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November 22, 2022

The Honorable Ron Wyden
United States Senate
Chair, Committee on Finance
221 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Mike Crapo
United States Senate
Ranking Member, Committee on Finance
239 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Richard Neal
United States House of Representatives
Chair, Committee on Ways and Means
372 Cannon House Office Building
Washington, D.C. 20515

The Honorable Kevin Brady
United States House of Representatives
Ranking Member, Committee on Ways and Means
1011 Longworth House Office Building
Washington, D.C. 20515

Re: Legislation to Protect Individual Retirement Accounts and Defined Contribution Plans from the Risks of Digital Assets

Dear Senators Wyden and Crapo and Representatives Neal and Brady:

On behalf of the People of the State of New York, I urge Congress to pass legislation to designate digital assets—e.g., cryptocurrencies, digital coins, and digital tokens—as assets that cannot be purchased using funds in Individual Retirement Accounts ("IRAs") and defined contribution plans, such as 401(k) and 457 plans. Further, I urge Congress to reject the recently proposed Retirement Savings Modernization Act, which would expressly allow 401(k) plan fiduciaries to make digital assets an investment option,[1] and the Financial Freedom Act of 2022,[2] which would prohibit the Secretary of Labor from constraining or prohibiting the range of investments offered through a self-directed brokerage window, i.e., the Secretary of Labor would not be able to prohibit investments in digital assets. Although cryptocurrencies have become popular over the last decade, they have no intrinsic value on which their prices are based. They generally do not provide investors with an ownership or equity interest in a company like a corporate stock, nor do they represent a creditor's ownership of a debt obligation like the holder of a corporate bond,[3] although they are often marketed as investments from which investors can expect to make profits from the actions of others. In part for these reasons, my office has warned repeatedly of the extreme volatility and risks that many of these assets present for retail investors.[4]

In May 2022, following the crash of TerraUSD, many cryptocurrencies reached then-record lows and investors lost hundreds of billions of dollars. Over the past two weeks, the value of many cryptocurrencies fell to new all-time lows after one of the largest crypto exchanges in the world— FTX Trading Ltd. ("FTX")—collapsed and filed for bankruptcy amid allegations that its now-former CEO and founder, Sam Bankman-Fried, engaged in self-dealing and used customer funds to speculate.[5] Tellingly, Mr. Bankman-Fried once described parts of the crypto industry in much the same way one would describe an ordinary Ponzi scheme. He described it as building a box that "does literally nothing . . . This box is worth zero obviously. . . . But on the other hand, if everyone kind of now thinks that this box token is worth about a billion dollar market cap, that's what people are pricing it at . . . ."[6] Mr.

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[1] Retirement Savings Modernization Act, H.R. 9066, S. 4973 117th Cong. (2022).

[2] Financial Freedom Act of 2022, H.R. 7860, S. 4147 117th Cong. (2022).

[3] My office has previously commented on the dangers of limited disclosures to investors in the context of retirement investment. *See* Letter from Xavier Becerra, Cal. Att'y Gen. et al., to Vanessa A. Countryman, Sec'y, Sec. & Exch. Comm'n (Mar. 16, 2020), https://www.sec.gov/comments/s7-25-19/s72519-6960384-212775.pdf

[4] Press Release, N.Y State Off. of the Att'y Gen., INVESTOR ALERT: Attorney General James Warns New Yorkers About Cryptocurrency Investment Risks (June 2, 2022), https://ag.ny.gov/press-release/2022/investor-alert-attorney-general-james-warns-new-yorkers-about-cryptocurrency; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Warns Investors About 'Extreme Risk' When Investing in Cryptocurrency, Issues Additional Warning to Those Facilitating Trading of Virtual Currencies (Mar. 1, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-warns-investors-about-extreme-risk-when-investing.

[5] FTX claims not to operate in New York (in part thanks to vigorous enforcement and more stringent regulations), which may limit the direct impact of its collapse on New Yorkers. While FTX applied for a trust charter with New York State's Department of Financial Services, the application had not been approved. *See* Jamie Crawley, *FTX US Reveals New York Trust Charter Application*, YAHOO! (May 11, 2022), https://www.yahoo.com/video/ftx-us-reveals-york-trust-135721256.html.

