

Publications

Modernization of DC Plan Investments

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There is a growing interest from the retirement industry and policymakers to modernize 401(k) and other defined contribution (“DC”) plan investments by incorporating alternative asset classes and lifetime income features. Although perceptions of litigation risk have created headwinds, a recent win for the defense bar in the Ninth Circuit highlights that, with proper risk disclosures and a prudent process, fiduciaries may invest in alternatives without violating their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Taken together with the Trump Administration’s expected regulatory initiatives, there is momentum toward modernizing and diversifying DC plan investments.

I. Anderson v. Intel Corporation Investment Policy Committee

A. Procedural Posture

The litigation began in 2019, when Anderson, a former Intel employee who participated in the Intel 401(k) Savings Plan and the Intel Retirement Contribution Plan, filed a complaint alleging, among other things, that the plan fiduciaries breached their (1) duty of prudence based on their allocations to hedge funds and private equity funds and (2) duty of loyalty by making investment decisions to the benefit of Intel Capital at the expense of plan participants.

The district court dismissed the complaint for failure to state a claim and granted leave to amend. In the opinion, the district court noted that Anderson failed to provide a meaningful benchmark to support the duty of prudence claim and failed to provide plausible allegations to support the duty of loyalty claim. The district court again dismissed, with prejudice, the amended complaint and emphasized that Anderson still failed to identify a meaningful benchmark comparator for Intel’s funds, as well as failed to detail allegations sufficient to support the self-dealing claims.

Anderson appealed, and the Ninth Circuit reviewed the district court's decision *de novo* and [affirmed](#).

B. Ninth Circuit Analysis – Duty of Prudence

The Ninth Circuit emphasized that the duty of prudence is process based: that is, the prudence analysis turns on whether plan fiduciaries follow appropriate processes to evaluate investments, rather than whether they got the decision “right.” More specifically, the court emphasized that a plaintiff cannot just allege that fiduciaries could have obtained better results through a different investment option and instead, a plaintiff needs to cross the line from possibility to plausibility to get past the pleading stage and into discovery. The Ninth Circuit affirmed the district court's holding that Anderson failed to state a claim for breach of the duty of prudence because he did not provide allegations from which the court could infer that an inadequate process led the fiduciaries to select hedge fund and private equity investments that were inappropriate for Intel.

Alignment with Plan Goals. The Ninth Circuit noted that ERISA and the Department of Labor's (the “Department”) regulations make clear that a plan's goals matter in an evaluation of a fiduciary's investment decision. It emphasized that “courts have routinely rejected claims that an ERISA fiduciary can violate the duty of prudence by seeking to minimize risk” and that fiduciaries need not adopt riskier strategies solely because such strategies may generate greater returns.

Disclosures. The Ninth Circuit also highlighted the fact that Intel “clearly disclosed the aims of its funds” by disclosing its risk-mitigation objective of providing greater downside protection in weaker markets, with the tradeoff of such protection being slight underperformance in stronger markets. The court further noted that even the complaint effectively conceded that the fiduciaries' investment decisions had their intended effects and exhibited the expected and disclosed performance tradeoffs.

Meaningful Comparators. The Ninth Circuit said that plaintiffs must compare performance of the funds they are challenging to funds or investments that are meaningfully similar. The court noted that Intel created customized benchmarks to monitor performance of its custom funds and suggested that Anderson could not simply compare the customized benchmarks and funds to standard benchmarks and funds unless they were meaningfully similar. The court explained that Anderson failed to identify a comparable comparator because the identified comparators exhibited “different aims, different risks, and different potential rewards” than the challenged funds.

General Challenges to Hedge Fund and Private Equity Funds. The Ninth Circuit explained that Anderson's general challenge to hedge fund and private equity investments overlooked the principle that prudence is assessed in light of a plan's portfolio as a whole. The court cited to the Department's opinion issued to our firm that found that plan fiduciaries can prudently include private equity investments in individual account plan lineups. *See* Information Letter to Jon Breyfogle, Groom Law Group, Chartered (June 3, 2020) (the “Information Letter”). The Ninth Circuit underscored Anderson's failure to plausibly allege that Intel's selection of hedge funds and private equity investments was imprudent at the scale they were made.

C. Ninth Circuit Analysis – Duty of Loyalty

Anderson alleged that the plan fiduciaries breached their duty of loyalty by giving hedge funds and private equity funds more capital to invest in certain companies and startups – those in which Intel Capital had already invested – with the purpose of benefiting Intel Capital by reducing risk rather than benefiting the plan. In analyzing Anderson's claim, the court explained that a potential for conflict alone is insufficient to allege a breach of the duty of loyalty.

The Ninth Circuit agreed with the district court's observation that Anderson failed to allege that the plan fiduciaries had influence over the investment firms' decisions to invest in companies and startups in which Intel Capital had already invested. The court affirmed the district court's holding that Anderson did not adequately allege a breach of the duty of loyalty given that Anderson only presented the *potential* for conflicts, without more.

II. Regulatory Developments & Industry Outlook

The Trump Administration will likely focus on the need to modernize DC plan investments. For example, the Trump Administration published the “[America First Investment Policy](#),” which explicitly directs the Secretary of the Department to “publish updated fiduciary standards . . . for investments in public market securities of foreign adversary companies.” The Department has also confirmed its intent to issue a new rule regarding the use of environmental, social, and governance (ESG) factors.

In addition, President Trump issued [Executive Order 14192](#), which directs agencies to “alleviate unnecessary regulatory burdens.” The Office of Management and Budget issued guidance interpreting Executive Order 14192 that states that agencies should review regulations that harm the national interest by impeding innovation, economic development, private enterprise, and entrepreneurship. At his confirmation hearing to head the Employee Benefits Security Administration, Daniel Aronowitz echoed these ideas.

Recent regulatory guidance highlights the impact of this Executive Order. Notably, the Department rescinded a Compliance Assistance Release issued during the Biden Administration that urged fiduciaries “to exercise extreme care” before adding cryptocurrency investments as a 401(k) plan investment option. In Compliance Assistance Release No. 2025-01 (“CAR No. 2025-01”), the Department noted it was returning to its previously longstanding “neutral approach to particular investment types and strategies.”

The industry can expect that the Department will evaluate other prior guidance that arguably may have deviated from asset class neutrality. For example, under the first Trump Administration, the Department issued the Information Letter, which provided a compliance roadmap for fiduciaries to include private equity investments in individual account plan lineups. However, during the Biden Administration, the Department issued a supplemental statement seemingly with the intent to discourage private equity investments in some DC plans. It is possible that the Department may rescind the supplemental statement, similar to CAR No. 2025-01. Moreover, the Department may consider additional advisory opinions or information letters, possible regulatory safe harbors, or other favorable guidance that may create a compliance roadmap and tamp down litigation risks as fiduciaries consider ways to modernize DC plan investment strategies.