

404(c) and 404a-5 Checklist

Plan Sponsor: _____
Plan Name(s): _____
Record Keeper: _____
Advisor: _____

Overview

The new participant disclosure regulation under ERISA 404a-5 requires the plan fiduciary¹ to furnish much of the same disclosures to all participants formerly required under 404(c) whether or not the plan intends to comply with ERISA 404(c).

Under the old 404(c) regulation, there was a long list of participant disclosures. While 404(c) was not mandatory, 404a-5 is. Previously, if a plan met the 404(c) participant disclosures, it would be considered an “ERISA Section 404(c) plan”, and it would be relieved from fiduciary liability for participant investment decisions. If the plan failed to make the disclosures, it would simply not be considered an “ERISA Section 404(c) plan” and would not be eligible for relief from liability for participant investment decisions. Now, with the 404a-5 rules in effect, plan sponsors are required to provide participant disclosures, regardless of whether they intend to be a 404(c) plan.

History

Under the Employee Retirement Income Security Act of 1974 (ERISA), plan sponsors are responsible for all investment decisions, including those made by the participants in participant-directed plans, unless the plan is an “ERISA Section 404(c) plan.” Section 404(c) of ERISA provides that, if a plan permits the participants to exercise control over the assets in their accounts and they actually do so, the plan sponsors are not liable for any loss that results from such exercise of control so long as the plan complies with the requirements of the Department of Labor (DOL) Regulation under Section 404(c). That Regulation describes the circumstances under which a participant or beneficiary is considered to have exercised independent control over the assets in his or her account as contemplated by Section 404(c).

How is 404(c) “linked” with 404a-5?

Since 404(c) protection itself is optional, the prior disclosures under 404(c) were optional. However, the DOL wanted the participant disclosures to be mandatory for all participant directed plans. Therefore, they put the recent disclosures under their regulations for ERISA 404(a) instead of 404(c), and simply cross-referenced the new rules, saying that 404(c) compliance now includes the mandatory 404a-5 requirements.

How can this resource help me?

This checklist is intended to help plan sponsors monitor how the plan they are responsible for is meeting the Regulation’s requirements to be an “ERISA Section 404(c) plan,” including the mandatory disclosure requirements under ERISA 404a-5. It lists the requirements that must be met (including a reference to the DOL regulation where that requirement can be found) and provides an explanation of the requirements and instructions regarding compliance where appropriate.

The checklist below is organized into five sections.

- 1.) the general requirements for plans that intend to comply with Section 404(c);
- 2.) the information that must be furnished to participants and beneficiaries;
- 3.) the information that must be available to participants, upon request;
- 4.) special requirements that apply to plans that include employer securities or annuities as an investment option; and
- 5.) restrictions that may be imposed.

For plans that do not intend to comply with ERISA 404(c), please note that references to DOL regulations specifically pertaining to ERISA 404a-5 are notated in red for quick reference.

I. General Requirements	Is This Requirement Satisfied? (Yes Or No)	How Is This Requirement Satisfied?
<p>A. The plan must be an “individual account plan”– i.e., a 401(k) plan or profit sharing plan? <i>2550.404c-1(b)(1)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>B. The plan must permit the participants to give instructions, written or otherwise, with respect to the investment of their accounts. <i>2550.404c-1(b)(1)(i)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>C. The plan must provide participants the opportunity to exercise control over the assets in their accounts NOTE: This requirement is fully discussed in Section II, below. <i>2550.404c-1(b)(2)(i)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>D. The plan must provide participants the opportunity to receive written confirmation of investment instructions NOTE: This requirement can be satisfied automatically by providing confirmation of investment instruction. <i>2550.404c-1(b)(2)(i)(A)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>E. The plan must offer participants a choice from a broad range of investment alternatives. A plan will meet this requirement only if the available investment alternatives are sufficient to provide the participant with a reasonable opportunity to satisfy the requirements listed below: <i>2550.404c-1(b)(3)(i)</i> The participants must be able to choose from at least three investment alternatives that will permit them to materially affect the potential return and the degree of risk on amounts in their individual accounts.</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>1. Each alternative must be diversified. <i>2550.404c-1(b)(3)(i)(B)(1)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>2. Each alternative must have materially different risk and return characteristics. <i>2550.404c-1(b)(3)(i)(B)(2)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>3. In the aggregate, the alternatives must enable the participant by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary <i>2550.404c-1(b)(3)(i)(B)(3)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

