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the assets of the plan, except to the extent that:

(1) The plan instrument or the trust instrument expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the provisions of title I of the Act of chapter XXV of this title, or

(2) Authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers (within the meaning of section 3(38) of the Act) pursuant to section 402(c)(3) of the Act.

[47 FR 21247, May 18, 1982]

§ 2550.403b–1 Exemptions from trust requirement.

(a) *Statutory exemptions.* The requirements of section 403(a) of the Act and section 403a–1 shall not apply—

(1) To any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) To any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) To a plan—

(i) Some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1954; or

(ii) Which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954. To the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code, whichever is applicable;

(4) To a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code.

(5) To any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to the Act.

[47 FR 21247, May 18, 1982]

§ 2550.404a–1 Investment duties.

(a) *In general.* Section 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 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 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 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'' 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), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) 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 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.

(c) *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 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 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) of this section, 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) How 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) How the chosen non-pecuniary factor or factors are consistent with the interests of 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 section 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 § 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:

(i) The fiduciary satisfies the requirements of paragraphs (a) and (c) of this section in selecting or retaining any such investment fund, product, or model portfolio; and

(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 § 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) *Proxy voting and exercise of shareholder rights.* (1) The fiduciary duty to manage plan assets that are shares of stock includes the management of 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) The fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right. In order to fulfill the fiduciary obligations under paragraph (e)(2)(i) of this section, 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;

(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 non-pecuniary objective, or promote non-pecuniary benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries;

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

(E) Maintain records on proxy voting activities and other exercises of shareholder rights; and

(F) Exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise 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.

(iii) Where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person who performs advisory services as to the voting of proxies, a responsible plan fiduciary shall prudently monitor the proxy voting activities of such investment manager or proxy advisory firm and determine whether such activities are consistent with paragraphs (e)(2)(i) and (ii) and (e)(3) of this section.

(iv) 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 (e)(2)(ii)(A) through (E) of this section.

(3)(i) In deciding whether to vote a proxy pursuant to paragraphs (e)(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 economic interest. Paragraphs (e)(3)(i)(A) and (B) of this section set forth optional means for satisfying the fiduciary responsibilities under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA with respect to decisions whether to vote, provided such policies are developed in accordance with a fiduciary's obligations under ERISA as set forth in the applicable provisions of paragraphs (e)(2)(i) and (ii) of this section. Paragraphs (e)(3)(i)(A) and (B) of this section do not establish minimum requirements or the exclusive means for satisfying these responsibilities. A plan may adopt either or both of the following policies:

(A) A policy to limit voting resources to particular types of proposals that the fiduciary has prudently determined are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment.

(B) A policy of refraining from voting on proposals or particular types of proposals when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold that the fiduciary prudently determines, considering its

percentage ownership of the issuer and other relevant factors, is sufficiently small that the matter being voted upon is not expected to have a material effect on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager).

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

(iii) No proxy voting policies adopted pursuant to paragraph (e)(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 material 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 a material 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 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 such securities that are passed through pursuant to the terms of an individual account plan to participants and beneficiaries with accounts holding such securities.

(f) *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) The term *plan* means an employee benefit plan to which Title I of the Act applies.

(5) 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) *Applicability date*. (1) Except for paragraph (e) of this section, this section shall apply in its entirety to all investments made and investment courses of action taken after January 12, 2021.

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

(3) Paragraph (e) of this section applies on January 15, 2021. Fiduciaries, other than investment advisers subject to 17 CFR 275.206(4)–6, shall have until January 31, 2022, to comply with the requirements of paragraphs (e)(2)(ii)(D) and (E) of this section. All fiduciaries shall have until January 31, 2022 to comply with the requirements of paragraphs (e)(2)(iv) and (e)(4)(ii) of this section.

(h) *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.

[85 FR 72883, Nov. 13, 2020, as amended at 85 FR 81694, Dec. 16, 2020]

§ 2550.404a–2 Safe harbor for automatic rollovers to individual retirement plans.

(a) *In general*. (1) Pursuant to section 657(c) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16, June 7, 2001, 115 Stat. 38, this section provides a safe harbor under which a fiduciary of an employee pension benefit plan subject to Title I of the Employee Retirement Income Security Act of 1974, as amended (the Act), 29 U.S.C. 1001 *et seq.*, will be deemed to have satisfied his or her fiduciary duties under section 404(a) of the Act in connection with an automatic rollover of a mandatory distribution described in section 401(a)(31)(B) of the Internal Revenue Code of 1986, as amended (the Code). This section also provides a safe harbor for certain other mandatory distributions not described in section 401(a)(31)(B) of the Code.

(2) The standards set forth in this section apply solely for purposes of determining whether a fiduciary meets the requirements of this safe harbor. Such standards are not intended to be the exclusive means by which a fiduciary might satisfy his or her responsibilities under the Act with respect to rollovers of mandatory distributions described in paragraphs (c) and (d) of this section.

(b) *Safe harbor*. A fiduciary that meets the conditions of paragraph (c) or paragraph (d) of this section is deemed to have satisfied his or her duties under section 404(a) of the Act with respect to both the selection of an individual retirement plan provider and the investment of funds in connection with the rollover of mandatory distributions described in those paragraphs to an individual retirement plan, within the meaning of section 7701(a)(37) of the Code.

(c) *Conditions*. With respect to an automatic rollover of a mandatory distribution described in section