FiduciaryAdvisors LLC
A Corporate Retirement Plan Advisory Firm

Retirement Times

NEWS AND UPDATES FOR RETIREMENT PLAN SPONSORS AND FIDUCIARIES

July 2021

Bitcoin: Coming to a 401(k) plan near you?

Our 2018 report on Bitcoin (BTC), and the conclusions therefrom, remain relevant today. In short, the prudence in adding Bitcoin to a retirement plan is questionable, at best.

Currency, let alone cryptocurrency, lacks intrinsic value, and does not provide dividends or income. The absence of intrinsic value, dividends, or income makes currency a less than ideal investment option because price becomes more a function of supply verses demand. Thus currencies are difficult to value and develop a long-range return forecast. Newer currencies like BTC contain elements of speculation because their approaches, adoption and technology are unproven. This can lead to tremendous volatility (see this discussion in our previous article), making them risky options for even the most sophisticated investors. U.S. Department of Treasury Secretary Janet Yellen recently issued a warning, stating that “(BTC) is a highly speculative asset, and you know I think people should be aware it can be extremely volatile and I do worry about potential losses that investors can suffer.”

BTC had taken early root among a variety of communities. Some saw it as a means of independence from governed societies’ financial systems while others believed it to have more diverse uses such as a way for an alternative currency to reach emerging markets, an opportunity for more seamless electronic payments, and the facilitation of anonymous transactions. The anonymity use-case which has driven BTC’s adoption is in turn subject to significant sustainability risk as more federal governments and nation states look to exert more control and regulation over these currencies. In fact, this may be the only way for cryptocurrency to be adopted en masse.

When it comes to building sound retirement portfolios, investing in assets that have intrinsic value and produce dividends and income continue to be the best strategies for those looking for outcomes that are more consistent and predictable. This not only applies to defined benefit investors looking to achieve some level of return or target a certain funded status, but to participants in defined contribution plans as well. If a plan decided to add cryptocurrencies to their fund offering, most participants do not possess the knowledge or expertise to make an informed and prudent allocation to this option. This would potentially open the door to fiduciary liability on behalf of plan sponsors who are responsible for monitoring designated investment alternatives made available to participants. Furthermore, from an administrative standpoint a lot of grey area persists. The infrastructure required to custody this type of asset is something most plan administrators lack at present.

To reiterate our conclusion from our first BTC article; while the innovative technology and recent returns can make this an exciting story to follow, the fiduciary considerations, wild valuation swings and uncertainty on several fronts make it clear: in building retirement portfolios it’s best to continue to watch BTC, and cryptocurrencies in general, from the sidelines, for now.

7 Ways to Reduce Fiduciary Liability

In 2020, nearly 100 lawsuits alleging breach of fiduciary duty were filed. And with the number of 401(k) lawsuits on the rise targeting plans both large and small, sponsors are well-advised to consider taking additional measures to mitigate fiduciary risk where practicable. Here are a few to consider.

1. Create and follow an IPS. While not an ERISA requirement, an investment policy statement (IPS) is considered a best practice according to Department of Labor (DOL) guidance. Among other things, it outlines how the organization will maintain and follow prudent processes for selecting and monitoring investments and oversee the performance of third-party providers. However, be advised that failure to follow IPS provisions can also expose an organization to increased risk, so careful crafting of IPS language is crucially important.

2. Outsource fiduciary responsibilities. While a 3(21) fiduciary acts in an advisory capacity, plan sponsors can hire a 3(38) fiduciary to maintain full authority and discretion over investments and take on the liability for managing them on a regular basis. Sponsors, however, must still conform to ERISA standards and follow a prudent process when engaging a 3(38) fiduciary (including monitoring them on an ongoing basis).

3. Obtain fiduciary liability insurance. This type of coverage is designed to protect companies from investment mismanagement claims and fiduciary legal liability. Such policies can protect both the organization as well as named fiduciaries, covering legal costs in the event of a 401(k) lawsuit. With the recent escalation of litigation, fiduciary liability insurance costs have also been on the rise, along with greater limitations in coverage.

