SNELL & WILMER L.L.P.
SECTION 404(c) COMPLIANCE CHECKLIST

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Plan Name :_____

Date Completed:_____

☞***Caution***: *To have ERISA Section 404(c) protection, the plan fiduciaries must comply with all of the following requirements, to the extent applicable. Plan fiduciaries should periodically confirm that all requirements continue to be met.*

A. OPPORTUNITY TO EXERCISE CONTROL

☐ **Plan Permits Opportunity to Give Instruction**: Under the terms of the plan, the participant or beneficiary has a reasonable opportunity to give instructions (in writing or otherwise) to an identified plan fiduciary.[1]

☐ **Written Confirmation**: If investment instructions are not given in writing (for example oral or telephonic instructions), a participant may request and receive written confirmation of their instructions.[2]

☐ **Plan Fiduciary Obligated to Comply**: Under the terms of the plan, the identified plan fiduciary is obligated to comply with the participant or beneficiary's investment instructions.[3]

Note: *A plan fiduciary may decline to implement an investment instruction if implementing the instruction would:*
(1) result in a prohibited transaction under ERISA or the Code;[4]
(2) generate income that would be taxable to the plan;[5]
(3) violate the plan documents, to the extent the plan documents are consistent with ERISA's requirements;[6]
(4) cause a fiduciary to maintain the indicia of ownership of plan assets outside the United States, except as permitted by ERISA Section 404(b);[7]
(5) jeopardize the plan's tax qualified status under the Code;[8]
(6) result in a loss in excess of the participant's account balance;[9] *or*
(7) result in any of the transactions described in DOL regulation §2550.404c-1(d)(2)(ii)(E).[10]

☞***Caution***: *Plan fiduciaries are not entitled to Section 404(c) protection for any participant investment instruction if it would cause any of the results in items (3) to (7) above.*[11]

☐ **Plan Charges No More than Reasonable Expenses**. The plan does not charge more than "reasonable" expenses for carrying out investment instructions.[12]

Note: *A plan may charge participant and beneficiary accounts for the reasonable expenses of carrying out investment instructions provided that procedures are established under the plan to periodically inform such participants and beneficiaries of actual expenses incurred with respect to their individual accounts.*

☞***Caution***: *Any fees or charges allocated to individual accounts must be disclosed in the summary plan description.*[13]

Relief for Mapped Investments: The Pension Protection Act of 2006 amended Section 404(c) effective for plan years beginning on or after January 1, 2008 to add fiduciary protection for certain mapped investments. Under Section 404(c)(4), a participant or beneficiary is *not treated as failing to exercise control* over the assets in his accounts if a "qualified change in investment options" occurs. While this fiduciary protection applies to investment changes that are mapped to investment options with similar risk and return characteristics, it does not provide protection when an investment option is eliminated without providing a similar replacement option. To receive mapping protection, the plan fiduciaries must provide notice at least 30 days, but not more than 60 days, before the change occurs, and must meet certain other requirements.[14]

Relief for Qualified Default Investment Alternatives: The Pension Protection Act of 2006 amended Section 404(c) effective for plan years beginning on or after January 1, 2007 to add fiduciary protection when participants fail to give investment instructions. By satisfying the requirements of Section 404(c)(5) and DOL regulation §2550.404c-5, participants who fail to give investment instructions and whose plan assets are invested in a "qualified default investment alternative" ("QDIA") *are treated as exercising control* over their accounts.[15] As a result, plan fiduciaries will retain Section 404(c) protection . However, plan fiduciaries remain responsible for selecting the QDIAs.[16]

B. INDEPENDENT CONTROL

☐ With respect to any transaction (i.e., investment instructions or the exercise of any voting, tender or similar rights), the participant or beneficiary, based on the facts and circumstances of the particular case, in fact, exercises independent control. In addition, each of the following must be true with respect to the transaction:[17]

