



June 1, 2026

The Honorable Daniel Aronowitz
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Fiduciary Duties in Selecting Designated Investment Alternatives, RIN 1210-AC38

Dear Assistant Secretary Aronowitz:

Better Markets¹ appreciates the opportunity to comment on the Department of Labor’s (“DOL” or “Department”) proposal to provide a “safe harbor” for ERISA plan fiduciaries selecting alternative investments for ERISA-covered 401(k) plans (“Proposal”).²

The Proposal is deeply flawed. The Proposal purports to offer a safe harbor to plan fiduciaries to reduce “frivolous” private litigation. Yet, Congress has not authorized the DOL to interfere with plan participants’ access to the courts to ensure that administrators act in accordance with their statutory fiduciary duties. ERISA unequivocally guarantees plan participants that right; and it does not authorize DOL to thwart participants’ access to federal courts, nor does it empower DOL to direct federal courts to water down those duties in pursuit of fattening up the private equity and debt markets as well as those who peddle crypto assets. Whether or not those investments are appropriate for American workers’ 401(k) accounts—and, to be clear, they are not—a plan administrator’s decision to select such investment options should be subject to the same robust duty of prudence that courts recognize as “the highest [standard] known to the law.”³

The Department should withdraw the Proposal.

COMMENTS

I. DOL lacks the authority to prohibit participants’ access to justice.

A. Congress expressly granted plan participants a private right of action to enforce ERISA against plan administrators who breach their fiduciary duties.

The Department’s stated purpose for this rulemaking is telling. The Proposal’s “overarching goal” is to “alleviate certain regulatory burdens and litigation risk that interfere with the ability of American workers to achieve ... competitive returns.” It further

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² *Fiduciary Duties in Selecting Designated Investment Alternatives*, RIN 1210-AC38, 91 Fed. Reg. 16088 (Mar. 31, 2026).

³ *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

states that this goal “can be achieved only by clarifying that ERISA gives fiduciaries (not opportunistic trial lawyers) the discretion and flexibility” to make investment decisions. These statements reveal that the rulemaking’s primary purpose is to curtail private litigation against plan fiduciaries. The Department, however, has no statutory authority to achieve that goal.

Congress established a robust civil enforcement framework in Section 502 of ERISA.⁴ That provision expressly grants plan participants and beneficiaries a private right of action to recover losses caused by breaches of fiduciary duty. Congress created this private enforcement mechanism as a cornerstone of ERISA’s participant-protection framework. Congress authorized the Department to prescribe regulations “necessary or appropriate” for carrying out ERISA’s provisions and to enforce the statute’s fiduciary standards⁵—not to erect regulatory barriers to the private litigation Congress established as a central enforcement mechanism. That rulemaking authority does not encompass regulations whose express purpose is to diminish participants’ ability to vindicate their statutory rights in court. Courts have consistently held that agencies may not use rulemaking authority to override or circumvent congressional judgments embedded in a statute’s enforcement structure.⁶ Congress designed ERISA’s enforcement scheme with deliberate intent; the Department cannot nullify that design through regulatory action aimed at deterring private suits.

The Department’s invocation of Executive Order 14330 does not cure this defect. “[A]n executive order is not ‘law’ within the meaning of the Constitution or the APA,”⁷ nor does the Constitution permit the President to seize for himself the “law-making power of Congress” by issuing an order that, “like a statute, authorizes a government official to promulgate ... rules and regulations.”⁸ To the extent that Executive Order 14330 directs the Department to reduce “litigation risk,” that directive must yield to the limits of the Department’s enabling statute.

B. DOL cannot dictate how federal courts decide ERISA actions.

Federal courts already have tools to address meritless ERISA litigation, including Rule 12(b)(6) dismissal, summary judgment, and sanctions under Rule 11. Swerving far out of its lane, the Department proposes to tell courts to also defer to plan fiduciaries in their decisions when determining under ERISA whether those fiduciaries adhered to the heightened duties the law prescribes. The Proposal states that “when ERISA fiduciary decision-making follows a prudent process—such as the process reflected in the proposed regulation—arbiters of disputes should defer to fiduciaries under a presumption of prudence.” But the Department has no authority to prescribe evidentiary standards or burdens of proof in federal litigation. Those matters are governed by the Federal Rules of Evidence, the Federal Rules of Civil Procedure, ERISA’s statutory text, and judicial precedent—none of which Congress has authorized the DOL to alter.