[6] Matt Levine, Opinion, *FTX's Balance Sheet Was Bad*, BLOOMBERG, (Nov. 14, 2022), https://www.bloomberg.com/opinion/articles/2022-11-14/ftx-s-balance-sheet-was-bad.

Bankman-Fried is now reported to be the subject of multiple investigations, and he has been interviewed by foreign law enforcement.[7]

Congress should use the remaining time it has in the final weeks of this session to protect the retirement savings of all Americans by excluding digital assets from IRAs and defined contribution plans. One way this can be accomplished is to amend 29 U.S.C. § 1104(a) and 26 U.S.C. § 408 to disallow purchases of digital assets with funds from IRAs or defined contribution plans.

A. The Protection of Retirement Savings from Digital Assets is an Important Issue for States and the Working Public

IRAs and defined contribution retirement plans are key investment vehicles for working people who choose to forego income now to fund their retirement later. For a substantial number of New Yorkers—indeed many Americans—the lion's share of their retirement savings will come from these plans. The total amount of U.S. retirement assets at the end of 2021 was $40.8 trillion; defined contribution plans and IRAs accounted for $24 trillion of those assets.[8] When workers retire, if they lack sufficient retirement savings to fund their living expenses, it will fall to state governments to ensure retirees are housed, clothed, and properly cared for.[9] In 2021 alone, New York apportioned more than $143 million for services to elderly people.[10] New York is not unique in that regard. California apportioned $283.1 million from its general fund for services administered by its Department of Aging in the 2022-23 fiscal year.[11] And Pennsylvania has projected a cumulative $14.3 billion increase in Pennsylvania's net assistance costs for the period 2015 to 2030 due to insufficient retirement savings.[12]

As the chief law enforcement officer for New York, I want to ensure that our people have adequate financial resources to live comfortably in their retirement years while also protecting the public purse from serving as a safety net for investor speculation.

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[7] Bibhu Pattnaik, *Bahamas Regulators Interview FTX's Sam Bankman-Fried, Say They Didn't Authorize Prioritizing Local Withdrawals*, YAHOO! FINANCE (Nov. 13, 2022), https://finance.yahoo.com/news/bahamas-regulators-interview-ftxs-sam-134714234.html.

[8] JOHN J. TOPOLESKI & ELIZABETH A. MYERS, CONG. RSCH. SERV., IF12117, U.S. RETIREMENT ASSETS: AMOUNT IN PENSIONS AND IRAS (2008).

[9] Philip Trostel, *The Fiscal Implications of Inadequate Retirement Savings in Maine* 10, UNIV. OF ME. (Feb. 13, 2017), https://digitalcommons.library.umaine.edu/cgi/viewcontent.cgi?article=1004&context=mcspc_ecodev_articles (chart showing cost to states for public aid to retirement-age individuals without adequate retirement savings).

[10] *See* N.Y. STATE ASSEMB. COMM. ON AGING, ANNUAL REPORT 2021 at 2 (2021), https://www.nyassembly.gov/Reports/?sec=story&story=100691.

[11] CAL. DEP'T OF AGING, HEALTH & HUMAN SERVS. 2022-23 STATE BUDGET: 4170 CALIFORNIA DEP'T OF AGING 1 (2012), https://www.ebudget.ca.gov/2022-23/pdf/Enacted/GovernorsBudget/4000/4170.pdf.

[12] ECONSULT SOLUTIONS, INC., THE IMPACT OF INSUFFICIENT RETIREMENT SAVINGS ON THE COMMONWEALTH OF PENNSYLVANIA 3, 37 (2018), https://patreasury.gov/pdf/Impact-Insufficient-Retirement-Savings.pdf

B. Congress is Empowered to Act to Protect the Retirement Savings of America's Workers from Digital Assets

Congress historically has enacted laws to help American workers save for retirement. In 1958, Congress introduced 403(b) plans, which were viewed as supplementing teachers' pensions and were initially only permitted to invest in annuities until mutual funds were added as permissible investments in 1974.[13] Congress established the IRA when it passed the Employee Retirement Income Security Act of 1974 ("ERISA"). Employers introduced 401(k) and 457 plans after Congress adopted 26 U.S.C. §§ 401(k) and 457 through the Revenue Act of 1978, when most workers' retirements were funded by defined benefit plans.[14] One of the primary benefits of defined contribution plans and IRAs is that monies saved in these plans are subject to favorable tax treatment.

