ERISA Fiduciary Best Practices During Market Instability

By **Nancy Ross, Brian Netter and Richard Nowak** (April 8, 2020)

Nancy Ross

Brian Netter

Richard Nowak

These are unsettling times. Seemingly every day brings a new announcement of a state or local shutdown order, a massive bailout package, or the Dow Jones Industrial Average having risen or fallen at a record rate. Unfortunately, these turbulent aspects of life in the time of COVID-19 seem like they will be with us for the foreseeable future.

In these unprecedented times, plan fiduciaries may be wondering what they can do to assist plan participants and also mitigate risk. Although it can be tempting to take drastic actions in the face of market downturns, often the best plan is to double down on existing best practices.

After all, in good times and bad, fiduciaries have the same obligation to administer plans prudently.[1] The Employee Retirement Income Security Act recognizes that fiduciaries do not have a unique power of market clairvoyance. That is why their prudence is judged "under the circumstances then prevailing."[2]

Our experience witnessing the effect of the turbulent financial climate and global recession in 2008 enables us to provide some best practices for plan sponsors and fiduciaries to consider in navigating their retirement plans through the COVID-19 market and business environment:

Closely monitor your investments.

Fiduciaries should continue to monitor their plans' investment outcomes and measure performance against the relevant benchmarks. At all times, but especially given current market volatility, fiduciaries should evaluate the timing and frequency of their investment reviews.

If you currently conduct a formal review of your plan's investment options annually, now is an appropriate time to consider whether to move up that review or to perform reviews with additional frequency. In addition to formal investment reviews, you should remain in frequent contact with your plan's investment advisers and consultants and confirm they have their own plans and strategies for monitoring the plan's investments and bringing any concerns promptly to your attention.

Robustly assess your investments.

Best practices counsel determining which, if any, of your investment options are at greater risk in this financial climate, and then engaging in a careful analysis of whether any changes are appropriate. Particular consideration should be given to performance outliers.

In times of market contraction, it is likely perfectly normal, under the circumstances then prevailing,[3] for nearly all investments to experience substantial declines. And the U.S. Supreme Court has emphasized that plan fiduciaries are entitled to rely on securities valuations that are based on market forces in efficient markets.

There is thus never any obligation for fiduciaries to guess how such securities will perform in the future. All that said, fiduciaries should consider whether investment options offer a reasonable risk-return trade-off, and whether disparities between an investment option's performance and that of its benchmark can be attributed to particular risk factors.

Maintain a diverse investment lineup.

In times like these, it can be tempting to move toward conservative investments like stable value funds, which have the benefit of insulating investors from some of the pull of a downward market. But times can change rapidly.

Just a month ago, some considered stable value funds to be unnecessarily conservative. If this crisis abates in a few months, that may soon be the case yet again.

As always, best practices counsel offering a diverse array of investment options to suit the needs of different plan participants — from younger employees who may have more of an appetite for taking on risk in return for a greater chance of reward to more conservative options for those nearing retirement and everyone in between. Depending on the demographics of your plan's participants, the inclusion of a stable value fund in the plan lineup may or may not make sense.

Pay particular attention to employer stock funds.

Plans that offer participants the option to invest in their own company's stock counsel special care, if only to counteract the natural tendency for employees to want to invest in and help the companies they work for and believe in. In a market downturn, if a company experiences significant market losses, participants with large holdings in the company's stock may face the prospect of both losing their jobs and a large chunk of their retirement savings.

Given the current market climate, now is an appropriate time to evaluate your company's stock and decide whether it is appropriate to impose a limit on future employee contributions into the fund. Fiduciaries should also be careful to subject corporate stock investments to the same careful analysis as other investment options. The key is to adequately monitor all investment options regularly.

Plan for the future.

Keep abreast of the financial markets and the news. Although these will be trying times for most companies, the nature of the effects will vary significantly by industry. Particularly if you expect slow growth, no growth or negative growth for your company in the near term, it may be appropriate to reconsider any material changes to your plan that were in the pipeline.

It may well be the case that the prudent choice would be to put those changes on hold due to current market volatility or employee disruption. Regrettably, many employees are already experiencing reductions in hours or other changes to their work status that might affect their retirement benefits. Best practices counsel determining whether changes in participant status might trigger changes in plan participation and then deciding any appropriate actions that must be taken.

Document your fiduciary process.

It is always prudent to document your deliberations, reasoning and any conclusions reached while evaluating plan investment options. That is true in both bull and bear markets.

Ultimately, plan investment decisions are not evaluated with 20/20 hindsight, but based on the information that was available to the fiduciaries and the process they followed in making their decisions. If the reasonableness of a plan investment decision is called into question, you will be glad to have contemporaneous support for your decisions.

Keep communicating — but be careful.

Consider, with due caution, appropriate participant communications in these times. If the plan sends out quarterly statements, some of those are certain to reflect a considerable decrease in portfolio values.

Although it may be tempting to send a comforting note about market reactions, be aware that anything other than a generic statement could come back to bite you. Forthright honesty is always the best policy.

Consider stepping up other communications with plan participants. Now, for instance, is an excellent time to remind employees of the educational or investment advisory services that your plan offers.

They will be comforted by the reminder that you are looking out for their best interests. Outside of formal communications with plan participants, you should also aim to stay in regular contact with your record-keeper and any others involved in monitoring your benefits call center. That will help you keep abreast of participant concerns and ensure that participants know about, and have unfettered access to, any benefits like necessary hardship withdrawals and loans.

Conclusion

These times are full of uncertainty. Given the current market climate, many of the actions fiduciaries take today will no doubt be called into question by aggressive plaintiffs attorneys in the coming months and years.

The best advice we can give is to avoid the temptation to take knee-jerk reactions to the current market downturn. Instead, pay close attention to your existing fiduciary duties and practices and actively engage with your plan's third-party advisers. Remember, fiduciaries have an obligation to act prudently and to protect the best interests of plan participants.

Most importantly, please stay safe.

Nancy Ross and Brian Netter are partners and co-chairs of the ERISA litigation practice at Mayer Brown LLP.

Richard Nowak is a partner at the firm.

Mayer Brown counsel Eric White contributed to this article.

[1] 29 U.S.C. §1104.

[2] Id. §1104(a)(1)(B).

[3] 29 U.S.C. §1104(a)(1)(B).