⁴ 29 U.S.C. § 1132.

⁵ Section 505 of ERISA, 29 U.S.C. § 1135.

⁶ *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must give effect to Congress’s unambiguous intent in the statutory text).

⁷ *California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023).

⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

Moreover, Congress knows how to create safe harbors. It did so directly in ERISA. Section 404(c)⁹ provides a safe harbor for participant-directed plans that relieves fiduciaries of liability only for losses that result from a participant's own exercise of control over the assets in his or her account, and only where the conditions specified in the Department's implementing regulation, 29 C.F.R. § 2550.404c-1, are satisfied—principally, that the participant has the opportunity to exercise actual control and is offered a broad range of investment alternatives with sufficient information to make informed decisions. However, Section 404(c) does not relieve fiduciaries of the duty to prudently select and monitor the menu of designated investment alternatives made available to participants.¹⁰ Congress thus drew a deliberate line: whereas participant-choice losses are non-actionable, fiduciary selection and monitoring failures remain subject to Section 404(a) and the private right of action in Section 502. That Congressional judgment cannot be enlarged by an agency regulation that further insulates fiduciaries from liability for breaches in the selection or monitoring of investment choices that cause participant losses.

Nor is the Department's proposed safe harbor a rational means to reduce frivolous litigation. Assuming that courts agree with the Department's interpretation of the statute and presume that plan fiduciaries who have checked the right procedural boxes acted prudently—regardless of whether the underlying investment decision was sound—the safe harbor would bar meritorious suits by participants who suffered genuine losses from imprudent investments made by fiduciaries who followed an elaborate but ultimately deficient process. Adoption of the Proposal would thus be “arbitrary” and “capricious,” in addition to being “not in accordance with law.” 5 U.S.C. § 706.

II. The proposal ignores the benefits to plan participants from private litigation.

The Proposal likewise suffers from a regulatory blind spot that would be fatal to any rule adopted in such circumstances: it ignores the very real benefits to plan participants and beneficiaries from private litigation. Such failure “to consider an important aspect of the problem” would render the resulting rule, if adopted, arbitrary and capricious.¹¹

A. Private litigation is an important deterrent against fiduciary misconduct.

Congress enacted ERISA in 1974 specifically because prior law failed to adequately protect pension beneficiaries from mismanagement and self-dealing by plan fiduciaries.¹² The private right of action in ERISA Section 502 was central to Congress's design precisely because it enlisted plan participants and their counsel as private attorneys general to police fiduciary conduct.

Decades of ERISA litigation have vindicated that design. Private suits have recovered billions of dollars for plan participants harmed by excessive fees, imprudent

⁹ 29 U.S.C. § 1104(c).

¹⁰ See *Tibble v. Edison Int'l*, 575 U.S. 523, 530 (2015); *Hecker v. Deere & Co.*, 556 F.3d 575, 589–90 (7th Cir. 2009).

¹¹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹² See H.R. Rep. No. 93-1280, at 4 (1974) (Congress found widespread instances of mismanagement, embezzlement, and conflicts of interest in the administration of pension plans).

investment selections, failure to monitor investment options, and conflicts of interest.¹³ Without private litigation, these harms would have gone unredressed, with participants and beneficiaries suffering the losses.

Empirical research bears this out. ERISA class action litigation “is a significant reason for the downward pressure on fees across the asset management industry.”¹⁴ The leading academic study of 401(k) plan fees documents a substantial, sustained decline in plan fees from previously high levels, attributing that decline in significant part to heightened attention from plaintiffs’ counsel and competitive pressure on service providers responding to litigation exposure.¹⁵

Industry data confirm this trend. The BrightScope/ICI Defined Contribution Plan Profile reports that the average total 401(k) plan cost declined from 1.02% of assets in 2009 to 0.85% in 2022—representing an annual savings of approximately \$8.7 billion for workers.¹⁶ These declines have occurred over the same period during which private fiduciary litigation has been most active—a correlation that, as the Yale Law Journal study above documents, reflects causation in significant part.