- ☐ **No Improper Influence**. The participant or beneficiary is not subjected to improper influence by a plan fiduciary or the plan sponsor.[18]

- ☐ **No Concealment of Material Non-Public Fact**: A plan fiduciary has not concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information by the fiduciary to the plan participant would violate any provision of federal law or any provision of state law that is not preempted by ERISA.[19]

- ☐ **Not Legally Incompetent**: The participant or beneficiary is not legally incompetent or the plan fiduciary accepts instructions not knowing the participant or beneficiary is legally incompetent.[20]

- ☐ **Transactions Involving a Fiduciary Must be Fair and Reasonable**: In the case of a sale, exchange or leasing of property (other than a transaction described in DOL regulation §2550.404c-1(d)(2)(ii)(E)) between the plan and a plan fiduciary or an affiliate of such a fiduciary, or a loan to a plan fiduciary or an affiliate of such a fiduciary, the transaction is "fair and reasonable" to the participant or beneficiary. For this purpose, a transaction is deemed to be fair and reasonable to a participant or beneficiary if he pays no more than, or receives no less than, adequate consideration (as defined in ERISA Section 3(18)) in connection with the transaction.[21]

Note: *The independence requirement does not require plan fiduciaries to provide investment advice to a participants or beneficiaries.*[22]

☞***Caution****: A participant or beneficiary will be deemed to have exercised control with respect to the exercise of voting, tender or similar rights appurtenant to the ownership interest in the investment alternative, only if the participant's or beneficiary's investment in the investment alternative was itself the result of an exercise of control, the participant or beneficiary was*

provided a reasonable opportunity to give instruction with respect to such incidents of ownership, the participant received any materials provided to the plan relating to the exercise of those rights, as well as a description of, or a reference to, plan provisions relating to the exercise of those rights, and the participant has not failed to exercise control by reason of improper influence, concealment of material fact, or legal incompetence.[23]

C. OPPORTUNITY TO OBTAIN SUFFICIENT INFORMATION TO MAKE INFORMED DECISIONS

1. PLAN FIDUCIARY MUST PROVIDE THE FOLLOWING WRITTEN DISCLOSURES

☐ **Section 404(c) Explanation**: An explanation that the plan is intended to constitute a plan described in Section 404(c) of the Employee Retirement Income Security Act, and Title 29 of the Code of Federal Regulations Section 2550.404c-1, and that plan fiduciaries may be relieved of liability for losses which are the direct and necessary result of investment instructions given by such participant or beneficiary.[24]

☐ **Description of Investment Alternatives**: A description of the investment alternatives available under the plan and with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each alternative, including information relating to the type and diversification of assets comprising the investment portfolio.[25]

☐ **Investment Managers**: The names of any designated investment managers.[26]

☐ **Investment Instruction Rules**: An explanation of the circumstances under which participants and beneficiaries may give investment instructions and an explanation of any specified limitations on such instructions under the terms of the plan, including any restrictions on transfers to or from a designated investment alternative, and any restrictions on the exercise of voting, tender and similar rights.[27]

☐ **Fees and Expenses**: A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g. commissions, sales loads, deferred sales charges, redemption or exchange fees).[28]

☐ **Additional Information**: A description of information that may be obtained upon request (see 2. below) and the name, address and phone number of the plan fiduciary (and if applicable, the person or persons designated by the plan fiduciary to act on its behalf) responsible for providing the information upon request.[29]

2. UPON REQUEST, PLAN FIDUCIARIES MUST PROVIDE PARTICIPANTS AND BENEFICIARIES WITH THE FOLLOWING INFORMATION

☐ **Operating Expenses**: A description of the annual operating expenses of each designated investment alternative (e.g., investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative.[30]

☐ **Investment Materials**: Copies of any prospectuses, financial statements and reports and of any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan.[31]

