

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

~~1.3.~~ The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor’s Order No. 1–2011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat 38. Sec. 2550.404a–2 also issued under sec. 657 of Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

~~2.4.~~ Revise § 2550.404a-1 to read as follows:

~~§§~~ **2550.404a–1 —Investment duties.**

~~(a)~~ *In general.* ~~Section~~Sections 404(a)(1)(A) and 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) provide, in part, that a fiduciary shall discharge that person’s duties with respect to the plan solely in the interests of the

~~(a)~~ participants and beneficiaries;~~;~~ for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan;~~;~~ and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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.

(b) *Investment prudence duties.* (1) With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in paragraph (a) of this section are satisfied if the fiduciary:

(i) 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 or menu with respect to which the fiduciary has investment duties; and

(ii) Has acted accordingly.

(2) For purposes of paragraph (b)(1) of this section, ~~““appropriate consideration”~~ “consideration” shall include, but is not necessarily limited to:

~~(i)~~ A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), or menu, to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return)

(i) associated with the investment or investment course of action compared to the opportunity for gain (or other return) associated with reasonably available alternatives with similar risks; and

(ii) ~~Consideration~~In the case of employee benefit plans other than participant-directed individual account plans, consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

(C) The projected return of the portfolio relative to the funding objectives of the plan.

(3) An investment manager appointed, pursuant to the provisions of section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if—:

(i) Such information is provided for the stated purpose of assisting the manager in the performance of the manager's investment duties~~;~~ and

(ii) The manager does not know and has no reason to know that the information is incorrect.

~~(4) Investments based on pecuniary factors. (1) A fiduciary's evaluation of an investment or investment course of action must be based only on pecuniary factors, except as~~

~~provided in paragraph (c)(2) of this section. A fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis, using appropriate investment horizons consistent with the plan's investment objectives and taking into account the funding policy of the plan established pursuant to section 402(b)(1) of ERISA. Risk and return factors may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action. Whether any particular consideration is a risk-return factor depends on the individual facts and circumstances. The weight given to any factor by a fiduciary should appropriately reflect a reasonable assessment of its impact on risk-return.~~

(c) *Investment loyalty duties.* (1) A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to ~~other objectives, and may not sacrifice investment return or take on additional investment risk to other objectives, and may not sacrifice investment return or take on additional investment risk to~~ promote ~~non-pecuniary~~ benefits or goals. ~~The weight given to any pecuniary factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk return.~~

~~(2) Notwithstanding the requirements of paragraph (c)(1), when choosing between or among investment alternatives that the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor in the investment decision provided that the fiduciary documents:~~

~~(i) why pecuniary factors were not sufficient to select the investment or investment course of action;~~

~~(ii) the selected investment compares to the alternative investments with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section; and~~

~~(iii) the chosen non-pecuniary factor or factors are consistent with the unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.~~

~~(d) *Investment Alternatives for Participant Directed Individual Account Plans.* (1) The standards set forth in paragraphs (a) and (c) of this regulation apply to a fiduciary's selection or retention of designated investment alternatives available to participants and beneficiaries in an individual account plan.~~

~~(2) In the case of selection or retention of investment alternatives for an individual account plan that allows plan participants and beneficiaries to choose from a broad range of investment alternatives as defined in 29 CFR 2550.404c-1(b)(3), a fiduciary is not prohibited from considering or including an investment fund, product, or model portfolio as a designated investment alternative solely because the fund, product, or model portfolio promotes, seeks, or supports one or more non-pecuniary goals, provided that:~~

~~(2) the If a fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns. A fiduciary may not, however, accept expected reduced returns or greater risks to secure such additional benefits.~~

(3) The plan fiduciary of a participant-directed individual account plan does not violate the duty of loyalty under paragraph (c)(1) of this section solely because the fiduciary takes into account participants' preferences in a manner consistent with the requirements of paragraph (b) of this section.

(d) Proxy voting and exercise of shareholder rights. (1) The fiduciary satisfies the requirements duty to manage plan assets that are shares of stock includes the management of paragraphs (a) and (c) shareholder rights appurtenant to those shares, such as the right to vote proxies.

(2)(i) When deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.