(Continued)

I. General Requirements , <i>continued</i>	Is This Requirement Satisfied? (Yes Or No)	How Is This Requirement Satisfied?
<p>4. Each of the alternatives, when combined with investments in the other alternatives, tends to minimize through diversification the overall risk of a participant's portfolio.</p> <p><i>2550.404c-1(b)(3)(i)(B)(4)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>5. The participants must be able to diversify the investment of their accounts so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' accounts.</p> <p><i>2550.404c-1(b)(3)(i)(C)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

II. Information That Must Be Provided to Participants and Beneficiaries	Is This Information Available to Participants (Yes Or No)	How Is This Requirement Satisfied?
<p>A. The plan must identify the fiduciary (or the person designated to act on its behalf) to provide requested information.</p> <p><i>2550.404c-1(b)(2)(i)(B)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>B. The plan must provide an explanation to participants that it is intended to constitute a plan described in ERISA Section 404(c) and regulations, and that the fiduciary of the plan may be relieved of liability for any losses that are a result of investment instructions given by the participant.</p> <p><i>2550.404c-1(b)(2)(i)(B)(1)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>C. The plan must provide the information required pursuant to the 2550.404a-5 participant-level fee disclosure rules, described in 1–5 below.</p> <p><i>2550.404c-1(b)(2)(i)(B)(2)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>1. Disclosure of the plan-related information listed in a–f below must be based on the latest information available to the plan, and must be provided on or before the date on which participants can direct their investments, and annually thereafter.</p> <p><i>2550.404a-5(c)(1)(i)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>(a) An explanation of the circumstances under which investment instructions may be given, and any specified limitations on such instructions, including restrictions on transfers to or from a designated investment alternative (DIA).</p> <p><i>2550.404a-5(c)(1)(i)(A) & (B)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

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II. Information That Must Be Provided to Participants and Beneficiaries , <i>continued</i>	Is This Information Available to Participants (Yes Or No)	How Is This Requirement Satisfied?
(b) A description of any plan provisions relating to the exercise of voting, tender and similar rights related to a DIA, and any restrictions on such rights. <i>2550.404a-5(c)(1)(i)(C)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) Identification of any DIAs offered under the plan and any designated investment managers. <i>2550.404a-5(c)(1)(i)(D) & (E)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) Description of any brokerage windows or self-directed brokerage accounts or similar arrangements that allow participants to select investments beyond those designated by the plan. <i>2550.404a-5(c)(1)(i)(F)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(e) Description of any fees for general plan administrative services (e.g., legal, accounting, recordkeeping) that may be charged against the participant's account and are not included in the total annual operating expenses of investments, as well as the method of allocation of such charges among participant accounts (e.g., pro rata, per capita). <i>2550.404a-5(c)(2)(i)(A)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(f) Description of any fees that may be charged against an individual participant's account rather than on a plan wide basis and are not included in the total annual operating expenses of investments. <i>2550.404a-5(c)(3)(i)(A)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(g) If there is a change to the information described in a–f above, the plan must provide notice of the change at least 30 days, but not more than 90 days, in advance of the effective date of such change. <i>2550.404a-5(c)(1)(ii) & (2)(i)(B) & (3)(i)(B)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
2. Disclosure of the investment-related information in a–i below must be based on the latest information available to the plan, and must be provided on or before the date on which participants can direct their investments, and annually thereafter. The information in a–i must be provided in a comparative chart format to facilitate a comparison of each DIA under the plan. <i>2550.404a-5(d)(1) & 2550.404a-5(d)(2)(i)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

