

ERISA Plan Investment Management in a Time of Market Disruption

by Andrew Holly

The coronavirus has roiled financial markets. What can fiduciaries of ERISA pension plans do to weather the storm?

COVID-19 has shocked the markets, resulting in massive losses for 401(k) plans, defined benefit plans, and other ERISA-governed pension plans. Turbulent economic times will almost certainly continue. ERISA fiduciaries find themselves in the eye of the storm, obligated to manage plan investments with an uncertain future ahead. And plaintiffs' attorneys lurk on the sidelines looking for potential opportunities to file class action lawsuits.

Here are some thoughts for ERISA fiduciaries on how to navigate these uncertain times and how to limit exposure to potential lawsuits.

Process, Process, Process: Remember the most important principle: ERISA does not demand that fiduciaries accurately predict market swings or perfectly “time” the market. But ERISA does require that fiduciaries develop and follow a prudent decision-making process. What that process looks like depends on the particular circumstances of your plan, but consider whether now is a good time for a special meeting of your investment committee or whether there are other appropriate steps to evaluate the rapidly evolving market conditions.

A prudent decision-making process can defeat an ERISA breach of fiduciary duty claim. For example, in one recent case, a district court dismissed the Department of Labor's (“DOL”) ERISA fiduciary-breach claims because the defendant-fiduciaries “implement[ed] a routine monitoring procedure” and then “adher[ed] to it.” *Scalia v. WPN Corp.*, 2019 U.S. Dist. LEXIS 167662, at *20-29 (W.D. Pa. Sep. 30, 2019). On the other hand, an inadequate decision-making process makes it more difficult for fiduciaries to escape liability. For example, the Fourth Circuit recently held that defendant-fiduciaries were liable for a decision to sell a plan's company stock holdings because they “failed to engage in a prudent decision-making process” and they reached the decision with

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“virtually no discussion or analysis.” *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358-60 (4th Cir. 2014). As these cases (and many others) make clear, process is paramount.

Document Your Decisions: Though not necessarily required by ERISA, careful documentation of decisions—and the reasons behind them—is critical to protecting yourself against litigation. Again, courts will evaluate an ERISA fiduciary’s decision not based upon whether it was “successful,” but upon whether the fiduciary followed a proper process in reaching that decision. It is important to make a clear record that you, in fact, followed a proper process. To do so, carefully document what decisions were made and how and why they were made. Often, it is helpful to document the potential risks and problems facing the plan (they are inevitable, especially when the markets are turbulent as they are today). Though this may seem counterintuitive, careful documentation of how a fiduciary responded to those problems can be a powerful defense in litigation.

Keep in Close Contact with Third-Party Investment Advisors: Consistent with the duty to follow a proper decision-making process, now may be a good time to meet, or check in with, your plan’s third-party investment advisor to see if they have any particular advice for your plan.

Review Fund Line Up: Given the risk of prolonged market volatility, consider reviewing your plan’s investments and their performance. The world has changed quickly; consider (in consultation with your advisors) whether your plan’s lineup needs to change as well.

Stable Value Funds: If your plan offers a stable value fund with wrap insurance protection, consider monitoring—or asking your plan’s investment manager to monitor—the financial health of the fund provider/insurer to ensure its solvency.

In recent years, there have been many lawsuits over stable value funds in ERISA plans. For example, in 2015, Lockheed Martin was forced to pay \$62 million to settle ERISA fiduciary-breach claims alleging, among other things, that the 401(k) plan invested in an overly conservative stable value fund. This stable value fund litigation has also swept in service providers. For example, J.P. Morgan had to pay \$75 million to resolve claims brought by a class of ERISA plans that it misrepresented the investment strategy used by its stable value fund. *In re J.P. Morgan Stable Value Fund ERISA Litig.*, 2019 U.S. Dist. LEXIS 163884 (S.D.N.Y. Sep. 23, 2019).

Service Provider Inquiry: It also may be a good time to check in with your plan’s service providers to verify how they will continue services amidst COVID-19’s disruptions. Are those service providers well-positioned to weather the economic storm? Consider whether there is a risk that services might be affected by ongoing market and social disruptions, and if so, form a backup plan. Once again, document your consideration of these risks and any decisions reached.

Participant Communications: Plan participants are nervous about their retirement savings. You may want to communicate with plan participants to reassure them—but be careful. Communications to participants about their retirement savings could be

construed as “investment advice,” which could expose you to fiduciary liability.

Defined Benefit Plans: Remember that ERISA’s fiduciary duties apply to defined benefit plans as well as defined contribution plans like 401(k) plans. The Supreme Court is currently considering the extent to which participants may sue fiduciaries of defined benefit plans. Recent market losses have inevitably caused some defined benefit plans to slip from “overfunded” to “underfunded,” thereby increasing the risk of challenges to the investment decisions by fiduciaries of defined benefit plans.

Company Stock/ESOP Issues: COVID-19’s market disruptions may have affected your plan’s holdings of company stock. The extent to which a fiduciary must monitor a plan’s investment in company stock, whether in a 401(k) or ESOP, is a complex area of law. The Supreme Court has revisited this issue three times in the last six years, including in a decision issued just months ago. *See Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2020). While a full discussion of a fiduciary’s obligation to monitor company stock investments is beyond the scope of this memorandum, it might be prudent to evaluate whether you are operating in line with your plan’s company stock policy.

Insurance/Indemnification: Though not directly related to COVID-19 and its market disruption, it is always a good idea to ensure that you have purchased appropriate amounts of fiduciary liability insurance and that your plan’s indemnification terms are up-to-date.

Keep up to Date on Regulatory Changes: While not a fiduciary duty, plan sponsors should keep abreast of regulatory changes from the DOL and Congress. The DOL and Congress are considering—and are likely to adopt—significant changes to regulations governing pension plans to address the COVID-19 situation. Plan sponsors might decide (or be required to) adopt plan changes to help employees deal with the fallout from COVID-19.

Privilege Issues: As always, keep in mind that communications about fiduciary duties between your plan’s fiduciaries and counsel might be subject to the fiduciary exception to the attorney-client privilege. This does not mean you should avoid communications with your attorney, but it does mean that you should be intentional about them. Be careful, for example, to separate communications about settlor issues from fiduciary issues.

Review Your Plan’s Fiduciary Structure: Keep in mind that ERISA’s definition of who is a “fiduciary” potentially includes those with a duty to appoint and remove other fiduciaries. It can also include those who review or monitor a fiduciary’s work. This “duty to monitor” can arise from the terms of plan documents, but it can also arise informally when individuals take on responsibilities outside of plan terms. In some instances, such practices have resulted in senior officers or board members unwittingly becoming defendants in ERISA fiduciary-breach lawsuits. Now is a good time to review your plan documents, and informal practices, to make sure you know who is in the “line of fire.”

Be Attentive to ERISA § 104(b) Requests: Prior market drops (including the 2007-08 financial crisis) triggered a cascade of lawsuits alleging breaches of ERISA fiduciary

duties. Hundreds-of-millions of dollars have been paid to resolve those lawsuits. Often, these lawsuits start with a simple ERISA § 104(b) request for plan documents. A plan administrator must comply with a proper § 104(b) request, but often these requests seek document beyond what is required. And errors in producing documents under § 104(b) have resulted in lawsuits that otherwise would not have been filed. Be attentive to any such requests, and seek advice if necessary.

Of course, this memorandum can only summarize some of the key issues and principles. Should you want to discuss these matters further, please feel free to contact us.