Real Estate in Participant-Directed Defined Contribution Plans: Fiduciary Considerations

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Executive Summary

In selecting investment alternatives, 401(k) plan sponsors—acting as fiduciaries—must apply generally accepted investment theories and prevailing investment industry practices. This means, in part, selecting a 401(k) lineup that is diversified across a sufficient number of asset classes (i.e., stocks, bonds, international investments, cash equivalents and real estate) to allow participants to develop appropriate portfolios in their accounts that reasonably reflect their risk and return objectives.

Unfortunately, the guidance issued by the Department of Labor does not specify which, or how many, asset classes should be included. Instead, plan fiduciaries should look to the prevailing practices within the institutional investment industry. To be safe, well-informed plan sponsors should consider including at least one investment from each of the major asset classes.

Some fiduciaries have not recognized that real estate is a major, or core, asset class. Real estate investments can play an important role in diversification because their market value fluctuation is not highly correlated to that of stocks and bonds. Further, real estate offers the prospect of enhanced risk-adjusted returns. The most liquid, daily-valued form of real estate investment is a real estate investment trust (REIT). As a result, prudent plan sponsors should consider including real estate as an asset class, and REITs as an investment alternative, in their plans.

While REIT managers may invest passively (i.e., indexed) or actively, historical performance numbers suggest that this is a category where active management has added value.

Introduction

This white paper summarizes the fiduciary requirements imposed by ERISA on sponsors of participant-directed defined contribution plans for the selection of investments. Following this summary is a discussion of the considerations for selecting real estate as one of the asset classes in a plan and then an analysis of the factors to be considered in selecting a specific type of real estate investment.

Under ERISA, plan sponsors must engage in a prudent process to select investments for their retirement plans. This means that a plan sponsor—usually acting through a plan committee—must apply generally accepted investment theories and prevailing investment industry practices in selecting the plan investment lineup. "Generally accepted investment theories" refers to the principles used to guide the selection of asset classes that balance expected return and the risk associated with that return, taking into account how different asset classes perform in relation to others in the market (i.e., the correlation among investments). This includes, for example, modern portfolio theory. "Prevailing investment industry practices" refers to both (i) the strategies and factors used by investment professionals in assessing risk compared to projected return, and (ii) the selection of investments to populate the asset classes. A plan sponsor's application of these theories and practices should result in the creation of a diversified investment lineup over a broad range of good-quality and reasonably priced investment choices.

The U.S. Department of Labor (DOL) has identified the importance of diversification in several ERISA regulations.[1] This includes, for example, the requirements for a plan to be considered a "404(c) plan": the plan sponsor must provide a broad range of investments that are internally diversified (*i.e.*, not overly dependent on a limited number of holdings), and have materially different risk and return characteristics, to enable participants to put together prudent and appropriate investment portfolios in their accounts. The qualified default investment alternative (QDIA) regulation requires that safe harbor default investments be "diversified so as to minimize the risk of large losses" and "designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures." While the DOL does not mandate a specific mix of equity and fixed income or dictate the asset classes to be included, the message is clear: diversification across different asset classes is required to fulfill the ERISA fiduciary duty for investments.

Why should real estate assets be included? (In this paper, "real estate assets" refers to publicly traded REITs, which are the most liquid, transparent and efficient way of offering real estate.) There are several reasons. First, real estate is considered a well-developed, mature investment sector, and as such is one of the 11 industry sectors included in the S&P 500, one of the most commonly accepted measures of the U.S. economy.[2] They are also commonly included in large defined benefit pension plans and in portfolios managed by sophisticated institutional asset managers. This suggests that including real estate in a portfolio is a prudent practice. Finally, Morningstar recognizes real estate assets as a significant element of a well-diversified portfolio. A recent article by Morningstar explained:

> *"Real estate funds can play an important role in diversifying a portfolio, because real estate returns tend not to be too highly correlated with either the broader stock market or the bond market. Also, because real estate investment trusts tend to pay healthy dividends, these stocks are often seen as income plays."* [3]

If real estate assets are to be included, the plan sponsor must use a prudent process to select them—that is, the same process they would use for the selection of all investments for the plan. Selecting real estate assets, then, should not present a unique challenge. Simply put, a prudent process entails gathering relevant information about the investment, assessing that information and making a decision. This is sometimes referred to as an "informed and reasoned" decision, since it should be informed by the information gathered and reasoned based on the prudent assessment of the information.