The Supreme Court has likewise reaffirmed the substantive role that private litigation plays in policing plan-investment decisions, rejecting the very kind of categorical safe harbor the Department now proposes to embed in regulation. In *Hughes v. Northwestern University*, the Court unanimously vacated a decision holding that the presence of some low-cost options in a plan menu insulated fiduciaries from liability for retaining high-cost options, and reaffirmed that fiduciaries have a “continuing duty to monitor” each investment and remove imprudent ones.¹⁷

“In the wake of heightened legal action around 401(k)s, employers have adjusted their retirement plans for a win-win: lower fees for employees and reduced litigation risk.”¹⁸ Litigation has driven plan fiduciaries to negotiate more aggressively with recordkeepers, document their selection and monitoring processes more rigorously, and migrate from retail to institutional share classes. These are precisely the deterrent and corrective effects Congress had in mind when it built private enforcement into ERISA’s design—and they would be substantially blunted by a regulatory safe harbor that immunizes fiduciaries from suit whenever they have followed a documented process, regardless of outcome.

¹³ See, e.g., *Tussey v. ABB, Inc.*, 746 F.3d 327 (8th Cir. 2014) (affirming judgment against plan fiduciaries for excessive recordkeeping fees); *Tibble v. Edison Int’l*, 575 U.S. 523 (2015) (holding fiduciaries have ongoing duty to monitor plan investments).

¹⁴ Beagan Wilcox Volz and Emily Laermer, *Legal settlements squeeze fees for U.S. employee retirement plans*, Financial Times (May 21, 2017), <https://www.ft.com/content/927df5a0-3ca2-11e7-821a-6027b8a20f23>.

¹⁵ Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and “Dominated Funds” in 401(k) Plans*, 124 Yale L.J. 1476, 1483–85 (2015).

¹⁶ BrightScope & Inv. Co. Inst., *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2022*, at 11 (Mar. 2025).

¹⁷ 595 U.S. 170, 175–78 (2022).

¹⁸ Darla Mercado, *Here’s the real reason why your 401(k) fees are falling* (May 9, 2018), <https://www.cnbc.com/2018/05/09/401k-fees-are-falling-due-to-lawsuits-over-charges.html>.

B. The Proposal’s regulatory impact analysis fails to account for the benefits of private litigation.

By dismissing ERISA litigation solely as the product of “opportunistic trial lawyers” the Proposal demonstrates a fundamental misunderstanding of the private enforcement model Congress established and the Supreme Court has repeatedly affirmed. This framing is not a neutral policy description—it is a value judgment that skews the Proposal’s cost-benefit analysis against participants.

The Proposal’s regulatory impact analysis examines the potential benefits to plan fiduciaries from reduced litigation costs but does not meaningfully assess the countervailing costs to plan participants from diminished deterrence of fiduciary misconduct. This omission is economically and legally significant. Because the Proposal creates a broader safe harbor designed to make it harder for participants to recover for fiduciary breaches, some of the costs currently borne by plan administrators (who have engaged in misconduct) will be transferred to plan participants (who suffer unremedied losses).

The Department has not quantified or even acknowledged this transfer. A proper cost-benefit analysis must weigh the value of private litigation as a deterrent, the amount of participant losses currently recoverable through private suits that would be foreclosed under the new safe harbor, and the degree to which reduced litigation risk may lead to less rigorous fiduciary conduct over time. Such a failure “to consider an important aspect of the problem” is the epitome of arbitrary and capricious rulemaking.¹⁹

III. Encouraging private market and crypto investments in workers’ 401(k)’s is bad policy.

The Department characterizes the Proposal as a necessary measure to “democratize access to alternative investments in 401(k) plans.”²⁰ But there is a reason fiduciaries have long declined to include private market investments and crypto assets in 401(k) plans. Private market investments suffer from high fees, low liquidity, and a lack of transparency; as a result, they are risky for retail investors.²¹ Crypto has proven to be nothing more than a purely speculative investment with no real-world utility.²² There is no need for the Department to “democratize access” to these alternative investments.

¹⁹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

²⁰ News Release, *US Department of Labor Proposes Landmark Rule to Democratize Access to Alternative Investments in 401(k) Plans*, U.S. Dep’t of Labor, <https://www.dol.gov/newsroom/releases/ebsa/ebsa20260330>.

²¹ See Benjamin Schiffrin, *Private Market Assets Do Not Belong in 401(k)s*, Better Markets (June 4, 2025), <https://bettermarkets.org/analysis/private-market-assets-do-not-belong-in-401ks/>.

²² See Benjamin Schiffrin, *We Must Regulate Crypto As It Exists Today*, Better Markets (Oct. 30, 2025), <https://bettermarkets.org/analysis/we-must-regulate-crypto-as-it-exists-today/>.

