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# ERISA Fiduciaries Must Monitor Market Turbulence

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The recent turmoil in the financial markets, while troubling for individual investors, also has potentially significant implications for ERISA fiduciaries. Individuals and committees who have investment authority over plan assets should reevaluate their portfolios in light of these developments. Circumstances may not require a change in investment strategy, but ERISA's prudence requirement requires fiduciaries to give immediate, thoughtful consideration to how those circumstances have changed.

## DRAMATIC MARKET CHANGES MAY REQUIRE FIDUCIARY ACTION

The dramatic end to the longest bull market in history leaves fiduciaries of ERISA-governed retirement plans in a quandary. While financial experts point to the long-term nature of retirement plan investing, and therefore may caution against an overreaction to the current turmoil, many of the most common investment vehicles used in 401(k) and 403(b) plans – such as target date funds and low-cost index funds – may be particularly susceptible to the volatility. That leaves plan fiduciaries (or the ERISA Section 3(38) investment managers they may have retained) to either defend the current investment lineup or make changes to it.

Many plan fiduciaries and record keepers are already fielding calls from participants who are concerned about the stability of the investment options available to them. On March 12, when the market posted its steepest daily drop in decades, net trading among 401(k) investors was more than 10 times higher than normal. Although fiduciaries have significant protection under Section 404(c) of ERISA from claims arising out of investment losses suffered by individual participants, the Department of Labor has long taken the position that if the plan's fiduciaries have imprudently selected the funds from which participants may choose, the 404(c) shield is unavailable.

All ERISA fiduciaries are required to fulfill their duties prudently, and in light of "the circumstances then prevailing." Put simply, this standard means that they must consider current conditions. It does not mean that fiduciaries should abandon long-term investment strategies, but if their conduct comes into question 18 or 24 months from now, a prudent record probably should reflect that the fiduciaries considered how current conditions could affect the plan.

Fiduciaries of defined benefit plans should pay especially close attention to market developments. Plans which were nearly "at risk" (for single employer plans) or "endangered" (for multiemployer plans) under Pension Protection Act standards as of their most recent actuarial valuations could easily fall below those thresholds as a result of investment losses. Fiduciaries of such plans should consider asking their actuaries to conduct mid-year valuations taking into account current market conditions, so that any contribution increases necessary to avoid at-risk or endangered status can be spread over a longer period.

## STRATEGIES FOR FIDUCIARIES

Individual circumstances will dictate whether and how plan fiduciaries should react to current market conditions. At a minimum, however, we suggest that fiduciaries consider the following strategies:

- Request formal input from the plan's financial advisor. Many advisors are issuing market updates that reflect their general assessment of the situation. Fiduciaries should consider asking their advisor for a more specific assessment of the implications for the plan's investments.
- Consider calling a special meeting to evaluate the situation. Waiting until the next regularly scheduled meeting of the fiduciaries – which could be months away – might not be considered prudent in light of the market's volatility. Even if the fiduciaries decide that no action is necessary, evidence that they engaged in such an evaluation will show that they are acting prudently in light of current circumstances. Be sure to reflect the substance of the fiduciaries' deliberations in meeting minutes.


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- For defined contribution plans that offer a stable value fund, evaluate the financial stability of the fund provider in light of current economic conditions. A stable value fund – and the safe haven it offers to plan participants – is only as “stable” as its underlying issuer.
- Defined benefit plan fiduciaries should evaluate whether an interim actuarial valuation is advisable. If additional contributions will be required to avoid falling into at-risk or endangered status, those contributions may hurt a little less if they can be spread out over several months.

If you would like assistance evaluating these strategies or documenting your fiduciary decisions, please contact any member of Spencer Fane’s Employee Benefits Practice Group.

This blog post was drafted by Greg Ash, an attorney in the Spencer Fane LLP Overland Park, KS office. For more information, visit spencerfane.com.