What information would be relevant in deciding to include real estate? As with almost any asset, this would include, among other things, information about performance, volatility, cost, liquidity, daily valuation, tradability and, in the context of REIT funds, internal diversification within the real estate sector. Since 1991, real estate assets have had the highest annualized return among the major assets classes.[4] Further, publicly traded REITs are liquid and valued daily. This means that, like mutual fund investments included in a plan lineup, both the plan and participants have the opportunity to buy or sell REITs on days when the markets are open. REITs (and especially REIT mutual funds) may also be diversified across real estate industry sectors, as well as within specific sectors, such as commercial, industrial, residential and other real estate markets. This tends to mitigate the risk of a downturn in any one sector of the real

(1) See, e.g., ERISA Reg §§2550.404a-1, 404c-1 and 404c-5. (2) Added as 11th sector category in the Global Industry Classification Standard in August 2016. (3) Kathman, David, "Our Favorite Domestic REIT Funds," http://www.morningstar.com/articles/857081/our-favorite-domestic-reit-funds.html (4) Source: Morningstar; data quoted represents past performance, which is no guarantee of future results.

estate market. As lawyers, we are not able to give investment advice, but our point here is that a plan sponsor will need to gather information about each of these elements and other relevant factors and make its own assessment.

Another consideration is whether to select a real estate fund that follows an index and is passively managed or to consider actively managed REITs. Market performance in the last decade shows that actively managed REITs have generally outperformed passively managed real estate investments.[5] This is a factor that a plan sponsor will need to assess in evaluating likely future performance.

Real estate assets could be a valuable addition for participants. For example, with appropriate investment education and, possibly, the use of asset allocation models, participants could construct better-diversified portfolios in their accounts. Similarly, advisors and consultants could include real estate assets in model portfolios, custom target date funds and managed accounts.[6] The use of REIT investments in providing these services would be consistent with generally accepted investment theories.

While asset class statistics about performance and volatility are useful in deciding whether to include a real estate investment, they don't address which real estate investment. A plan sponsor will need to engage in a prudent process to evaluate a reasonable cross-section of REITs or other real estate alternatives that meet the plan's overall investment objectives. In essence, this requires assessing the features of the alternatives using the same methodology employed for selecting other investments for the plan lineup.

In summary, neither the DOL or the courts have defined what constitutes a broad range of investments or what asset classes should be included in a well-diversified lineup. However, modern portfolio theory is based on the concept that the inclusion of asset classes that are not highly correlated—that is, where the market value fluctuation tends to be different from that of many other asset classes and investments—will help protect participant accounts over the long term by better balancing return and volatility. This suggests that plan sponsors should include all of the major asset classes in their investment lineup rather than picking and choosing only certain classes. And this means that plan sponsors should consider real estate in establishing a well-diversified, balanced lineup of investment alternatives … both as a best practice and as good risk management.

Discussion

In this section, we lay a foundation by discussing the duties owed by fiduciaries under ERISA in carrying out their obligations to the plans they serve. We then turn to the prudence of selecting real estate as an asset class within a plan lineup and conclude with a discussion of the factors related to the selection of specific real estate investments.

Fiduciary Requirements

This section includes an introduction to the legal requirements that govern fiduciaries under ERISA. This includes:

- A discussion of the prudent process for making decisions; and
- The steps and information required in the prudent process.

Under ERISA, the sponsors of participant-directed plans owe the participants the duties of prudence and loyalty, and must act with the exclusive purpose of providing them with benefits.[7] In fulfilling these duties, they are required to engage in a prudent process in making decisions about the plan, including selecting the plan's investment lineup. (For the sake of convenience, the term "plan sponsor" is used to refer to the fiduciary of a plan who is responsible for these decisions—sometimes, this is a committee appointed by the board of directors or designated officers of the sponsor.)