Congress has already passed some legislation to safeguard retirement accounts from the massive losses that have now become synonymous with digital assets. For example, investments in 403(b) plans are limited to "an annuity contract provided through an insurance company; a custodial account invested in mutual funds; or a retirement income account set up for church employees."[15] Moreover, ERISA requires fiduciaries administering the investments of retirement plans—including 401(k)s and 457s—to exercise the care, skill, and diligence of a "prudent man" under the circumstances when selecting investments.[16] More to the point, Congress expressly required plan fiduciaries to diversify investments "so as to minimize the risk of large losses."[17] Prohibiting the investment of retirement funds into digital assets would serve the same legislative goal of "minimiz[ing] the risk of large losses" in retirement accounts, but would do so in a manner that leaves no question for plan fiduciaries that these are inappropriate assets due to their unique and significant risk profile.

Congress has also prohibited certain asset classes from being purchased with retirement funds. When Congress established IRAs, it expressly carved out from the pool of available assets certain investments it deemed inconsistent with retirement goals, such as life insurance contracts. 26 U.S.C. § 408(a)(3). Congress also enacted legislation in 1981 to additionally exclude collectibles, such as artwork, antiques and any stamp or coin (subject to limited exceptions), as an investment option in IRAs and other individually directed retirement accounts qualified under section 401(a) (including individually directed 401(k)s). It

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[13] Tara Siegel Bernard, *Answers to Questions About 403(b) Plans*, N.Y. TIMES (Oct. 21, 1990), https://www.nytimes.com/2016/10/23/your-money/403-b-retirement-plans-explained.html.

[14] Timothy W. Martin, *The Champions of the 401(k) Lament the Revolution They Started*, WALL ST. J. (Jan. 2, 2017), https://www.wsj.com/articles/the-champions-of-the-401-k-lament-the-revolution-they-started-1483382348; Nat'l Assoc. for Gov't Defined Contribution Admins. Publications Comm. and Exec. Bd., *Government 457(b) Primeri*, RET. INSIGHT AND TRENDS, https://www.retirement-insight.com/government-457b-primer/ (last visited Nov. 21, 2022).

[15] *See Retirement Plans FAQs Regarding 403(b) Tax-Sheltered Annuity Plans*, INTERNAL REVENUE SERV., https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-403b-tax-sheltered-annuity-plans#plan (last visited Nov. 17, 2022).

[16] 29 U.S.C. § 1104(a)(1)(B).

[17] 29 U.S.C. § 1104(a)(1)(C).

accomplished this by treating purchases of collectibles with self-directed defined contribution plan funds or IRA funds as distributions and therefore subject to immediate taxation. 26 U.S.C. § 408(m). At the time, the Committee on Ways and Means observed an "increasing interest in investing retirement savings in collectibles" and was concerned "that investments in collectibles do not contribute to productive capital formation."[18] In the case of cryptocurrencies, not only do they generally fail to contribute to productive capital formation, but, as discussed more fully below, they are also conduits of speculation and fraud, and are particularly vulnerable to theft.

