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ADJUSTING FIDUCIARY DUTIES IN A CHANGING WORLD

The obligation to do what is right for one's beneficiary, present at the inception of trusts in the middle ages, still figures in contemporary descriptions of fiduciary standards. Further, the norms are reinforced by the fact that fiduciaries such as corporate directors, directors of mutual funds, ERISA fiduciaries, and trustees of personal trusts may all be held personally liable for breaches of their duty.

Another of these attributes, the open-ended obligation of a fiduciary to act, pinpoints an important aspect of the modern fiduciary's dilemma. How do fiduciaries know when they must add new elements to their work, such as actively voting the stock held in trust portfolios or becoming more involved monitors of corporate governance? …(T)he first step fiduciaries should take is to determine the scope of their mandate, that is, examine the documents and laws that define the purposes for which they are given power over the assets of others. For most pension and trust fiduciaries, the mandate involves investment management aimed at reaching stated financial goals for the funds. Changing circumstances produce changes in the means investment managers use to achieve the funds' economic goals. For instance, the enormous accumulation of money in pension funds means that the funds own increasingly large percentages of stock in growing numbers of corporations; consequently the exercise of shareholder powers may really affect the economic value of the funds. Similarly, revisions in the proxy voting rules and disclosure provisions of the securities laws facilitate the exercise of shareholder power. As market operations, rules, and business practices affecting commissions and fees change, fiduciaries must constantly readjust the balance between costs and the value of services rendered to the fund. As alternative investments and techniques are proposed to improve on yields available through conventional portfolios, fiduciaries must try to balance the costs and risks against potential benefits.

Fiduciaries must learn to recognize when new factors that affect their responsibilities appear or when older factors take on new importance. As potentially significant economic factors appear, fiduciaries must analyze and act on them in accordance with basic fiduciary principles. Fiduciaries must also remember that meeting the prudence test requires inquiry into the facts and potential effects of new or newly significant factors. Whatever their ultimate decisions are, their procedures for reaching those decisions must be able to withstand scrutiny.

Excerpt from *Fiduciary Standards in Pension and Trust Fund Management*
by Betty L. Krikorian, Esq.