In the context of selecting investments, the Department of Labor (DOL) has described the prudent process in a regulation.[8] A plan sponsor must:

> *"…[give] appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved…"*

The DOL goes on to explain in this regulation what constitutes "appropriate consideration," noting that it includes, but is not necessarily limited to:

> *"(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio… to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action…"*

(5) Morningstar. This information represents past performance, which is no guarantee of future results. (6) Target date funds that are generally available in the marketplace typically have little or no allocation to real estate. Morningstar, Cohen & Steers. (7) ERISA Section 404(a). (8) ERISA Regulation Section 2550.404a-1.

In other words, the plan sponsor needs to evaluate how the proposed investment fits within the overall investment policy of the plan, applying modern portfolio theory. (When the DOL refers to a plan's "portfolio" of investments, the term should be read to mean the plan's investment lineup in a participant-directed plan.)

The DOL then explains specific factors a plan sponsor should consider:

> *"(ii) Consideration of the following factors as they relate to the portfolio:*
>
> *"(A) The composition of the portfolio with regard to diversification;*
>
> *"(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and*
>
> *"(C) The projected return of the portfolio relative to the funding objectives of the plan."*

While not the only relevant factors, the DOL lays out three key elements a plan sponsor needs to look at:

- **Diversification:** how does each proposed investment fit within and aid in the creation of a diversified lineup that includes investments over multiple asset classes?
- **Liquidity:** is the investment sufficiently liquid to enable the plan sponsor to eliminate the investment from the plan lineup if it is prudent to do so? In addition, in a participant-directed plan, are participants able to reasonably move out of the investment?
- **Performance:** does the investment provide a reasonable return—both currently and on a projected basis—in relation to the plan's cash flow needs and also in relation to the projected risk of the investment?

Other guidance also reflects the importance of analyzing the costs associated with investments, in addition to performance and liquidity.[9] In an analogous regulation on the selection of annuities for defined contribution plans, the DOL says that a plan sponsor must:

> *"Appropriately conclude that … the cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract."*[10]

Even though this refers to cost in relation to an annuity contract, it reflects the general principal that plan sponsors need to take cost into account in selecting an investment for the plan.

The essence of this process is that the plan sponsor must:

- gather relevant information about the investments,
- assess that information, and
- make an informed decision based on the assessment that it performed.

As part of the process, the plan sponsor has to perform two jobs simultaneously: (1) it must analyze whether the plan's investment lineup is adequately and appropriately diversified; and (2) it must analyze information about each investment. In both cases, there is an emphasis on diversification in addition to performance and liquidity. And the analysis of diversification requires that sponsors apply generally accepted investment theories, such as modern portfolio theory.[11]

The DOL has described the importance of diversification in several specific contexts. For example, ERISA Section 404(c) gives protection to fiduciaries in a participant-directed plan by saying that if a participant combines the plan's investment alternatives in a way that results in losses, the plan sponsor is not liable.[12] In order to obtain this relief, plan sponsors must provide a "broad range" of investment alternatives. The regulation under this section says that a plan offers a broad range:

> *"only if the available investment alternatives are sufficient to provide the participant or beneficiary with a reasonable opportunity to:*
>
> *"(A) Materially affect the potential return on amounts in his individual account with respect to which he is permitted to exercise control and the degree of risk to which such amounts are subject;*
>
> *"(B) Choose from at least three investment alternatives:*
>
> *"(1) **Each of which is diversified;***
>
> *"(2) Each of which has materially different risk and return characteristics;*
>
> *"(3) Which in the aggregate enable the participant or beneficiary by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the participant or beneficiary; and*

(9) *See, e.g.*, ERISA Regulation Section 2550.404a-4. (10) Id. at subsection (b)(4). (11) *See, e.g.*, ERISA Regulation Section 2550.404c-5. (12) The section says that fiduciaries have a defense from liability for losses that result from a participant's exercise of investment control over his or her account, so long as various requirements are met.

"(4) *Each of which when combined with investments in the other alternatives tends to minimize through diversification the overall risk of a participant's or beneficiary's portfolio;*

"(C) Diversify the investment of that portion of his individual account with respect to which he is permitted to exercise control so as to minimize the risk of large losses, taking into account the nature of the plan and the size of participants' or beneficiaries' accounts." [Emphasis added][13]

In essence, the 404(c) regulation describes the "broad range" in terms of diversification at two different levels. There must be diversification of the available investment alternatives within the plan. In addition, there must be diversification within each investment individually. The purpose is to enable participants to "minimize the risk of large losses." While 404(c) provides fiduciary protection, it may also be viewed as a fiduciary requirement in that it is difficult to imagine a plan sponsor creating a lineup that does not meet the broad range test.

