

Labor Department warning opens divide on crypto in 401(k) plans

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Lawmakers and investor advocates are ringing alarms over the idea of allowing cryptocurrency into 401(k) and other retirement plans, especially after a turbulent month that saw some projects implode and

other cryptocurrencies go into free fall.

The debate kicked off in March when the Labor Department posted a compliance release that said those in charge of 401(k) [retirement plans](#) should "exercise extreme care" when contemplating adding cryptocurrencies to [investment](#) options. A month later, one of the largest financial service providers, Fidelity Investments, said it would offer the option to invest part of 401(k) plans in bitcoin.

ForUsAll, a 401(k) provider, sued the Labor Department this month, saying the warning violated the law that governs how federal agencies develop and issue rules. The California-based company said the department has no legal authority or existing precedent and said its guidance was issued suddenly and without public comment.

ForUsAll argued in its suit, filed in U.S. District Court for the District of Columbia, that the department's cautionary release sets a precedent and could embolden it to ban other investment types or strategies.

"The DOL plays several important roles that serve American workers—but 'armchair financial adviser' shouldn't be one of them," Jeff Schulte, CEO at ForUsAll, said in a statement. "Congress never gave [government officials](#) the power to pick winners and losers, let alone the legal authority to arbitrarily restrict entire asset classes."

Critics say cryptocurrency volatility can be particularly devastating for those saving for retirement. Supporters say it's another way to build wealth.

Most 401(k) plans have a menu of pre-selected traditional investments such as mutual funds, or allow a self-directed brokerage window, which lets employees pick specific investments. The Labor Department said those responsible for overseeing cryptocurrency investments or allowing

investments in cryptocurrencies through brokerage windows "should expect to be questioned."

Labor Secretary Marty Walsh indicated that the department was looking at a possible rulemaking when he was grilled June 14 at a House Education and Labor Committee hearing about the department's decision to issue a warning on cryptocurrency.

The department is trying to restrict the types of investments that Americans can choose to make when they don't have the legal authority to do so, said David Ramirez, chief investment officer at ForUsAll, said in an interview. The company manages 401(k) plans for small and many rapidly growing [tech companies](#) and is focused on providing access to alternative investments, including cryptocurrencies.

"We feel that this is really a form of informal rulemaking that happened overnight," Ramirez said. "That creates a very dangerous slippery slope."

This is bigger than cryptocurrency, Ramirez said, and is about whether Americans benefit from the Labor Department deciding which investments are best.

"If downside volatility is the issue, what's next? Is the Department of Labor going to ban Netflix or Meta from self-directed brokerage windows?" Ramirez said.

The company's suit seeks to require the department to retract its statement and prohibit it from enforcing it.

Bills would block guidance

Following the Labor Department's caution, lawmakers introduced bills to keep the pathway open for cryptocurrencies in retirement funds.

Alabama Republican Sen. Tommy Tuberville introduced legislation that would block the department from issuing a regulation or guidance that limits the type of investments that self-directed 401(k) account investors can choose through a brokerage window.

Tuberville says his bill is not just about cryptocurrency.

"This is about anything, whether it's about oil stocks or anything that might be seen by this administration as controversial," Tuberville said in an interview. "They should not have the opportunity to block the American citizens from investing in these open windows."

Tuberville said he is not telling people to invest in cryptocurrency but that he just wants people to have the opportunity if they choose.

"Nobody should have the ability to say, listen, we're going to try to protect you and keep you out of these certain avenues that you might want to get into, and that's not the federal government's business," Tuberville said. "It's none of their business at all, and the Department of Labor, I think, is really overstepping their boundaries here."

Rep. Byron Donalds, R-Fla., introduced a companion to Tuberville's bill in the House in late May. Donalds said cryptocurrency is a way for people to build wealth even as they need to be aware that cryptocurrency markets can be very volatile.

"Some of your best rewards and your best gains in the [financial industry](#) also come in places where it's a volatile industry," he said in an interview.

'Stay away'

On the other side of the issue are Sens. Tina Smith, D-Minn., and

Elizabeth Warren, D-Mass., who criticized Fidelity for its decision to offer bitcoin in retirement plans in a letter to the company in May.

Bitcoin and other cryptocurrencies are highly volatile and speculative investments, Smith said in an email.

"Cryptocurrencies are not subject to the same reporting and data integrity requirements as other investment products and it can be a challenge for even the most informed investors to evaluate these assets," Smith said. "As I wrote to Fidelity in May, I have deep concerns about financial institutions offering these products as part of retirement savings plans, which could put the savings of millions of Americans at risk."

Bartlett Naylor, financial policy advocate at consumer advocacy organization Public Citizen, likened investing in crypto in 401(k) plans to "throwing pennies against a wall to see what heads or tails comes up."

"We are dismayed that firms such as Fidelity are allowing this," Naylor said in an interview. His advice to investors thinking about it: "Stay away."

Charles Sizemore, principal of Sizemore Capital Management LLC, a registered investment adviser based in Dallas, said the general trend in retirement plans has been toward more choice.

"In the abstract, I would say that is absolutely good," Sizemore said in an interview. He advocates for people to be able to invest their money as they want, though they should not be encouraged to take more risk than they understand.

He said it's likely that some employers will offer crypto as an investment option in 401(k) plans.

"If you're competing for workers with everybody else, and a prospective employee is between you and the next guy, and you say, well, our 401(k) allows you to buy crypto, that very well might make the difference," Sizemore said.

The Labor Department and Fidelity did not respond to requests for comment.

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