☐ **Asset Information:** A listing of assets comprising the portfolio of an investment alterative which holds plan assets, the value of such assets (or the proportion of the investment alternative which it comprises), and, with respect to each such asset which is a fixed rate investment contract issued by a bank, savings and loan association or insurance company, the name of the issuer of the contract, the term of the contract and the rate of return on the contract.[32]

☐ **Performance Information:** Information concerning the value of shares or units in designated investment alternatives available to participants and beneficiaries under the plan, as well as information concerning the past and current investment performance of the alternative, determined, net of expenses, on a reasonable and consistent basis.[33]

☐ **Account Information**: Information concerning the value of shares or units in investment alternatives held in the account of the participant or beneficiary.[34]

3. IN CERTAIN CIRCUMSTANCES, PLAN FIDUCIARIES MUST PROVIDE THE FOLLOWING ADDITIONAL WRITTEN INFORMATION

☐ **Publicly Traded Investment Alternative**: If the plan offers an investment alternative subject to the Securities Act of 1933 (such as mutual funds), immediately before or after the participant's or beneficiary's initial investment in the investment alternative, a copy of the most recent prospectus provided to the plan.[35]

☐ **Voting, Tender and Similar Rights**: If, under the terms of the plan, voting, tender or similar rights are passed through to participants, any materials provided to the plan relating to the exercise of those rights, as well as a description of, or a reference to, plan provisions relating to the exercise of those rights.[36]

☐ **Confidentiality Procedures For Employer Security Alternative**: If the plan offers an investment alternative designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security, 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 beneficiaries, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the confidentiality procedures.[37]

D. REASONABLE RESTRICTIONS ON THE FREQUENCY OF INVESTMENT INSTRUCTIONS

☐ **Reasonable Restrictions In Light Of Market Volatility**: The plan imposes only *reasonable* restrictions on the frequency with which participants and beneficiaries may give investment instructions.[38]

> ☞***Caution:*** *A restriction is not reasonable unless, with respect to each investment alternative made available by the plan, the plan permits participants and beneficiaries to give investment instructions with a frequency that is appropriate in light of the investment's likely market volatility.*[39]

☐ **Three Month Rule for Core Funds**: At least three of the investment alternatives (or all three if the plan offers only three investment alternatives), which constitute a broad range of investment alternatives, permit participants and beneficiaries to give investment instructions at least once within any three month period (the "Core Funds").[40]

☐ **One Core Fund Must Accept Transfers More Frequently**: At least one of the Code Funds must accept transfers as frequently as participants and beneficiaries are permitted to give instructions for any investment alternative which permits participants and beneficiaries to give investment instructions more frequently than once in any three month period.[41]

☐ **Transfers Into Low Risk Fund**: If any investment alternative permits investment instructions more frequently than once in any three month period, participants and beneficiaries must be allowed to direct their investments out of such fund into an income producing, low risk, liquid fund, subfund or account as frequently as they are permitted to give instructions for the other fund.[42]

☐ **Transfers Out of Low Risk Fund**: Participants and beneficiaries may transfer amounts out of the low risk fund, subfund or account, to one of the Core Funds, as frequently as they are permitted to give investment instructions with respect to the Core Fund.[43]

☐ **Transfers Out of Employer Securities Fund**: With respect to transfers out of an investment alternative which is designed to permit a participant or beneficiary to directly or indirectly acquire or sell any employer security, *either* (check whichever applies):[44]

☐ The Core Funds accept transfers from the employer securities alternative as frequently as participants and beneficiaries are permitted to give investment instructions with respect to the employer security alternative; [45]*or*

☐ Participants and beneficiaries are permitted to transfer out of each employer security alternative into an income producing, low risk, liquid fund, subfund or account as frequently as they are permitted to give investment instructions with respect to such employer security alternative *and*, with respect to such low risk fund, subfund or account, participants and beneficiaries are permitted to transfer out of the fund, subfund or account to each Core Fund, as frequently as they are permitted to give investments instructions with respect to each such investment alternative.[46]