In another regulation, defining the requirements for a plan's default investment alternative to be qualified (*i.e.*, a QDIA), the DOL also mandates diversification. Each of the mandated QDIAs must be:

- an investment fund or model portfolio that "applies generally accepted investment theories [and] is diversified so as to minimize the risk of large losses"; or
- an investment management service "applying generally accepted investment theories, [that] allocates the assets of a participant's individual account to achieve varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures [*i.e.,* diversified]." [Emphasis added][14]

When the DOL refers to diversification, it does not specify the asset classes or industry segments that must be included in a plan's lineup. In fact, the DOL has acknowledged that "there is no single, complete, universally accepted theory of optimal investment. Instead there are competing and evolving theories which have much in common (what might be called 'generally accepted' theories)."[15]

Nevertheless, there is a generally recognized definition of diversification. It consists of:

"the act of investing in different industries, areas, countries, and types of financial instruments, to reduce the chance that all of the investments will drop in price at the same time."[16]

It is commonly understood to mean "spreading the portfolio among different types of assets, including not only stocks but also bonds, real estate, international investments, and cash equivalents."[17] In addition, the S&P 500 Index takes into account investments over 11 industry segments.[18]

Thus, a plan sponsor seeking to fulfill the fiduciary obligation to provide a broad range of investment alternatives for selection by its participants—to satisfy the diversification requirement—should consider including investments in each of the categories identified in the foregoing definition and across the industry segments included in the S&P 500 Index. The inclusion of all 11 S&P asset classes would be good risk management.

The next section of this paper looks specifically at the inclusion of real estate assets in a plan lineup in satisfying the diversification requirement.

Selecting Real Estate for a Plan Lineup

Statistical and factual information about investments included in this section are based on information, provided by Cohen & Steers, on which we have relied without independent investigation.

In this paper, the term "real estate" is used to refer to publicly traded, actively managed real estate investment trusts, or REITs. Individual properties may be prudent investments in some very large defined benefit plans, since there is less need for liquidity to meet the plan's benefit needs. However, for small to mid-sized participant-directed defined contribution plans, there is generally a need for two types of liquidity. The first is at the plan level, so that a plan sponsor can remove and replace an investment alternative with relative ease if it is prudent to do so. The second is at the participant level to facilitate changes in the investment alternatives in a participant's account, typically on a daily basis. Publicly traded REITs provide both types of liquidity.

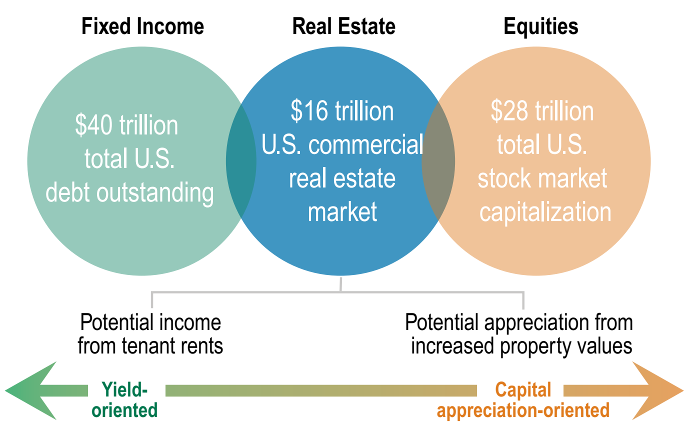
(13) ERISA Regulation Section 404c-1(b)(3). (14) ERISA Regulation Section 2550.404c-5(e)(4). (15) Preamble to proposed regulations on Investment Advice – Participants and Beneficiaries, 73 Fed. Reg. 49896 (August 22, 2008), at fn 59. (16) Collins English Dictionary. (17) Id. (18) On August 31, 2016, the S&P Index moved stock-exchange listed equity REITs from a sub-classification within the Financials sector to a separate Real Estate Sector within the Index. According to FAQs issued by Nareit, this reclassification recognized the growing position of real estate in the global economy. The addition of real estate as a new industry classification within the Index followed a reclassification by Morningstar in 2010 and by the OMB in 2007 in the North American Industry Classification System.