(ii) When deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must:

(A) Act solely in accordance with the economic interest of the plan and its participants and beneficiaries, in a manner consistent with paragraph (b)(4) of this section;

(B) Consider any costs involved;

(C) Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective;

(D) Evaluate relevant facts that form the basis for any particular proxy vote or other exercise of shareholder rights; and

~~(i)(E) Exercise prudence and diligence in selecting or retaining any such investment fund, product, or model portfolio; and the selection and monitoring of persons, if any, selected to exercise shareholder rights or otherwise advise on or assist with exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services.~~

~~(ii) the investment fund, product, or model portfolio is not added or retained as, or as a component of, a qualified default investment alternative described in 29 CFR 2550.404c-5 if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.~~

~~(e) (Reserved)~~

~~(iii) A fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without a determination that such firm or service provider's proxy voting guidelines are consistent with the fiduciary's obligations described in paragraphs (d)(2)(ii)(A) through (E) of this section.~~

~~(3)(i) In deciding whether to vote a proxy pursuant to paragraphs (d)(2)(i) and (ii) of this section, fiduciaries may adopt proxy voting policies providing that the authority to vote a proxy shall be exercised pursuant to specific parameters prudently designed to serve the plan's interests in providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.~~

~~(ii) Plan fiduciaries shall periodically review proxy voting policies adopted pursuant to paragraph (d)(3)(i) of this section.~~

(iii) No proxy voting policies adopted pursuant to paragraph (d)(3)(i) of this section shall preclude submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon is expected to have a significant effect on the value of the investment or the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager) after taking into account the costs involved, or refraining from voting when the fiduciary prudently determines that the matter being voted upon is not expected to have such an effect after taking into account the costs involved.

(4)(i)(A) The responsibility for exercising shareholder rights lies exclusively with the plan trustee except to the extent that either:

(1) The trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1); or

(2) The power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2).

(B) Where the authority to manage plan assets has been delegated to an investment manager pursuant to ERISA section 403(a)(2), the investment manager has exclusive authority to vote proxies or exercise other shareholder rights appurtenant to such plan assets in accordance with this section, except to the extent the plan, trust document, or investment management agreement expressly provides that the responsible named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the exercise or management of some or all of such shareholder rights.

(ii) An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to an investment policy statement that conflicts with

the policy of another plan. Compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)). In the case of proxy voting, to the extent permitted by applicable law, the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle. Such an investment manager may, however, develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager's investment policy statement, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy statement and proxy voting policy are consistent with Title I of ERISA and this section before deciding to retain the investment manager.

(5) This section does not apply to voting, tender, and similar rights with respect to shares of stock that are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such shares.

~~(f)~~(e) *Definitions.* For purposes of this section:

(1) The term “*investment duties*” means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act.

(2) The term “*investment course of action*” means any series or program of investments

or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated investment alternative under the plan.

~~(3) The term “pecuniary factor” means a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.~~

~~(4)~~(3) The term “plan” means an employee benefit plan to which Title I of the Act applies.

~~(5)~~(4) The term “designated investment alternative” means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. The term “designated investment alternative” shall not include “brokerage windows,” “self-directed brokerage accounts,” or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

~~(g) Effective date. (1) This section shall be effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE], and shall apply in its entirety to all investments made and investment courses of action taken after such date.~~

~~(2) Plans shall have until April 30, 2022 to make any changes to qualified default investment alternatives described in 29 CFR 2550.404c-5, where necessary to comply with the requirements of paragraph (d)(2).~~

~~(3) Until the effective date under paragraph (g)(1), the prior regulation under the Act (as it appeared in the July 1, 2020 edition of 29 CFR part 2550) applies.~~

~~(f) Severability.~~ If any provision of this section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of invalidity or unenforceability, in which event the provision shall be severable from this section and shall not affect the remainder thereof.

~~(g) Applicability date. (1) Except for paragraphs (d)(2)(iii) and (d)(4)(ii) of this section, this section shall apply in its entirety to all investments made and investment courses of action taken after [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].~~

~~(2) Paragraphs (d)(2)(iii) and (d)(4)(ii) of this section apply on [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].~~

Signed at Washington, DC, _____ 2020 D.C., this _____ day of _____, 2022.

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