A. Private market assets pose unique risks for retail investors

1. Private market assets are opaque.

Private market assets are unquestionably risky for retail investors. That’s because the private markets lack the disclosure requirements that exist in the public markets.²³ The federal securities laws protect retail investors through a mandatory disclosure framework for public offerings.²⁴ These disclosures ensure investors have the information that they need to make informed investment decisions.²⁵ But these disclosure requirements are entirely absent from the private markets.²⁶ That is why private market assets have long been restricted to so-called accredited investors— institutions and high net worth individuals with the resources to fend for themselves.²⁷

Private market assets also suffer from a lack of liquidity. Unlike in the private markets, assets such as “stocks, bonds, and exchange-traded funds (ETFs) trade frequently and therefore have observable shifts in market prices each day.”²⁸ But private market assets “change hands only very rarely.”²⁹ This means that “working out a price is hard,” and “history can hardly serve as a guide” because any transactions are not public.³⁰ It also means that retail investors, who are used to having easy access to their money, would not be able to readily liquidate their positions in the private markets.³¹

The lack of transparency and lack of liquidity in the private markets also renders private market assets hard to value.³² “In the absence of mandatory disclosure, investors in the private market are expected to conduct their own due diligence to determine a fair

²³ Benjamin Schiffrin, *The Risks the Private Markets Pose to Retail Investors, the Economy, and Financial Stability*, The Public Interest by Better Markets, Substack (Mar. 24, 2025), <https://bettermarkets.substack.com/p/the-risks-the-private-markets-pose>.

²⁴ Benjamin Schiffrin, *The Rise of the Private Markets Poses Risks for Retail Investors and Capital Formation*, Better Markets (Nov. 18, 2024), https://bettermarkets.org/wp-content/uploads/2024/11/BetterMarkets_Rise_of_Private_Markets_Report_11-18-2024.pdf.

²⁵ *Id.* at 4.

²⁶ See Brendan Callan, *We Must Bolster Private Market Transparency for Retail Investor Participation*, Forbes (May 27, 2026), <https://www.forbes.com/councils/forbesfinancecouncil/2026/05/27/we-must-bolster-private-market-transparency-for-retail-investor-participation/>.

²⁷ *Id.*; Benjamin Schiffrin, *There’s No Such Thing as Private Market Assets in the Hands of the General Public*, Better Markets (Sept. 10, 2025), https://bettermarkets.org/wp-content/uploads/2025/09/BetterMarkets_NoSuchThingAsPrivateMarkets_Report_09-10-2025.pdf, at 4.

²⁸ Managed Funds Association, *Primer: Investment manager valuation of illiquid assets* (Apr. 8, 2026), <https://www.mfaalts.org/industry-research/primer-investment-manager-valuation-of-illiquid-assets/>.

²⁹ *The risky world of private assets opens up to retail investors*, The Economist (May 1, 2025), <https://www.economist.com/finance-and-economics/2025/05/01/the-risky-world-of-private-assets-opens-up-to-retail-investors>.

³⁰ *Id.*

³¹ Benjamin Schiffrin, *Private Securities Offerings Should Be the Exception, Not the Rule*, Better Markets (May 19, 2025), https://bettermarkets.org/wp-content/uploads/2025/05/BetterMarkets_Private_Markets_Report_05-19-2025.pdf, at 3.

³² Schiffrin, *supra* note 23.

price for a security,” which “is prohibitively expensive, extremely difficult, and/or practically impossible for a retail investor.”³³ And valuing less liquid assets such as private credit loans or stakes in private companies “is harder because they do not trade on public exchanges.”³⁴ Indeed, the lack of clarity about what an asset is worth is a regular complaint even among the accredited investors who participate in the private markets.³⁵ The lack of disclosures, illiquidity, and valuation difficulties that plague the private markets would be nearly impossible to navigate for retail investors.³⁶

2. Private funds charge exorbitant fees.

So retail investors are unlikely to benefit from the inclusion of private market assets in 401(k) plans, but financial intermediaries likely will. That’s because the fees associated with private market investments are much higher than for stocks and bonds.

