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The recent article *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*[1] (the "Article") undertook a detailed review of the development of financial scholarship regarding investment practices and legal scholarship addressing the evolution of fiduciary duties. The Article reviewed whether a passive approach (or utilization of indexing) is encouraged or even required by law in order for a fiduciary to meet their fiduciary duty. The Article concluded with a recommendation that a passive investment strategy should be the default standard for corporate and professional trustees.

This response is not meant as an expansive review of the Article's arguments concerning portfolio construction. Instead, the authors would like to briefly address one foundational premise as a reminder to all practitioners. It is crucial for fiduciaries to understand that Mr. Harmon's and Ms. Fisher's sophisticated analysis, and their discussion of "passive investments" refers solely to the construction of an investment portfolio and not a trustee's fundamental approach to his or her task. A trustee utilizing a passive investment strategy should not confuse the use of the term "passive" with their fiduciary duty and obligations in managing a portfolio. An index fund may relieve some of the burden on a trustee because the trustee may not need to undertake extensive research and analysis on the market for individual stocks. Yet, a trustee's fiduciary duty still requires the trustee to undergo sufficient research and analysis to ascertain whether a particular index is a good fit for the needs of a trust and its beneficiaries.

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1 Bryon W. Harmon & Laura A. Fisher, *The Prudence of Passivity: An Argument for Default Passive Management in Trust Investing*, 44 ACTEC L.J. 147 (2019).

The concept of prudence in trustee investing has significantly evolved over the last fifty years.[2] Throughout this time, there have been enormous rises in stock markets and increased inflation, as well as recent bouts of extreme volatility in financial markets. Individual investors have found it difficult at times to navigate the changing markets. Trustees have the additional burden of their heightened standard of care and fiduciary duty owed to the beneficiaries of the trusts they administer.

As stated by Justice Samuel Putnam in *Harvard College v. Amory*, "[a]ll that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion."[3] The ideas from this seminal case eventually became known as the Prudent Investor Rule which focuses on the process of how a trustee makes an investment choice, not the results.

In trustee investing in New York, nothing is prudent or imprudent, *per se*. The needs of each trust are different, and each trust's investment strategy is different. Moreover, the needs of each trust should be analyzed and reviewed on a periodic basis, or more frequently as necessary. A prudent trustee thus is never truly passive in determining how to construct a portfolio. Even if a passive investment product is utilized, a trustee may need to actively select the index, monitor its performance, or revisit asset allocations in response to changed market conditions or beneficiary needs. The investments themselves may be "passive" but the trustee is not.

Based upon anecdotal evidence, it appears that many investment advisors and corporate fiduciaries do use indexing and index funds for trustee investments; however, (and most importantly) these individuals remain "active" investors. This includes selecting an index, managing it and sometimes deviating from the index. The trustee or investment advisor actively manages, reviews and analyzes the selected index fund. Even if the investment result is not the desired result, the trustee or investment advisor has complied with the mandates of the Prudent Investor Rule by this repeated analysis and constant review. In many instances it may be preferable and prudent to utilize indexes. Regardless, a trustee must "actively" undertake that periodic (or more frequent) analysis.

Essentially, this comment focuses on a question of semantics, with the authors finding some concern with the oft-used term of art "passive investing." The "active" part of the fiduciary's role – the selection of

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[2] *See generally* C. Raymond Radigan & Jennifer F. Hillman, *The Evolution of Prudence in Trustee Investing*, N.Y. L.J., July 9, 2013, https://www.law.com/newyorklawjournal/almID/1202609889391/?slreturn=20190513114340.

[3] 26 Mass. 446, 461 (1830).

the portfolio, be it indexes or otherwise, and the periodic review of performance against the needs of the Trust – is the single most important task that a trustee undertakes in order to comply with the Prudent Investor Rule.