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# FIDUCIARY RESPONSIBILITIES UNDER ERISA IN AN UNCERTAIN MARKET

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If you are an ERISA fiduciary charged with management or investment of plan assets, and recent market activity has not tripped any alarm bells – or, if the alarm bells have been tripped, but you are are looking for a bit of guidance on how to respond, then keep reading. Due to a combination of recent factors, including the spread of the Coronavirus (COVID-19), the stock market suffered its worst drop in over 30 years this past week. Moreover, the market outlook will likely continue to be uncertain for the near future as businesses around the world adjust and take action in response to the COVID-19 outbreak and many consumers are quarantined in their homes.

In this volatile market, it is important for fiduciaries of retirement and other funded plans governed by the Employee Retirement Income Security (ERISA) to keep their fiduciary duties in mind and take appropriate action. As a reminder, those duties under Sections 404 and 406 of ERISA include:

- The duty to act prudently;
- The duty to diversify assets of the plan;
- The duty to comply with provisions of the plan;
- The duty of loyalty;
- The duty to pay only reasonable plan expenses; and
- The duty to avoid prohibited transactions.

The first three of these are particularly relevant when the market is uncertain.

- **The duty to act prudently:** It is important to remember that this duty requires the fiduciary to act with the care, skill, prudence, and diligence that a prudent person acting in a like capacity would use *in similar circumstances*. When the circumstances include a volatile market, acting prudently may require a fiduciary to research more, ask more questions, or more regularly seek expert advice. Many investment managers and plan providers are offering to meet to reassess investment performance and strategy in light of market changes, and to discuss fiduciary responsibility and strategy. They are also providing educational materials for responding to market changes. Fiduciaries should utilize these resources and/or take similar action on their own. Since this duty emphasizes process over outcome, fiduciaries should take care to document the actions they take as well as the process behind such actions.

- **The duty to diversify assets of the plan:** Diversification is intended to minimize the risk of large losses. By avoiding disproportionate investments in a single security or type of securities or securities dependent on one locality and industry, participants in the plan can have some protection from even a large drop in the market as a whole. For plans that comply with Section 404(c) of ERISA, fiduciaries are relieved of liability for poor performance of participant-directed plans (like a 401(k)) if the participant actually exercises control over individual account assets, or if funds are defaulted into a Qualified Default Investment Alternative (QDIA), so long as the fiduciary properly selects and monitors such investment alternatives. Fiduciaries will also need to review the issues related to offering or investing in employer stock. Fiduciaries should consult with investment professionals to determine whether a re-evaluation of diversity or portfolio rebalancing is warranted in light of recent market activity.

- **The duty to comply with provisions of the plan:** Fiduciaries are required to act in accordance with documents governing the plan to the extent the documents comply with ERISA. These documents include the plan document, summary plan description, trust agreement, investment management agreements, and investment policy statement. Any action or inaction taken in response to market performance should be consistent with the plan’s investment policy statement and other plan documents which serve as guideposts for plan fiduciaries.

In addition, plan fiduciaries will want to monitor their service providers and effectively communicate with participants to ensure participants continue to receive the tools and information they need to invest, as applicable, and plan for their retirement.

In an uncertain market, fiduciaries can find some relief in knowing that if they follow their fiduciary duties and, engage in, and document, good process, they will best serve their plan’s participants while also minimizing their own fiduciary exposure.

## RELATED PRACTICE AREAS

- Employee Benefits & Executive Compensation
- Employee Benefits & Executive Compensation

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