4. Document, document, document. Keep detailed records of the prudent processes your company follows, from investment selection to fee benchmarking to ongoing fiduciary education and training. This documentation can strengthen your case in the event of a lawsuit.

5. Meet the safe harbor requirements of ERISA Section 404(c). This provision offers a “safe harbor” which if met relieves plan sponsors and fiduciaries from liability for losses arising from participant-directed investment. But to qualify, the plan must satisfy several a myriad of requirements pertaining to matters such as investment options, plan design and administration, as well as participant disclosures. Luckily the majority of these responsibilities are taken care of by top tier recordkeepers and/or third party administrators.

6. Take advantage of QDIA protections. In Section 624 of the Pension Protection Act of 2006, the DOL established the qualified default investment alternative (QDIA) safe harbor that allows for default investments to be made on behalf of participants who fail to make investment elections. QDIAs can include a target date fund, balanced fund or professionally managed account. Other regulatory requirements must also be satisfied to enjoy safe harbor relief from fiduciary liability for QDIAs, including the use of prudent QDIA selection criteria, participant notification, and regular monitoring of investment performance.

7. Class-action waivers and arbitration agreements. These plan document provisions require participants to undertake fiduciary breach litigation on an individual basis and prohibit the filing of legal actions in court (versus arbitration). Ideally, such clauses are included at the inception of the plan, as when added as amendments, the sponsor may have to later demonstrate that participants were made aware of the change. In cases where employees have already separated from the company, this may prove difficult.

Don't assume your plan is too small to be vulnerable to litigation risk. Creating layers of protection based on plan design features, documentation and adherence to prudent processes, fiduciary outsourcing and insurance coverage can help mitigate fiduciary liability.

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To Bundle or Not to Bundle — What's Best for Your Business Is the Question

Whether to use bundled or unbundled service providers is an important decision for your retirement plan. A fully bundled arrangement provides an easy, one-stop shop for services, while unbundling separates functions and uses a third-party administrator (TPA), distinct from the recordkeeper. While there is no right or wrong answer to this question, weighing the advantages of each option against the needs of the organization is essential.

The Benefits of Bundling

Convenience and simplicity. Often less complicated than dealing with multiple vendors, bundling may be a better choice when convenience is key. Bundling offers a comprehensive all-in-one solution, which can make it a more efficient and easier-to-manage option for many businesses.

Cost-effectiveness. Organizations can realize significant savings by bundling services when the cost of administrative and recordkeeping services is offset by management fees. But this is not always the case, so be sure to compare the "all in" costs when deciding.

Time savings. With a bundled arrangement, you do not have to take time to research and engage multiple providers since all services are consolidated under one umbrella. And you never need to spend time figuring out who to call when you have concerns about your plan — you will have a single point of contact for all your questions.

The Upside of Unbundling

Greater flexibility and choice. Bundled providers do not allow you to select experts for each service individually, while unbundling gives you the freedom to choose the ones best suited to your organization's particular needs. A bundled provider may be strong in one area, but not perform across all services equally. While engaging vendors independently can involve a bit more work, you may find doing so well worth the time and effort.

More complex and customizable plan design. Third-party administrators generally have a greater capacity to craft a plan tailored to meet an organization's specific goals — one that can better adapt to changing business conditions while complying with regulatory requirements. A TPA made-to-order plan can be particularly helpful when an employer's needs are more complex and require more sophisticated plan design features. Bundled providers, on the other hand, may use more of a boilerplate approach, resulting in a plan that doesn't fully align with all business objectives.

Increased agility. Even if you think the approach you have settled on is ideally suited to your needs, those needs may change over time. Or you may discover that an aspect of the overall service fails to meet expectations. With an unbundled arrangement, you can change up individual providers as needed, without having to upend your plan and start over from scratch, enabling an organization to be nimbler.

Decisions, Decisions

While the trend has been decidedly in favor of unbundling services in recent years, particularly among larger plans, which arrangement works best varies depending on the organization. Choose the option that provides the flexibility and customization — or ease and convenience — best suited to your situation.

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