Why Include Real Estate

In this section, we discuss factors that a plan sponsor should consider in deciding on a plan's investment lineup. As lawyers, we are unable to provide and have not undertaken to provide investment advice.

One reason for including real estate is the size of the real estate market as a core asset class. It is the third-largest class behind fixed income and equities, as shown in Exhibit 1:

Exhibit 1: Size of Financial Markets



At October 31, 2018. Sources: Broadridge, Securities Industry and Financial Markets Association (SIFMA), Green Street Advisors.

Market capitalizations for fixed-income as of September 30, 2017; for real estate as of December 31, 2017; for equities as of February 28, 2018.

Another reason is performance. During the period from 2003 through 2017, U.S. REITs outperformed the S&P 500 index in 10 of the 15 years.[19] The annualized return was 10.5% over that period, almost 3% higher than the index (10.5% vs. 7.6%). Obviously, past performance is not a guarantee of future performance; however, it does indicate that different asset classes have periods of outperformance and the failure to include a major asset class means that those periods will be missed. While REITs have been somewhat more volatile, this can be offset when they are combined with other assets that are not affected by market fluctuations in the same way as real estate investments.

This performance factor is illustrated in Exhibit 2, which shows the performance of REITs since 2003.

Performance is only one of the measures to consider, however. Another is the impact of real estate assets on diversification. Again, by real estate assets, we are referring to publicly traded REITs, which themselves are often diversified among different types of real estate—e.g., commercial, industrial, residential and so on—or over different geographic areas. This form of diversification helps to protect against market downturns of one class of real estate versus others, or one area of the country versus others. In addition, like stocks, bonds and commodities, publicly traded REITs provide liquidity, which is essential in participant-directed plans. Further, publicly traded REITs often perform counter to other asset classes in fluctuating markets, thus mitigating a portfolio's overall volatility.[20] Real estate assets can also

Exhibit 2: Return Characteristics (2003–2017)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2003–2017 Annualized
U.S.																
Real Estate	37.1	31.6	12.2	35.1	-15.7	-37.7	28.0	28.0	8.3	18.1	2.5	30.1	3.2	8.5	5.2	10.5
Stocks	28.7	10.9	4.9	15.8	5.5	-37.0	26.5	15.1	2.1	16.0	32.4	13.7	1.4	12.0	21.8	7.6
Global																
Real Estate	40.7	38.0	15.4	42.4	-7.0	-47.7	38.3	20.4	-5.8	28.7	4.4	15.9	0.1	5.0	11.4	9.9
Stocks	33.8	15.2	10.0	20.7	9.6	-40.3	30.8	12.3	-5.0	16.5	27.4	5.5	-0.3	8.2	23.1	7.4

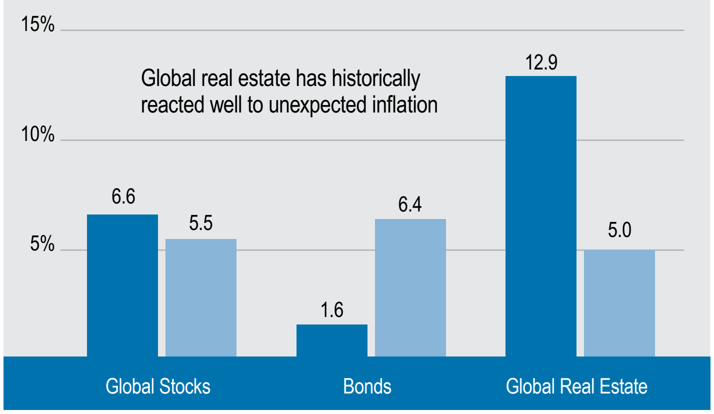
At December 31, 2017. Source: Morningstar and Cohen & Steers.
Data quoted represents past performance, which is no guarantee of future results. U.S. Real Estate: FTSE Nareit Equity REIT Index. U.S., Stocks: S&P 500. Global Real Estate: FTSE EPRA Nareit Developed Index. Global Stocks: MSCI World Index.