C. Digital Assets Should Be Designated a Prohibited Asset for IRAs and Defined Contribution Plans

1. Most Digital Assets Have No Intrinsic Value and Are Therefore Too Unstable to Be a Suitable Asset for Retirement Savings

Digital assets are uniquely unsuitable for retirement savings for a multitude of reasons, but here I will focus on three.[19] First, the underlying value of cryptocurrencies is unpredictable and not determined by true price discovery because they have no intrinsic value on which their prices are based. As a result, prices swing wildly and crash without warning and without regard to any changes in the economics of the asset or the broader economy. For instance, Bitcoin, the first and most popular cryptocurrency, peaked at $68,789.63 on November 10, 2021, and traded as low as $15,599.05 just yesterday. Similarly, in May 2022, we witnessed the crash of a so-called stablecoin, TerraUSD, that was touted as maintaining a one-dollar peg but ultimately crashed and traded for mere cents. The failure of TerraUSD spread like a contagion and resulted in $500 billion in losses into the broader crypto market.[20] Interpol has issued a "red notice" for the arrest of the founder of TerraUSD.[21]

To be clear, there is a distinction between digital assets and blockchain technology. There has been a global conflation of the innovations of blockchain technology on the one hand and speculation over digital assets that happen to function through a blockchain on the other. My proposal does not limit the growth or uses of any technology, including blockchain—and does not opine on their value. Moreover, I do not propose prohibiting the purchase of debt or equity stakes in publicly traded blockchain-based businesses in retirement accounts.

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[18] H.R. REP. NO. 97-201, at 143 (1981); *see also* STAFF OF THE JOINT COMM. ON TAX'N, 97TH CONG., GEN. EXPLANATION OF THE ECON. RECOVERY ACT OF 1981 212 (COMM. PRINT 1981). Over time, Congress created limited exceptions permitting IRAs to be used to purchase certain precious metal coins that meet specific requirements.

[19] *See supra* note 3.

[20] Pranshu Verma, *Their Cryptocurrencies Crashed the Market. Now They're Back at It.*, WASH. POST (June 1, 2022), https://www.washingtonpost.com/technology/2022/06/01/terraform-labs-crypto-luna/.

[21] Arjun Kharpal, *Wanted Crypto Exec Linked to $60 Billion Crash Faces Passport Freeze*, CNBC (Oct. 6, 2022), https://www.cnbc.com/2022/10/06/luna-founder-do-kwon-faces-passport-freeze-after-crypto-collapse-.html; ; Manish Singh and Kate Park, *Interpol Issues Red Notice for Terra Founder Do Kwon*, TECHCRUNCH (Sept. 25, 2022), https://techcrunch.com/2022/09/25/do-kwon-interpol/?guccounter=1.

2. Digital Asset Companies Are a Breeding Ground for Fraud, Crime, and Theft and Will Render Retirement Accounts Vulnerable to Same

Second, cryptocurrencies are often an instrument for fraud and crime.[22] Issuers of digital assets and many of their financial backers often violate broader laws and regulations by engaging in unregistered offerings of securities,[23] market manipulation,[24] and other fraudulent practices in violation of New York's Martin Act[25] and the federal securities laws.[26] Because these market participants are often foreign, anonymous, or both, victims of their fraudulent practices often have no practical recourse in United States courts.

The Federal Trade Commission ("FTC") reports that "[s]ince the start of 2021, more than 46,000 people have reported losing over $1 billion in crypto to scams. . . ."[27] As the FTC recently observed:

> Crypto has several features that are attractive to scammers, which may help to explain why the reported losses in 2021 were nearly sixty times what they were in 2018. There's no bank or other centralized authority to flag suspicious

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[22] Tom Wilson, *Crypto Crime Hit Record $14 billion in 2021, Research Shows*, REUTERS (Jan. 6, 2022), https://www.reuters.com/markets/us/crypto-crime-hit-record-14-billion-2021-research-shows-2022-01-06/.

[23] Digital asset companies in New York are generally required to register with the Office of the Attorney General for the State of New York pursuant to GBL § 359-e and are required to obtain a Bitlicense or trust charter from the New York State Department of Financial Services. *See* N.Y. COMP. CODES R. & REGS. tit. 23, § 200.1-22.

[24] *See* infra note 25.

