
ERISA Disclosure Requirements

RPost Registered E-mail® System – Protection from Investment Loss Liability

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Officers, directors, board members, 401(k) Plan committee members, Plan administrators, trustees, investment advisors, and investment managers could be held **personally liable for investment losses** resulting from participant investment decisions unless the Plan complies with the Employee Retirement Income Security Act (ERISA) Section 404(c).

To abate this liability many plan sponsors are voluntarily electing to become compliant under ERISA Section 404(c). Compliance is achieved by providing required and requested information to participants and **making sure they actually received it**, even if they CLAIM that they did not receive the notice.

One of the more vexing issues of 404(c) requirements is the delivery of a prospectus to participants either immediately before or immediately after each new, first-time investment. The printing and mailing costs alone can be expensive.

RPost and its Registered E-mail® services enable corporations to comply with the ERISA disclosure requirements at a low cost, while retaining **verifiable proof of compliance**, and **without requiring any hard-copy mail**, copies, printing, or the retention of paper records. Any company with a 401(k) Plan, any mutual fund that has Plans for employee portfolios, and record keepers should consider seriously the Registered E-mail® service as a means to either (1) comply with notification requirements, or (2) move more from paper to electronic to reduce the cost of compliance.

Background: Officers, directors, and Plan managers are generally named fiduciaries or function as fiduciaries and as such are **liable for 401(k) investment losses for each participant** if the company is not taking advantage of the relief offered under ERISA section 404(c).

In September 2003, the court set precedent by its decision in the Enron 401(k) case where Plan participants sued the Officers, Directors and other fiduciaries for reimbursement of their 401(k) investment losses when the Enron stock collapsed. Those personally at risk are all of the fiduciaries, which include the officers of the company, board of directors, board committee members,

Plan committee members, trustees, investment advisors, and investment managers. In the Enron case, the Judge concluded that, "If the Plan does not qualify as a 404(c), the fiduciaries retain liability for all investment decisions made, including decisions by the Plan participants."

There are two ways that this matter erupts: either through participant lawsuits or Department of Labor Investigations. Both occurred in the ENRON matter. There are now more than 50 class action lawsuits pending against major corporations.

ERISA Protections offered in section 404(c): If the Plan does not comply with ERISA section 404(c), the Plan fiduciaries are responsible for the prudence of the participant's investment decisions. ERISA 404(c) allows the fiduciary to transfer the legal responsibility only for losses resulting from participants' actions. The Department of Labor and the Judge in the Enron 2003 decision clearly state that if the Plan does not qualify as a 404(c) Plan, the fiduciaries retain liability for ALL investment decisions made, including decisions by the Plan participants. The only circumstances in which ERISA relieves the Plan fiduciary from responsibility for a participant-directed investment, is when the plan qualifies as a 404(c) Plan.

ERISA 404(c) protections are lost most frequently by:

- ❑ Failing to prove that a prospectus has been provided immediately preceding or following the initial investment in an alternative.
- ❑ Failing to prove that the participants have been notified of the identity of the 404(c) fiduciary.
- ❑ Failing to prove that participants have received notice of the five categories of information available upon request.
- ❑ Failing to prove that Plan participants have been notified that the fiduciaries may be relieved of liability.

With first class mail, the 404(c) Fiduciary retains no proof of compliance in case the participant CLAIMS that he/she was not notified. By using certified mail, return receipt mail, or courier, the costs become prohibitive. The answer is the RPost Registered E-mail® service.

RPost Registered E-mail® Protection: A solution, to protect the officers, directors, and other fiduciaries would be to use the Registered E-mail® service to deliver the prospectuses containing the proper risk disclaimers to the individual purchaser within 401(k) portfolios. Further, the Registered E-mail® service could be used to deliver the other required notifications. If this information is delivered to the plan participant, by means of the Registered

Receipt then the company, its officers, directors and other fiduciaries have proof of compliance under ERISA 404(c).

Should a future dispute arise with respect to content, timing, delivery or receipt, the company, administrator, directors, and officers would be protected by the verification capabilities inherent within the Registered Receipt.

[The Registered E-mail[®] service works for any e-mail address without requiring the receiver to do anything or have anything on their end. Neither RPost nor any third party needs to store any information about the e-mail prospectus delivery. This proof is in the form of a Registered Receipt e-mail, which is returned to the sender in a counterfeit-proof form and can be authenticated at any time.]

Savings and Protections – Employing RPost Registered E-mail[®] to comply with ERISA 404(c):

- ❑ Allows the financial organization, and more importantly in this high risk environment, the plan administrator, record keeper, employer, board of directors, and officers the ability to protect themselves from liability wherever the recipient claims non-receipt of the e-mail prospectus or disputes the content of the notice of risks and disclaimers in the attached prospectus.
- ❑ Permits prospectus delivery by email, with all of the cost savings inherent in moving the required notification from paper to electronic format.
- ❑ Provides legal, verifiable evidence for the sender in order to protect the sender in a possible dispute relating to delivery, content, timing or receipt and to prove compliance with their fiduciary duties under ERISA 404(c).

About RPost:

RPost[®] (www.rpost.com) is the Registered E-mail[®]™ company. The Registered E-mail[®]™ service provides the sender of an email with legally valid proof of authorship, content, and delivery to any Internet address. The RPost system does not require the recipient to have any special software or take any compliant action to prove delivery. RPost provides the sender with a tamperproof e-mail receipt that contains all the information required to prove delivery and content; RPost does not retain a copy of the message. RPost technology is proprietary with over twenty patents pending worldwide. The U.S. General Services Administration has approved the Registered E-mail[®] service for their IT schedule with AT&T, Sprint, and Qwest as authorized vendors. The RPost system is currently used by several Federal government agencies

including the U.S. General Accounting Office. Symantec Corporation, the global leader in information security, is a major investor in RPost.

About the Author:

Pat Byrnes, Member of the American Society of Pension Actuaries (MSPA), Member of the American Academy of Actuaries (MAAA) and an Enrolled Actuary (EA), is President of Actuarial Consultants, Inc., a Los Angeles-based consulting and administrative firm. He is also co-founder of Strategic Benefits Group, as well as co-founder and Managing Director of CCI, a compensation consulting company.

He is past President of the American Society of Pension Actuaries (ASPA), and in 2004 received the Commissioner's Award from the Tax-exempt and Government Entities Division of the Internal Revenue Service for his contributions in co-founding and co-chairing the Los Angeles Benefits Conference for the past 13 years.

He earned a Bachelor of Science and Commerce from the University of Santa Clara in 1967 and a Masters in Business Administration from the Wharton School of the University of Pennsylvania in 1969.