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II. Information That Must Be Provided to Participants and Beneficiaries , <i>continued</i>	Is This Information Available to Participants (Yes Or No)	How Is This Requirement Satisfied?
(a) Name of each DIA and a description of the type or category of the investment. <i>2550.404a-5(d)(1)(i)(A) & (B)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(b) For each DIA whose return is not fixed, the average annual return for the last 1-, 5-, and 10-calendar year-periods, and a statement that past performance is not necessarily an indication of future performance. <i>2550.404a-5(d)(1)(ii)(A)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(c) For each DIA whose return is fixed, the fixed annual rate of return and the term of the investment; and if the issuer of the investment has the right to adjust the fixed rate of return, a statement that the issuer may adjust the rate of return and how to obtain (e.g., telephone or website) the most recent rate of return. <i>2550.404a-5(d)(1)(ii)(B)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(d) For DIAs whose return is not fixed, the name and returns of an appropriate market index for the last 1-, 5-, and 10-calendar-year periods for benchmark purposes. <i>2550.404a-5(d)(1)(iii)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(e) For DIAs whose return is not fixed, <ul style="list-style-type: none"> • the amount and a description of each shareholder-type fee (e.g., sales charges that are not included in the total annual operating expenses), and any restrictions on transfers or withdrawals of the investment; • the total annual operating expenses expressed as a percentage (i.e., expense ratio) and a dollar amount for a \$1,000 investment; • A statement that fees and expenses are only one of several factors to consider when making investment decisions; and • A statement that the cumulative effect of fees can substantially reduce the growth of a participant’s account, and participants can visit the Employee Benefit Security Administration’s website for an example of the long-term effects of fees. <i>2550.404a-5(d)(1)(iv)(A)(1)-(5)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

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II. Information That Must Be Provided to Participants and Beneficiaries , <i>continued</i>	Is This Information Available to Participants (Yes Or No)	How Is This Requirement Satisfied?
(f) For DIAs whose return is fixed, the amount and describe shareholder-type fees and any restriction on a purchase, transfer or withdrawal. <i>2550.404a-5(d)(1)(iv)(B)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(g) A website address that for each DIA (as applicable to the investment) provides the name of the issuer and the objectives and strategies of the investment, including a description of the types of assets held, portfolio turnover rate, performance data updated at least quarterly or more frequently if required by other law, and fee and expense information. <i>2550.404a-5(d)(1)(v)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(h) Include a glossary (or a website address that includes a glossary) of general terms to assist participants in understanding DIAs. <i>2550.404a-5(d)(1)(vi)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
(i) Include a statement identifying the name, address and telephone number of the plan administrator to contact to request information; a statement that additional investment-related information is available at the website address provided; and a statement explaining how to request free paper copies of the information. <i>2550.404a-5(d)(2)(i)(A)-(C)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
3. Subsequent to an investment in a DIA, provide to the participant any materials provided to the plan related to the exercise of voting, tender and similar rights to the extent that such rights are passed through to participants under the terms of the plan. <i>2550.404a-5(d)(3)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
4. At least quarterly, the plan must furnish a statement showing the dollar amount of any fees for general plan administrative services charged against the participant's account for the quarter, a description of the services to which the charges relate, and if applicable, an explanation that some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (e.g., revenue sharing). <i>2550.404a-5(c)(2)(ii)(A)-(C)</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

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II. Information That Must Be Provided to Participants and Beneficiaries , <i>continued</i>	Is This Information Available to Participants (Yes Or No)	How Is This Requirement Satisfied?
<p>5. At least quarterly, the plan must furnish a statement showing the dollar amount of fees actually charged to a participant's account on an individual rather than a plan wide basis during the preceding quarter, and must provide a description of the services to which the charges relate (e.g., loan processing fee).</p> <p><i>2550.404a-5(c)(3)(ii)(A)&(B)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

III. Information That Must Be Made Available To Participants and Beneficiaries Upon Request	Is This Requirement Satisfied? (Yes Or No)	How Is This Requirement Satisfied?
<p>A. Upon request, the plan must provide copies of any prospectuses, financial statements and reports, and any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan; a statement of the value of a share or unit of each DIA; and a list of the assets comprising the portfolio of each DIA and the value of each such asset (or the proportion of the investment alternative that it comprises).</p> <p><i>2550.404a-5(d)(4)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

IV. Special Requirements That Apply To Plans With Employer Securities Or Annuities	Is This Requirement Satisfied? (Yes Or No)	How Is This Requirement Satisfied?
<p>A. If a plan offers an investment alternative that is designed to permit a participant to acquire or sell an employer security, the plan must provide a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities' and the exercise of voting, tender and similar rights, by participants; and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures.</p> <p><i>2550.404c-1(b)(2)(B)(3)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