Those funds famously charge very high fees, typically 2% of assets per year plus 20% of any profits. That compares with regular mutual funds, which charge around 1% in total, and the modern wave of low-cost index funds, which sometimes charge 0.1% or less. . . . Any number of Wall Street thinkers and investors . . . point out that the math makes it almost impossible for any high-fee fund to work out as a good deal for investors. As U.S. stocks have historically earned about 10% a year a fund charging 2% in fees and 20% of any profits must earn returns of 15% a year before fees just to keep up with the index. Or, to put it another way, it has to beat the stock-market indexes by 50% a year, every year, just to keep up.³⁷

This is why research increasingly shows that, after considering fees, private market assets do not outperform public market assets and indeed underperform them.³⁸

Nonetheless, the high fees mean that the financial industry would benefit from the inclusion of private market assets in Americans’ 401(k) accounts. Indeed, the Financial Times recently found that 16 semi-liquid private funds run by Blackstone, Blue Owl, Apollo, and KKR generated more than \$2 billion in servicing fees for wealth advisers since 2017.³⁹ Two Blackstone funds paid \$280 million in servicing fees to brokers in 2025.⁴⁰ This fee structure has helped “push wealthy clients into these

³³ *Retail Investor Access to Private Markets Assets, Recommendations of the Investor as Owner and Market Structure Subcommittees of the SEC Investor Advisory Committee* (Sept. 18, 2025), <https://www.sec.gov/files/iac-private-markets-091125.pdf>, at 22.

³⁴ Managed Funds Association, *supra* note 28.

³⁵ Schiffrin, *supra* note 31, at 3.

³⁶ *Id.*; see also Callan, *supra* note 26.

³⁷ Brett Arends, *Private funds with high fees are coming for your 401(k) – and Trump’s acting labor secretary is cheering them on*, MarketWatch (Apr. 24, 2026), <https://www.morningstar.com/news/marketwatch/20260424131/private-funds-with-high-fees-are-coming-for-your-401k-and-trumps-acting-labor-secretary-is-cheering-them-on>.

³⁸ Schiffrin, *supra* note 21.

³⁹ Kuldeep Jha, *Servicing fees from private funds topped \$2bn for advisers, FT analysis*, GlobalData (Apr. 20, 2026), <https://finance.yahoo.com/markets/stocks/articles/servicing-fees-private-funds-topped-092746055.html>.

⁴⁰ *Id.*

products.”⁴¹ Now, the same incentives are pushing retail investors into these products. As one LinkedIn post said, “nothing says ‘fiduciary duty’ like a fat revenue share.”⁴²

Given the evidence, it is not surprising that private funds have not yet disclosed the fees they will charge 401(k) plans.⁴³ Whatever they are, they will be much higher than the fees on the investments that most Americans have in their 401(k)s today. So it is “no mystery why Wall Street would want to put these funds in [Americans’] retirement plans”; rather, the “question is why investors would want them.”⁴⁴

3. Accredited investors are fleeing private funds.

In addition to high fees, the other reason Wall Street wants to put private funds into Americans’ 401(k) plans is that the accredited investors who traditionally invest in the private markets are fleeing the space. Private market firms are finding it harder to raise new money.⁴⁵ And not only are accredited investors putting less money into new private market investments, but they are also pulling money out of existing private market investments.⁴⁶ So the private funds industry “needs retail investors to compensate for the fact that institutional investors are pulling back from the private markets.”⁴⁷ As a result, the private funds industry wants a slice of the \$12 trillion in Americans’ retirement accounts.⁴⁸ It considers access to Americans’ 401(k) plans a holy grail.⁴⁹ Indeed, “the prospect of tapping into 401(k) plans has Wall Street salivating.”⁵⁰

Yet that is no reason to expose retail investors to risky private market assets through their 401(k)s. The Department should not push retail investors in the private markets at the same time that accredited investors are pulling out. It certainly should not do so just because that is what the private funds industry wants.

Indeed, the juxtaposition is especially jarring now. Investors who are already in the private markets literally cannot get out fast enough. Bloomberg recently reported:

⁴¹ *Id.*

⁴² Shaughnessy, Kristen, LinkedIn, https://www.linkedin.com/posts/kristen-shaughnessy-98969710_nothing-says-fiduciary-duty-like-a-fat-activity-7451761686958526464-8y1L.

⁴³ Jones, Renee M., LinkedIn (Apr. 23, 2026), <https://www.linkedin.com/feed/update/urn:li:activity:7453148191383928832/>.

⁴⁴ Arends, *supra* note 37.

⁴⁵ Schiffrin, *supra* note 21.

