

The Growing Mutual Fund Scandal: A Practical Guide for ERISA Fiduciaries
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Amidst the avalanche of information regarding the growing mutual fund scandal, retirement plan fiduciaries are once again facing tough choices as to how the scandal affects a retirement plan's investment offerings. The following issues are relevant to ERISA retirement plans as well as any state pension fund or Section 403(b) or Section 457 plan.

➤ **The Allegations:**

- *Late Trading* – Late Trading is the process that allows certain shareholders to make a trade after the recognized "closing time" to capitalize on profits or losses resulting from events after the market closing time.
- *Market Timing* – Market Timing is the process that allows certain shareholders to profit from events happening throughout the world even though these shareholders are prevented from doing so by the fund prospectus.

➤ **The Fiduciary Duties:**

- The decision to offer a particular fund for the investment of plan assets is a fiduciary act.
- Fiduciaries must periodically monitor the various investments and investigate any issues raised relating to those investments.

➤ **The Questions to Ask:**

- *Does your plan engage an independent third-party investment consultant?* An independent consultant will assist you in evaluating your current choices and whether any of the fund choices should be replaced or reallocated.
- *If no, does your plan offer any of the fund families involved in the current allegations?* If your plan does not use an independent third party consultant, then you must determine whether any of the current funds remain a prudent investment. You may wish to consider hiring an independent consultant to assist with this process.
- *If you have funds implicated, should you replace them?* There is no right answer to this question, but asking the question is important. Presumably, you originally chose these funds for a reason after a prudent search process. Replacing the fund could give rise to transaction costs, you may choose a fund that will likewise be implicated in the next few months or you may choose a fund that will not perform as strongly as the replaced fund. However, by not replacing the implicated fund, you may expose your participants to lower fund performance if massive withdrawal from the fund occurs and participants may allege that with hundreds of thousands of mutual funds to choose from, you have exposed their retirement money to unnecessary and imprudent

risk. Only a detailed and prudent evaluation will provide you with the answer to this question as it relates to your plan.

- *If we do not have implicated funds, is there any reason to worry?* Just because your retirement plan does not offer an investment in the implicated funds, it does not remove your duty to periodically monitor your investments. Your plan's investment committee should be meeting quarterly and should specifically review your fund offerings to determine if you have any reason to engage a further discussion into any of the current fund offerings. Additionally, as the mutual fund scandal is expected to grow, you should periodically consider whether any of your fund offerings have been implicated.

➤ **The Communication:**

Most plans will receive a participant inquiry regarding the mutual fund scandal and how it implicates your plan. While you do not want to unnecessarily alarm participants, you must have a strategy for answering any participant questions regarding the issue. This strategy should include whether any of the funds in your plan are implicated and that the plan fiduciaries and any applicable consultants are reviewing the matter to determine the prudent action. If your plan is heavily invested in the implicated funds, you may wish to broadly communicate to all participants that you are reviewing the matter and will act accordingly. Additionally, any decisions regarding the funds in a participant directed plan will likely have Section 404(c) implications to consider.

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The above summary is an overview of the process that fiduciaries should be considering when examining the mutual fund scandal and its effect on their retirement plan. This overview is not intended to be legal advice and should not be construed as legal advice for any particular factual situation.

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