IV. Special Requirements That Apply To Plans With Employer Securities Or Annuities , <i>continued</i>	Is This Requirement Satisfied? (Yes Or No)	How Is This Requirement Satisfied?
<p>B. Regarding the annual investment-related disclosure rules under 2550.404a-5, the following special rules apply to employer securities:</p> <ol style="list-style-type: none"> In lieu of describing the investment’s principal strategies, risks and turnover rate, provide an explanation of the importance of a well-balanced and diversified portfolio. The requirements to provide fee and expense information by website, and total annual operating expenses do not apply unless the DIA is a fund in which participants acquire units of participation, rather than shares. <p><i>2550.404a-5(i)(1)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
<p>C. In the case of a DIA that is an annuity, the following information must be provided:</p> <ol style="list-style-type: none"> The name of the contract, fund or product; The option’s objectives or goals; The benefits and factors that determine the price of guaranteed income payments; Any limitations or fees applicable to withdrawals or transfers allocated to the option; Any fees that will reduce the value of amounts allocated by participants to the option, such as surrender charges or administrative fees; A statement stating that guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability; and A website address that provides the name of the issuer, and the above-listed information. <p><i>2550.404a-5(i)(2)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

V. Plan May Impose Reasonable Restrictions	Does The Plan Impose This Restriction? (Yes Or No)
<p>A. A plan may charge participants’ accounts for the reasonable expenses of carrying out investment instructions. If the plan imposes such charges, the plan must establish procedures to periodically inform the participants of actual expenses incurred with respect to their respective individual accounts.</p> <p><i>2550.404c-1(b)(2)(ii)(A)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>B. A plan may permit a fiduciary to decline to implement investment instructions by participants which would result in a prohibited transaction described in ERISA section 406 or section 4975 of the Internal Revenue Code or would generate unrelated business taxable income for the plan.</p> <p><i>2550.404c-1(b)(2)(ii)(B)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No

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V. Plan May Impose Reasonable Restrictions, <i>continued</i>	Does The Plan Impose This Restriction? (Yes Or No)
<p>C. A plan may impose reasonable restrictions on the frequency with which participants may give investment instructions, so long as participants are permitted to give investment instructions with a frequency that is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject, and the requirements listed in the next two sections are met.</p> <p><i>2550.404c-1(b)(2)(ii)(C)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>1. The first requirement to satisfy the “frequency of instructions” requirement is that for at least three of the investment alternatives satisfying the “broad range” requirement described below, participants are permitted to give investment instructions no less frequently than once within any three-month period.</p> <p><i>2550.404c-1(b)(2)(ii)(C)(1)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>2. The second requirement is that at least one of the three investment alternatives satisfying the “broad range” requirement permits participants to give investment instructions with regard to transfers into the investment alternative. This should be as frequent as participants are permitted to give investment instructions with respect to any investment alternative in the plan that permits investment instructions more frequently than once within any three-month period.</p> <p>For each investment alternative that permits participants to give investment instruction more frequently than once within any three-month period, participants are permitted to direct their investments to and from a low-risk, liquid fund, subfund or account as frequently as they are permitted to give investment instructions with respect to each such alternative.</p> <p><i>2550.404c-1(b)(2)(ii)(C)(2)(i)-(ii)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>D. In order for Participants to have independent control over their accounts, Plan fiduciaries may not:</p> <ol style="list-style-type: none"> 1. Improperly influence participants in making their investment choices 2. Conceal material non-public facts regarding an investment option 3. Accept instructions from a participant knowing him or her to be legally incompetent <p><i>2550.404c-1(c)(2)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No

This Checklist is being used to assist the plan sponsor to better fulfill its responsibilities in connection with the requirements under Section 404(c) and 404a-5.

It is for informational purposes only.

Please note that this Checklist is not meant to ensure compliance with Section 404(c) and Section 404a-5 or ERISA and is not legal advice or a legal opinion.

You should consult with legal counsel regarding compliance with ERISA and other applicable laws.

The relationship between the plan sponsor and the advisor, and the services provided by the advisor, are governed by the agreement entered into with the advisor. ERISA Section 404(c) and 404a-5 do not relieve the fiduciaries of responsibility for the prudent selection and monitoring of the investment options offered under the plan.

Further, to the extent a participant decides not to exercise control over his or her account, the fiduciaries remain responsible for prudently allocating the assets in that participant’s account.

Thus, the fiduciaries must prudently select and monitor the appropriate “default account” for the participants.

The references above and practices as indicated are based upon data and information provided by several parties including but not limited to the plan sponsor, record keeper, custodian, trustee, auditors and other parties. Further, various documentation must be maintained by the plan sponsor to substantiate the satisfaction of requirements indicated in this checklist. No assurance can be given that regulatory bodies or a court of law will agree that the checklist conforms to Regulation 404(c) and 404a-5.