(19) Morningstar. Data quoted represents past performance, which is no guarantee of future results. (20) Morningstar, Cohen & Steers.

provide a level of protection against inflation, since they tend to increase in value with inflation. This is shown in Exhibit 3 that covers the 27-year period from 1991–2017:

Exhibit 3: Sensitivity to Positive/Negative Inflation Surprises

Annualized Return in Excess of Cash (1991–2017)[(a)]



At December 31, 2017. Source: Morningstar Direct and Cohen & Steers.

Data quoted represents past performance, which is no guarantee of future results. Quarterly data. (a) Based on Philadelphia Fed Survey of Professional Forecasters and US Headline Inflation, 1991–2017. Inflation surprise defined as the difference between actual headline inflation in the current quarter versus what was expected by professional forecasters in the previous quarter. A positive surprise means actual inflation was higher than it was expected to be, while a negative surprise means actual inflation was lower than it was expected to be. Global stocks: MSCI World Index. Bonds: ICE BofAML U.S. 7–10 Year Treasury Index. Global Real Estate: FTSE Nareit Equity REIT Index through February 2005 and FTSE EPRA Nareit Developed Index thereafter.

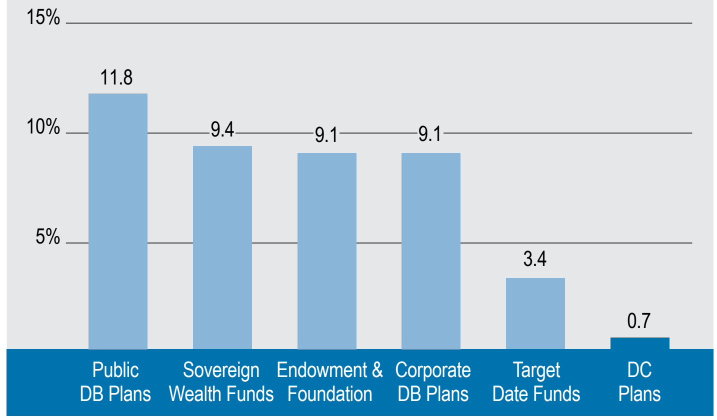
Another reason plan sponsors may want to consider including real estate in the plan lineup is the fact that investment managers of large defined benefit plans, endowments and foundations have historically used real estate to help diversify their portfolios. Exhibit 4 shows the percentage of assets in the portfolio allocated to real estate.

This chart graphically shows that the percentage of assets invested in real estate is significantly higher in large plans and endowments that tend to have more institutional asset managers. Though not dispositive of the issue of whether real estate should be included in a diversified plan lineup, it suggests that plan sponsors of defined contribution plans may want to consider taking advantage of the understanding and experience of these managers in their own plans.

The above discussion describes some of the factors that a plan sponsor should consider in deciding whether to include real estate as an asset class in its plan lineup: the size of the real estate asset class, performance of real estate investments as compared to other sectors of the market, how real estate helps address diversification, and the fact that professional asset managers of large plans and endowments include real estate as a segment of their assets. While this is not an exhaustive list, it does illustrate some of the more important considerations that plan sponsors should take into account in making its own determination about whether to include real estate in their lineups.

Exhibit 4: The DC Disconnect

Average Real Estate Allocation



At December 31, 2017. Source: DC Plans: Greenwich Associates 2016 Institutional DC Trends (survey of the largest tax-exempt funds in the U.S.); Corporate DB Plans/Sovereign Wealth Funds/Endowment & Foundation/Public DB Plans: Cornell University and Hodes Weill & Associates, "Institutional Real Estate Allocations Monitor" (data represents average target real estate allocation among survey respondents, representing 244 institutions in 28 countries, with total assets under management of more than US$11.5 trillion and portfolio investments in real estate totaling approximately US$1.1 trillion across Target Date Funds: Morningstar, based on 20 largest 2030/2035 funds as of 9/30/2018.