[25] N.Y. Gen. Bus. Law §§ 352-353; *see* Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Sues Cryptocurrency Platform for Operating Illegally and Defrauding Investors (Sept. 26, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-sues-cryptocurrency-platform-operating-illegally-and; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Directs Unregistered Crypto Lending Platforms to Cease Operations In New York, Announces Additional Investigations (Oct. 18, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-directs-unregistered-crypto-lending-platforms-cease; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Secures Nearly Half a Billion Dollars to Resolve Illegal Stock and Cryptocurrency Sales (Sept. 13, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-secures-nearly-half-billion-dollars-resolve-illegal-stock#; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Ends Virtual Currency Trading Platform Bitfinex's Illegal Activities in New York (Feb. 23, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-ends-virtual-currency-trading-platform-bitfinexs-illegal; Press Release, N.Y State Off. of the Att'y Gen., Attorney General James Sues to Shut Down Illegal Cryptocurrency Trading Platform and Virtual Currency, Seeks to Recoup Defrauded Funds for Thousands of Investors (Feb. 17, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-sues-shut-down-illegal-cryptocurrency-trading-platform-and

[26] 15 U.S.C. §§ 77e, 78i(a); *see, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges The Hydrogen Technology Corp. and its Former CEO for Market Manipulation of Crypto Asset Securities (Sept. 28, 2022), https://www.sec.gov/news/press-release/2022-175.

[27] Emma Fletcher, *Reports Show Scammers Cashing in on Crypto Craze*, FED. TRADE COMM'N: CONSUMER PROTECTION DATA SPOTLIGHT (June 3, 2022), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/06/reports-show-scammers-cashing-crypto-craze#crypto7.

> transactions and attempt to stop fraud before it happens. Crypto transfers can't be reversed— once the money's gone, there's no getting it back.[28]

Even retirement plans with significant oversight are not safe—for example, the Ontario Teachers' Pension Plan invested $95 million into the crumbled cryptocurrency platform FTX.[29]

Not surprisingly, cryptocurrencies are also widely subject to hacking in ways largely unheard of in traditional financial instruments.[30] For instance, in February 2022, a hacker "swatted" IRA Financial Trust by calling the police and falsely reporting a kidnapping at IRA Financial's headquarters. After the police arrived and employees began to exit the building, a hacker stole approximately $37 million in cryptocurrency that was custodied as retirement savings for hundreds of IRA Financial customers—including dozens of New Yorkers.[31]

3. Digital Asset Companies Do Not Operate with Sufficient Guardrails to Protect Retirement Savings

The third and perhaps most important reason that cryptocurrencies are incompatible with IRAs and defined contribution plans is that the issuers often evade safeguards designed to protect the average investor and the integrity of the system. As this Office pointed out in its 2018 Virtual Markets Integrity Initiative Report, unlike registered broker-dealers, crypto trading platforms may lack customer protections and transparency to protect against conflicts of interest that could arise as a result of the platforms' employees trading for their own personal accounts or the platforms engaging in proprietary trading on their own venue, for example, as a market maker.[32] In June 2022, for instance, Nathaniel Chastain, was indicted for insider trading in connection with trading non-fungible tokens ("NFTs"), another form of digital asset. Chastain was the product manager with OpenSea, an online NFT marketplace. He used confidential information to secretly purchase NFTs that were going to be featured on

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[28] Emma Fletcher, *Reports Show Scammers Cashing in on Crypto Craze*, FED. TRADE COMM'N: CONSUMER PROTECTION DATA SPOTLIGHT (June 3, 2022), https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/06/reports-show-scammers-cashing-crypto-craze#crypto7.

[29] *See* Erin Griffith & David Yaffe-Bellany, *Investors Who Put $2 Billion Into FTX Face Scrutiny, Too*, N.Y. TIMES (Nov. 11, 2022), https://www.nytimes.com/2022/11/11/technology/ftx-investors-venture-capital.html.

[30] *See* David Uberti, *How Hackers Target Bridges Between Blockchains for Crypto Heists*, WALL ST. J. (Apr. 5, 2022), https://www.wsj.com/articles/how-hackers-target-bridges-between-blockchains-for-crypto-heists-11649151001; Vicky Ge Huang, *Crypto Hackers Stole $190 Million in 'Frenzied Mob Attack'*, WALL ST. J. (Aug. 2, 2022), https://www.wsj.com/livecoverage/stock-market-news-today-08-02-2022/card/crypto-hackers-stole-190-million-in-frenzied-mob-attack--EBfOTCteOuu50vYDAoaC.

