Debevoise & Plimpton

The Debrief

A District Court Weighs in on Private Equity and Hedge Funds in 401(k) Plans: The January 2022 Intel Decision

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On January 8, 2022, in a case with a long and complex procedural history dating back almost seven years, including a Supreme Court ruling on the application of ERISA's statute of limitations to the claims presented, the U.S. District Court for the Northern District of California granted a motion to dismiss amended claims brought by participants in two defined contribution plans sponsored by Intel Corporation, Inc. ("Intel"). The plaintiffs alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA") because the plans offered investment choices with significant allocations to alternative investments, namely a target date fund that included up to 37.2% hedge funds and commodities and an investment option that included approximately 56.22% hedge funds, private equity and commodities. We refer to the investment fund options at issue in the case together as the "Intel Funds."

The District Court dismissed the plaintiffs' "conclusory allegations" that the Intel Funds' substantial allocations of alternative assets was a per se breach of the plan fiduciaries' duty of prudence. The District Court also dismissed the plaintiffs' allegations that the Intel Funds were imprudently designed when compared to comparator benchmark funds selected by the plaintiffs, holding that these claims could not survive a motion to dismiss in the absence of factual allegations as to why these comparator funds were "meaningful" benchmarks with "similar aims, risks, and rewards" as the Intel Funds.

The Intel decision comes close on the heels of, but does not rely on or refer to, recent U.S. Department of Labor ("DOL") guidance on the inclusion of private equity investments in 401(k) plans, specifically the DOL's June 2020 Information Letter and its clarifying December 2021 Supplemental Statement. The 2020 Information Letter stated that "a plan fiduciary of an individual account plan may offer an asset allocation fund with a private equity component" in a manner consistent with the requirements of Title I of ERISA and provided a roadmap for 401(k) plan fiduciaries on how to conduct an objective, thorough and analytical process to evaluate whether to include private equity and alternative asset classes as components of a plan investment. The 2021 Supplemental Statement reiterated that ERISA would permit private equity investments to be included as part of a professionally managed multi-asset asset allocation fund offered as an investment alternative under a 401(k) plan, subject to the plan's fiduciary concluding that adding such investments was both prudent and in the best interest of the plan participants and beneficiaries.[1]

Although the Intel decision generally focuses on the sufficiency of the plaintiff's pleadings, the holding in the case reaffirms the key takeaways from the DOL's recent guidance—that is, a prudent fiduciary that has properly evaluated the risks and rewards of an investment in private equity or other alternative asset classes can choose to add such investments as 401(k) investment options if, after an objective, thorough and analytical process, it concludes in good faith that this decision is in the best interests of plan participants and beneficiaries. In the Intel decision, the District Court concluded that the plaintiffs failed to state a claim that the Intel plan fiduciaries violated ERISA based on having authorized the inclusion of alternative assets in certain investment options under the 401(k) plan and by comparison to the returns on other available asset allocation funds that the plaintiffs did not demonstrate had similar aims, risks and rewards as the subject Intel Funds. Of particular note is the fact that the Intel Funds had a much higher percentage allocation of alternative investments than the 15% allocation referred to in a footnote to the DOL's June 2020 Information Letter.

We will continue to monitor developments in this area of importance for our clients. In the meantime, please do not hesitate to contact us with any questions.


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[1] Our firm's summary of the DOL's June 2020 Information Letter may be found here, and our discussion of the DOL's December 2021 Supplemental Statement can be accessed here.