Active Versus Passive Management

It is commonly accepted that for some types of investments, low-cost index (passively managed) funds have provided superior returns to the average actively managed investment. As a result, some plan sponsors may have concluded that index funds are always superior and that the law requires or encourages the inclusion of passively managed investments. This is not the case. Instead, the law requires consideration of the factors that professional investors and investment advisers would use in evaluating funds. Management style (that is, active versus passive) and cost are two of the many factors to be considered. Obviously, the prospect of future performance is also a factor, though past performance is no guarantee of future results.

The DOL has not taken the position that prudent investments should be passive or actively managed funds. While it considered the issue in proposed guidance,[21] it ultimately decided against the lowest-cost funds, such as index funds,

(21) See, Department of Labor Proposed Best Interest Contract Exemption, 80 F.R. 21960, 21978, April 20, 2015.

over other investments.[22] Further, in the DOL guidance on participant disclosure, the Department specifically acknowledged that plans may hold both actively managed and index funds.[23]

A review of ERISA fiduciary litigation shows the same thing. That is, the class action plaintiffs' firms have sued plan sponsors in instances when both actively managed funds and passive index funds were used. Interestingly, while there have also been claims that plans should have used index funds, not a single court has ruled in favor of the plaintiffs on that issue.

But what about performance? A recent report by Wilshire Consulting shows that in 2017, active managers largely underperformed their benchmarks.[24] However, the report shows that REIT managers beat the benchmarks, returning a median 2.4% in excess returns gross of fees.[25] Further, 89% of active REIT managers outperformed the index in 2017, and did so consistently over three, five and 10-year periods, though in smaller percentages.[26]

Selecting a Specific Real Estate Investment

Assuming a plan sponsor decides to include real estate as one of the asset classes in its fund lineup, the next question is how to select a specific REIT investment for the lineup. The answer is straightforward: the plan sponsor should use the same prudent process it uses to select any investment for the plan. Put another way, there is nothing unique about selecting real estate investments. A plan sponsor should:

- consider information about the REIT investment, especially in comparison to other competing real estate investments,
- assess the information, and
- make an informed decision based on the assessment of that information.[27]

Among other things, a plan sponsor should consider issues such as performance, cost, volatility, diversification within the investment, the quality of management of the REIT investment, and liquidity. In considering these factors, a plan sponsor may find it valuable to compare the information about a specific investment against a common benchmark or index.

Conclusion

In selecting investment alternatives, 401(k) plan sponsors must apply generally accepted investment theories—the principles used to guide the creation of an investment portfolio that balance expected return over the degree of risk associated with that return—and prevailing investment industry practices—the strategies and factors used by investment professionals in selecting investments. This means, in part, selecting a 401(k) lineup that is diversified across major asset classes (*i.e.*, stocks, bonds, international investments, cash equivalents and real estate) and within each investment. A sometimes overlooked asset class is real estate, e.g., publicly traded, actively managed REITs. However, real estate is now considered a core asset class and, as such, is used by institutional investors for diversification. These investments can play an important role in diversification because their market value fluctuation tends to be different than stocks and bonds (that is, they are not highly correlated). As a result, plan sponsors, acting as fiduciaries, should consider including real estate as an investment alternative in their plans.

(22) See, DOL Final Best Interest Contract Exemption, 81 F.R. 21002, 21063-4, April 8, 2016. Even though this exemption has been vacated by the Fifth Circuit Court of Appeals, the DOL's position reflects that the Department does not favor index funds over actively managed funds as a matter of policy. (23) 75 F.R. 64910, 64915 (October 20, 2010). (24) See, Fox, Brooke, "Infographic: Where Active Managers Actually Beat the Benchmarks," FUNDfire, March 22, 2018. (25) Id. (26) Id. (27) See, ERISA Regulation Section 2550.404a-1.

Risks of Investing in Real Estate Securities. The risks of investing in real estate securities are similar to those associated with direct investments in real estate, including falling property values due to increasing vacancies or declining rents resulting from economic, legal, political or technological developments, lack of liquidity, limited diversification and sensitivity to certain economic factors such as interest-rate changes and market recessions.

Fred Reish and Bruce Ashton, the authors of this analysis, are partners in the Employee Benefits & Executive Compensation Practice Group of Drinker Biddle & Reath LLP. They are not affiliated with Cohen & Steers but have been compensated by us to provide this discussion. Cohen & Steers has also provided factual descriptions, charts, and investment information for their analysis.

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