those instructions. Participants must be able to select from a broad range of investment alternatives and to give instructions at least quarterly. Protection under ERISA §404(c)(1) only applies to transactions the participant authorized, although QDIA protection under ERISA §404(c)(5) can apply to default investments.

Additionally, the participant must receive, or be entitled to receive, certain information regarding the plan, its available investments, and any specific investment the participant has selected. Much of this information duplicates the information the plan administrator must provide under the new participant fee disclosure regulations under ERISA §404(a).

Q-3: How will the participant disclosure regulations change the 404(c) information requirements?

The new regulations drastically reduce the volume of information listed in the 404(c) regulations themselves, because the information is now required under the 404(a) regulations. Under the new rules effective for plan years beginning after October 31, 2011, a plan satisfies the 404(c) information requirements for a participant if:

- The participant receives an explanation that the plan is a 404(c) plan and therefore the fiduciaries may not have liability for losses resulting from the participant's choices;
- The participant receives the information required under the new participant disclosure regulations under ERISA §404(a); and
- If the plan offers employer securities as an investment alternative, the participant receives a description of the procedures established to provide for the confidentiality of information regarding holding and voting those securities, including contact information for the responsible fiduciary.

Q-4: How does the information the new 404(a) regulations require compare with the information required by the existing 404(c) regulations?

The requirements are very similar. The new 404(a) regulations require more disclosures regarding plan expenses and investments, and mandate that investment disclosures come as a comparative chart. The new regulations mandate providing some information that previously was available only if the participant requested it. On the other hand, the 404(c) regulations required that when the participant made an initial investment, the participant receive a copy of the prospectus. Under the new rules, the plan must deliver a prospectus only if the participant requests it.

Q-5: A plan can choose to operate without 404(c) protection. In that case, the plan could avoid the 404(c) information requirements. Will the same choice apply to the new 404(a) information requirements?

No. One of the main reasons the DOL moved the information requirements to 404(a) was to make the disclosures mandatory for all participant directed defined contribution plans, whether or not the employer wishes to have 404(c) protection for the plan.

Q-6: Does 404(c) protection apply to a fiduciary's selection of designated investment alternatives which the plan will make available to participants, or to the selection of service providers?

According to the final regulations, no. The regulations state that 404(c) protection does not relieve a fiduciary "from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan." While the DOL has long contended that this is the case, courts have sometimes interpreted 404(c) more broadly. The final regulations attempt to narrow the scope of 404(c) protection. The fiduciary is not liable for the participant's choices, but remains responsible for the fiduciary's own decisions and actions. A similar clause appears in the 404(a) regulations.

SAMPLE FORMS

SunGard has developed the following forms and checklists to assist practitioners to implement both the participant fee and the service provider fee disclosure regulations:

- SERVICE PROVIDER FEE DISCLOSURE FORM
- PARTICIPANT FEES QUARTERLY DISCLOSURE STATEMENT
- PARTICIPANT FEES ANNUAL DISCLOSURE STATEMENT
- Checklist of Covered Service Provider Disclosure Requirements
- Checklist of Participant Fee Disclosure Requirements

We will provide attendees of our [Plan Fees Workshop](#) and our [Orlando Advanced Pension Conference](#) copies of the sample forms. The sample forms will also be in the ERISA Forms segment of the [Pension Library](#).

[Plan Fees Workshop: Navigating the Maze – Jan/Feb 2011](#)

The DOL has spent years working on guidance related to plan fees. What can the plan pay? How can fiduciaries understand what the plan is paying? What must fiduciaries tell participants? What must fiduciaries tell the DOL? What must those charging the fees disclose? Finally, it is all coming together, with several sets of new regulations and new requirements. Unfortunately, the various pieces of guidance use different thresholds and different terminology (or, even worse, the same terms to mean different things). The result, instead of understanding, is a maze of confusion and frustration. Attend this new workshop to find out what the rules are and what they mean for you. Learn what to expect and what to do. We will help you get through the maze of regulations to achieve compliance with the new disclosure requirements. We also will provide sample forms to facilitate compliance with the new regulations. Register for the workshop on our [Web site](#).

[Orlando Advanced Pension Conference – Seats Are Still Available](#)

February 9-11, 2011. Learn the latest pension updates, including: the DOL's new rules on fiduciaries and investments; service provider fee disclosure regulations; the participant fee disclosure rules; and more. Earn up to 19 hours of continuing education credits including 1 ethics hour. View the complete agenda and [register online](#).

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