[31] Compl. ¶¶ 93 – 101, *IRA Fin. Tr. v. Gemini Tr. Co., LLC*, No. 1:22-cv-04672, (S.D.N.Y. June 6, 2022) (Doc. No. 1).

[32] N.Y. STATE OFF. OF THE ATT'Y GEN., VIRTUAL MARKETS INTEGRITY INITIATIVE REPORT § 3 (2018), https://virtualmarkets.ag.ny.gov/#section3.

OpenSea's homepage and then sold them at a substantial profit once the NFTs were featured on the homepage.[33]

Additionally, most issuers of cryptocurrencies are not examined by any regulator, state or federal. They neither operate pursuant to net capital requirements, nor do they maintain minimum reserves to meet liabilities and prevent a run.[34] Safeguards like those provided by the Federal Deposit Insurance Corporation or the Securities Investor Protection Corporation are unavailable to protect investors from the failures of digital asset companies. When cryptocurrencies fail, their issuing companies lack the wherewithal to make their investors whole.[35] Indeed, right now we are witnessing the collapse of the cryptocurrency platform FTX, which has halted withdrawals of both cryptocurrencies and fiat currencies and has filed for bankruptcy. FTX's fall could result in direct losses exceeding $8 billion, plus losses it is causing in broader markets.[36] As stated by in John J. Ray III, FTX's new CEO for purposes of its Chapter 11 restructuring, in his bankruptcy declaration:

> Never in my career have I seen such a complete failure of corporate controls and such a complete absence of trustworthy financial information as occurred here. From compromised systems integrity and faulty regulatory oversight abroad, to the concentration of control in the hands of a very small group of inexperienced, unsophisticated and potentially compromised individuals, this situation is unprecedented.[37]

Finally, as a practical matter, the Internal Revenue Service ("IRS"), which is charged with monitoring how IRA proceeds are expended, is hard-pressed to accomplish this mission

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[33] Press Release, U.S. Atty's Off., Southern District of N.Y., *Former Employee of NFT Marketplace Charged in First Ever Digital Asset Insider Trading Scheme* (June 1, 2022), https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-charged-first-ever-digital-asset-insider-trading-scheme.

[34] Digital asset companies with a Bitlicense or trust charter that are legally operating in New York are the exception, as they are subject to supervision of the New York State Department of Financial Services. That supervision requires, among other things, detailed financial reviews, examinations, minimum reserves, net capital requirements, a fitness review of the principals, and a review of potential conflicts of interest. *See* N.Y. COMP. CODES R. & REGS. tit. 23, § 200.1-22. In addition, Section 200.19 requires a licensee to disclose all material risks associated with the licensee's products and virtual currency generally. However, many cryptocurrency businesses abstain from doing business in New York rather than submit to supervision in New York.

[35] *See*, *e.g.*, Vicky Ge Huang, *FTX Customers Face a Long Road to Try to Get Their Money Back*, WALL ST. J. (Nov. 11, 2022), https://www.wsj.com/articles/ftx-customers-wonder-whether-theyll-ever-see-their-money-again-11668139118; Sidhartha Shukla, *Crypto Lender Vauld Freezes Withdrawals, Eyes Restructuring*, BLOOMBERG (July 4, 2022), https://www.bloomberg.com/news/articles/2022-07-04/crypto-lender-vauld-freezes-withdrawals-weighs-restructuring?leadSource=uverify%20wall; *Crypto Exchanges Are Freezing Withdrawals*, CNBC TV 18 (June 24, 2022), https://www.cnbctv18.com/cryptocurrency/why-crypto-exchanges-are-freezing-withdrawals-13928692.htm.

[36] Patricia Kowsmann et al., *Binance Walks Away from Deal to Rescue FTX*, WALL ST. J. (Nov. 10, 2022), https://www.wsj.com/articles/binance-is-said-to-be-likely-to-walk-away-from-deal-to-buy-ftx-11668020963. FTX claims not to operate in New York, which may limit the direct impact of this collapse on New Yorkers.