E. BROAD RANGE OF INVESTMENT ALTERNATIVES

The plan's investment alternatives provide the participant or beneficiary with a reasonable opportunity to:[47]

☐ **Materially Affect Return**: Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject;[48]

☐ **Choose From Three or More Alternatives**: Choose from at least three investment alternatives:[49]

☐ each of which is diversified;[50]

☐ each of which has materially different risk and return characteristics;[51]

☐ which in the aggregate enable the participant or beneficiary, 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; [52]and

☐ each of which when combined with investments in the other alternatives tends to minimize, through diversification, the overall risk of a participant's or beneficiary's portfolio.[53]

☐ **Diversify to Minimize Risk of Large Losses**. Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of the participant's or beneficiary's accounts.[54]

> ***Note:*** *In practice, the requirement to provide a broad range of investment alternatives has prompted most advisors to conclude that a Section 404(c) plan must offer, at a minimum, a stock fund, a bond fund and a money market (or similar) fund.*

> ***Note:*** *In determining whether a plan provides the participant or beneficiary with a reasonable opportunity to diversify his investments, the nature of the investment alternatives offered by the plan and the size of the portion of the individual's account over which he is permitted to exercise control must be considered. Where such portion of the account of any participant or beneficiary is so limited in size that the opportunity to invest in look-through investment vehicles (i.e., mutual funds or similar products) is the only prudent means to assure an opportunity to achieve appropriate diversification, a plan may satisfy this requirement only by offering look-through investment vehicles.*[55]
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> ☞***Caution****: Where look-through investment vehicles are available as investment alternatives to participants and beneficiaries, the underlying investments of the look-through investment vehicles are considered in determining whether the plan meets the requirement to offer three or more investment alternatives and allow participants to diversify to minimize the risk of large losses.*[56]

F. ADDITIONAL REQUIREMENTS FOR PLANS OFFERING EMPLOYER STOCK

The plan may offer employer securities as an investment option and still comply with ERISA Section 404(c) if it meets the following additional requirements:[57]

☐ **Qualifying Employer Securities**: Such securities are "qualifying employer securities" (as defined in ERISA Section 407(d)(5)).[58]

☐ **Stock or Publicly Traded Partnership**: Such securities are stock or an equity interest in a publicly traded partnership (as defined in section 7704(b) of the Code), but only if such partnership is an existing partnership as defined in section 10211(c)(2)(A) of the Revenue Act of 1987 (Public Law 100-203).[59]

☐ **National Exchange**: Such securities are publicly traded on a national exchange or other generally recognized market.[60]

☐ **Sufficient Frequency and Volume**: Such securities are traded with sufficient frequency and in sufficient volume to assure that participant and beneficiary directions to buy or sell the security may be acted upon promptly and efficiently.[61]

☐ **Information**: Information provided to shareholders of such securities is provided to participants and beneficiaries with accounts holding such securities.[62]

☐ **Voting, Tender and Similar Right**s: Voting, tender and similar rights with respect to such securities are passed through to participants and beneficiaries with accounts holding such securities.[63]

☐ **Confidentiality Procedures**: Information relating to the purchase, holding, and sale of securities, and the exercise of voting, tender and similar rights with respect to such securities are maintained in accordance with written confidentiality procedures designed to safeguard the confidentiality of

such information, except to the extent necessary to comply with Federal laws or state laws not preempted by ERISA.[64]

☐ **Confidentiality Fiduciary**: The plan designates a fiduciary who is responsible for ensuring that the confidentiality procedures are sufficient to safeguard the confidentiality of such information, such procedures are being followed, and an independent fiduciary (see description immediately below) is appointed.[65]

☐ **Independent Fiduciary**: An independent fiduciary is appointed to carry out activities relating to any situations that the confidentiality fiduciary determines involve a potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights.[66]

> ☞***Caution:*** *A fiduciary is not independent if the fiduciary is affiliated with any sponsor of the plan.*[67]

Endnotes

[1] DOL Reg. §2550.404c-1(b)(2)(i)(A)

[2] Id.