⁴⁶ Benjamin Schiffrin, *The SEC’s Determination to Push Retail Investors into Private Market Assets Benefits Wall Street Rather than Main Street*, Better Markets (Mar. 3, 2026), <https://bettermarkets.org/wp-content/uploads/2026/03/Better-Markets-Private-Markets-Roundtable-Fact-Sheet-3-3-2026.pdf>, at 4.

⁴⁷ *Id.* at 1.

⁴⁸ Schiffrin, *supra* note 21.

⁴⁹ *Id.*

⁵⁰ Nick Niedzwiadek, *Trump 401(k) rule to test free-market approach to retirement savings*, Politico (Mar. 31, 2026), <https://subscriber.politicopro.com/article/2026/03/trump-401k-rule-to-test-free-market-approach-to-retirement-savings-00851243?site=pro&prod=alert&prodname=alertmail&linktype=article&source=email>.

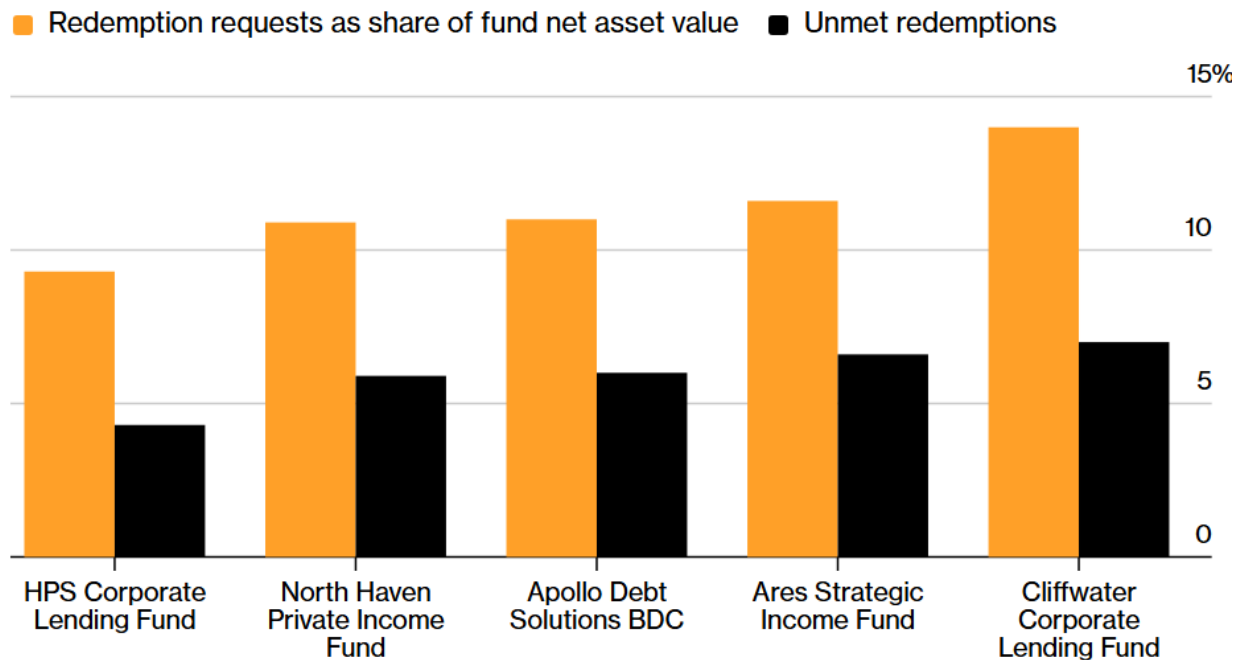
A wave of redemption requests across the private credit industry has left more than \$4.6 billion of investor capital trapped behind withdrawal limits, with more asset managers expected to impose curbs in the coming weeks. Investors have sought to pull roughly \$13 billion from over a dozen funds so far this quarter But since the vehicles cap withdrawals at 5% of net assets per quarter, they’ve been able to access only about two-thirds of that amount.⁵¹

For example, BlackRock recently capped withdrawals from one of its private credit funds at 5% “after investors sought to cash in nearly double that amount.”⁵²

BlackRock’s fund is not an outlier. Many other private credit funds have recently allowed investors to redeem less than half of what they requested in the first quarter:

Private Credit Funds Enforce Redemption Limits

Some returned less than half what investors requested in the first quarter



Source: Robert A. Stanger data and Bloomberg calculations

Source: Bloomberg⁵³

⁵¹ Olivia Fishlow and Ellen DeMauro, *Trapped in Private Credit, Investors Wait to Pull Out \$5 Billion*, Bloomberg (Mar. 26, 2026), <https://www.bloomberg.com/news/articles/2026-03-26/trapped-in-private-credit-investors-wait-to-pull-out-5-billion?sref=mQvUqJZj>.

