Sample 404(c) Compliance Checklist

ERISA Section 404(c) provides that if an individual account plan permits participants (or beneficiaries) to exercise control over the assets in their respective accounts, and such participants (or beneficiaries) exercise control over the assets in their accounts, the plan fiduciary will not be liable for losses resulting from investment choices made by the participant (or beneficiary). This protection is available if the plan complies with the requirements contained in ERISA Section 404(c) as outlined in the checklist below.

Note that special additional requirements apply if Section 404(c) protection is desired for changes in investment line-up or blackout periods. Those requirements are not reflected in this checklist.

PLAN DESIGN REQUIREMENTS

☐ 1. Offer three or more funds that are diversified, have materially different risk and return characteristics that enable participants to achieve a portfolio with aggregate risk and return characteristics within the range normally appropriate for each participant and allow the participant to minimize risk by diversification.

☐ 2. Permit fund transfers at least quarterly and with a frequency that is appropriate in light of market volatility.

☐ 3. Provide participants with the opportunity to give investment instructions at least once every 3 months to a plan representative that is responsible for collecting investment instructions and forwarding the information to execute the transactions.

☐ 4. Designate plan representatives to be responsible for satisfying the disclosure requirements.

☐ 5. Monitor the performance of the funds and complete a formal review at least annually. A written fund review along with a written investment policy is preferred.

☐ 6. If ERISA 404(c) protection is desired for amounts invested in a default fund: (a) plan participants must have been given an opportunity to, and failed to, direct the investment of the assets; (b) the assets are invested in a Qualified Default Investment Alternative (QDIA) that satisfies the regulations; (c) transfers are allowed as frequently as other plan investments, but not less than once every three months; and (d) any transfer or withdrawal is not subject to restrictions, fees or expenses during the first 90-days.

☐ 7. The Plan must contain a statement that it is intended to constitute a plan described under section 404(c) of ERISA and 29 CFR 2550.404a-5, and that the fiduciary of the plan may be relieved of liability for any losses that are the direct and necessary result of investment instructions given by such participant or beneficiary.

DISCLOSURE REQUIREMENTS

As noted in item 7 above, the plan fiduciary must provide an explanation that the plan is intended to be a Section 404(c) plan and that plan fiduciaries may be relived of liability for any loss that is the direct and necessary result of investment instructions given by the participant. In addition, the fiduciary must furnish the information listed in items 1 through 7 below to all current participants, beneficiaries, and alternate payees and on an ongoing basis to all newly eligible participants and to any new beneficiaries or alternate payees.

Coordination with participant fee disclosure requirements: ***The new participant fee disclosure regulation under ERISA §2550.404a-5 requires the plan fiduciary to furnish these same disclosures to all participants, whether or not the plan intends to comply with ERISA 404(c). To avoid duplication of disclosure requirements under ERISA Sections 404(c) and 404(a), the final participant fee disclosure regulation also modified the Section 404(c) regulation so that it incorporates the disclosure requirements set forth under ERISA §2550.404a-5 by reference. Hence, the ERISA Section 404(c) disclosure requirements listed below will be met when the annual and quarterly participant fee disclosure requirements under ERISA §2550.404a-5 are furnished to participants. (For details on the 404(a) participant fee disclosure requirements please see Qualified Plan News 2011-2 available at*** *http://foremployers.voya.com/articles/401k-infocenter*)

☐ ***1. Provide an explanation of how participant may give investment instructions, state any limitations on those instructions, including restrictions on transfers.***

☐ ***2. Provide a description of funds including the type and diversification of assets and the risk and return characteristics.***

☐ ***3. If the plan uses designated investment managers, identify each such manager by name, address and phone number.***

☐ ***4. If there are investment transaction fees or expenses charged directly to individual participants accounts, describe those fees.***

☐ ***5. If there are voting, tender or similar rights available with respect to any of the funds offered, describe any restrictions on those rights. Please note that if these rights are passed through to participants, you must pass on to participants any materials provided to the plan that are attendant to those rights.***

☐ ***6. The name, address, and phone number of the plan fiduciary responsible for giving information upon request.***

☐ ***7. If ERISA 404(c) protection is intended for a QDIA, participants must receive:***

- ***Investment information outlined above as it relates to the QDIA.***
- ***Timely initial and annual QDIA notices.***

Distribute timely upon request: The following information must be provided if requested by the participant or beneficiary.

☐ ***1. Provide all prospectuses, financial statements or other reports regarding the funds available under the plan.***

☐ ***2. Provide a description of the annual operating expenses of each investment fund, including any investment management fees.***

☐ ***3. Provide information on the value of shares or units in each fund, and the past and current investment performance of the fund.***

☐ ***4. If a Guarantee Investment Contract (do you mean an annuity contract?) is available as an investment option, provide the name of the issuer, the term of the contract, and the rate of return of the contract.***

☐ ***5. Provide participants' most recent account statements.***

☐ ***6. Provide a copy of the plan's most recent Form 5500 series filing.***

A separate disclosure does not need to be distributed if the information requested is provided in other information distributed to participants

<u>IRS Circular 230 Disclosure</u>
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