[3] Id.

[4] DOL Reg. §2550.404c-1(b)(2)(ii)(B)(1)

[5] DOL Reg. §2550.404c-1(b)(2)(ii)(B)(2)

[6] DOL Reg. §2550.404c-1(d)(2)(ii)(A)

[7] DOL Reg. §2550.404c-1(d)(2)(ii)(B)

[8] DOL Reg. §2550.404c-1(d)(2)(ii)(C)

[9] DOL Reg. §2550.404c-1(d)(2)(ii)(D)

[10] DOL Reg. §2550.404c-1(d)(2)(ii)(E)

[11] DOL Reg. §2550.404c-1(d)(2)(ii)

[12] DOL Reg. §2550.404c-1(b)(2)(ii)(A)

[13] DOL Field Assistance Bulletin 2003-3 (May 19, 2003)

[14] ERISA Section 404(c)(4)(C)

[15] ERISA Section 404(c)(5) and DOL Reg. §2550.404c-5(a)

[16] ERISA Section 404(c)(5) and DOL Reg. §2550.404c-5(b)

[17] DOL Reg. §2550.404c-1(c)(2)

[18] DOL Reg. §2550.404c-1(c)(2)(i)

[19] DOL Reg. §2550.404c-1(c)(2)(ii)

[20] DOL Reg. §2550.404c-1(c)(2)(ii)

[21] DOL Reg. §2550.404c-1(c)(3)

[22] DOL Reg. §2550.404c-1(c)(4)

[23] DOL Reg. §2550.404c-1(c)(1)(ii)

[24] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(i)

[25] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(ii)

[26] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(iii)

[27] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(iv)

[28] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(v)

[29] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(vi)

[30] DOL Reg. §2550.404c-1(b)(2)(i)(B)(2)(i)

[31] DOL Reg. §2550.404c-1(b)(2)(i)(B)(2)(ii)

[32] DOL Reg. §2550.404c-1(b)(2)(i)(B)(2)(iii)

[33] DOL Reg. §2550.404c-1(b)(2)(i)(B)(2)(iv)

[34] DOL Reg. §2550.404c-1(b)(2)(i)(B)(2)(v)

[35] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(viii)

[36] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(ix)

[37] DOL Reg. §2550.404c-1(b)(2)(i)(B)(1)(vii)

[38] DOL Reg. §2550.404c-1(b)(2)(ii)(C)

[39] Id.

[40] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(1)

[41] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(2)(i)

[42] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(2)(ii)

[43] Id.

[44] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(3)

[45] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(3)(i)

[46] DOL Reg. §2550.404c-1(b)(2)(ii)(C)(3)(ii)

[47] DOL Reg. §2550.404c-1(b)(3)(i)

[48] DOL Reg. §2550.404c-1(b)(3)(i)(A)

[49] DOL Reg. §2550.404c-1(b)(3)(i)(B)

[50] DOL Reg. §2550.404c-1(b)(3)(i)(B)(1)

[51] DOL Reg. §2550.404c-1(b)(3)(i)(B)(2)

[52] DOL Reg. §2550.404c-1(b)(3)(i)(B)(3)

[53] DOL Reg. §2550.404c-1(b)(3)(i)(B)(4)

[54] DOL Reg. §2550.404c-1(b)(3)(i)(C)

[55] Id.

[56] DOL Reg. §2550.404c-1(b)(3)(ii)

[57] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)

[58] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(i)

[59] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(ii)

[60] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(iii)

[61] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(iv)

[62] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(v)

[63] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(vi)

[64] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(vii)

[65] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(viii)

[66] DOL Reg. §2550.404c-1(d)(2)(ii)(E)(4)(ix)

[67] Id.