⁵² Paula Seligson et al., *Private Credit’s Gate-Crashers Are Forcing Funds Into a Brutal Spot*, Bloomberg (Mar. 8, 2026), <https://www.bloomberg.com/news/features/2026-03-08/blackrock-blackstone-confront-withdrawals-as-private-credit-redemptions-surge?sref=mQvUqJZj>.

⁵³ Fishlow and DeMauro, supra note 51.

These figures lead to the conclusion that the Proposal is “not a move to help regular investors.”⁵⁴ “Instead, it’s a massive greed grab for Wall Street firms looking to tap into money workers are trying to save for retirement.”⁵⁵ Those firms need a new source of funding as accredited investors flee. They have decided that source should be retail investors. But that is no reason to expose retail investors to risky private market assets. Accordingly, the Department should withdraw the Proposal.

B. Crypto is a purely speculative asset.

There is even less reason to expose Americans’ 401(k)s to crypto. As mentioned above, crypto is a purely speculative investment. It has no real-world utility. Cryptocurrencies lack intrinsic value and have no reserves or price stabilization mechanisms. This means that the price of Bitcoin and other cryptocurrencies fluctuates wildly.⁵⁶ Increasingly, the price of Bitcoin depends on one company’s desire for buying Bitcoin.⁵⁷ This is not an asset class that belongs in Americans’ retirement accounts.

In other words, providing more access to crypto via 401(k) plans is “fraught with risk.”⁵⁸ Crypto’s volatility “may be fine for people in their 30s and 40s, but if retirement is in the next five or ten years, [investors] can’t afford to lose 50% on a single day.”⁵⁹ There is also “the danger that regular investors will think Bitcoin isn’t that risky if more plan sponsors include it in their 401(k)s, which could set them up for big losses.”⁶⁰

Policymakers “should stop pretending crypto is something it is not.”⁶¹ Crypto “remains a speculative asset held by a relatively small, politically connected share of the population.”⁶² “Changes in cryptocurrency values are driven by little more than vibes.”⁶³ For these reasons, it is “easy to imagine” lawsuits alleging breaches of fiduciary duties

⁵⁴ Michelle Singletary, *Trump’s labor plan is a massive 401(k) greed grab for Wall Street*, Wash. Post (Apr. 8, 2026), <https://www.washingtonpost.com/business/2026/04/08/retirement-savings-crypto/>.

⁵⁵ *Id.*

⁵⁶ Schiffrin, *supra* note 22.

⁵⁷ Olga Kharif, *Bitcoin Grows More Dependent on Saylor’s Buying Machine*, Bloomberg (May 20, 2026), <https://www.bloomberg.com/news/articles/2026-05-20/bitcoin-grows-more-dependent-on-michael-saylor-s-buying-machine?sref=mQvUqJZj>.

⁵⁸ Donna Fuscaldo, *Cryptocurrency In Your 401(k): Should You Invest In It?*, Kiplinger (Mar. 12, 2026), <https://www.kiplinger.com/retirement/retirement-planning/cryptocurrency-may-be-coming-to-your-401-k-with-rules-change>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Paul Winfree, *Washington, stop pretending crypto is something it isn’t*, Wash. Post (Jan. 20, 2026), <https://www.washingtonpost.com/opinions/2026/01/20/crypto-speculative-money-finance/>.

⁶² *Id.*

⁶³ *Id.*

“based on the volatility of crypto-assets” if they are included in 401(k) plans.⁶⁴ The Department, and the Proposal, should not pretend that crypto is safer than it is.

CONCLUSION

Better Markets urges the Department to withdraw the Proposal.

Sincerely,
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⁶⁴ Alexis Bates et al, *Challenges for Fiduciaries Adding Crypto to 401(k) Plans*, Law360 (May 28, 2025), <https://www.law360.com/articles/2345517/challenges-for-fiduciaries-adding-crypto-to-401-k-plans>.