[37] Declaration of John J. Ray III in Support of Chapter 11 Petitions and First Day Pleadings, *In re: FTX Trading LTD.*, No. 22-11068 (Bankr. D. Del. Nov. 17, 2022) (Doc. No. 24).

for unconventional assets such as cryptocurrency and other digital assets. One report from the Government Accountability Office determined:

> Noncompliance involving unconventional IRA assets is difficult to detect and time consuming for IRS to pursue. Whereas IRS relies on automated enforcement for IRAs invested in conventional assets held by custodians and trustees, enforcement for IRAs invested in unconventional assets . . . requires labor-intensive audits of individual taxpayers.[38]

D. The Risk Digital Assets Pose to Retirement Savings Have Materialized

Now is the time for Congress to act. In March of this year, the U.S. Department of Labor ("DOL") stated that it had "serious concerns about the prudence of a fiduciary's decision to expose 401(k) plan's participants to direct investments in cryptocurrencies, or other products whose value is tied to cryptocurrencies."[39] DOL included tokens, coins, crypto assets, and any derivatives in its list of assets about which it was concerned. The release listed five reasons that investments in cryptocurrencies present significant risks of fraud, theft and loss: speculative and volatile investments; the challenge for plan participants to make informed investment decisions; custodial and recordkeeping concerns; valuation concerns; and the evolving regulatory environment.

Even after this unequivocal guidance, financial services providers have recklessly announced that they will nonetheless make available 401(k) offerings that allocate a portion of retirement savings to cryptocurrencies.[40] Senators Durbin, Warren, and Smith wrote a letter just yesterday urging one of these providers to reconsider its decision to allow 401(k) plan sponsors to permit investments in Bitcoin.[41]

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Because of the lack of equity interest or debt obligations, the lack of transparent market forces, and because of the pervasiveness of fraudulent actors, many of the digital assets available to investors are just like the box of tokens the FTX founder described: worthless.

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[38] U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-210, REPORT TO THE RANKING MEMBER, COMMITTEE ON FINANCE, U.S. SENATE, INDIVIDUAL RETIREMENT ACCOUNTS, IRS COULD BETTER INFORM TAXPAYERS ABOUT AND DETECT NONCOMPLIANCE RELATED TO UNCONVENTIONAL ASSETS at "What GAO Found" (2020).

[39] Compliance Assistance Release No. 2022-01, U.S. Dep't of Lab., Emp. Benefits Sec. Admin., 401(k) Plan Investments in "Cryptocurrencies" (Mar. 10, 2022), https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/compliance-assistance-releases/2022-01.

[40] *See, e.g.*, Press Release, Fidelity Investments, Fidelity Investments Advances Leading Position as Digital Assets Provider with Launch of Industry's First-of-Its-Kind Bitcoin Offering for 401(k) Core Investment Lineup (Apr. 26, 2022), https://newsroom.fidelity.com/press-releases/news-details/2022/Fidelity-Investments-Advances-Leading-Position-as-Digital-Assets-Provider-With-Launch-of-Industrys-First-of-Its-Kind-Bitcoin-Offering-for-401k-Core-Investment-Lineup/default.aspx.

[41] Letter from Senators Richard J. Durbin, Elizabeth Warren, and Tina Smith, to Abigail Johnson, CEO, Fidelity Investments (Nov. 21, 2022).

For these reasons, Congress should eliminate the undue risk to retirement savings posed by digital assets by designating them impermissible assets for defined contribution plans and IRAs. The simplest way to accomplish this is to add subparagraphs to 26 U.S.C. § 408(m) and 29 U.S.C. § 1104(a) that prohibit investing funds in these plans or accounts into digital assets. Congress should further reject the proposed Retirement Savings Modernization Act and the Financial Freedom Act of 2022, which would put 401(k) retirement savings at risk by exposing them to the volatility and illegality of cryptocurrencies.

On behalf of the People of the State of New York, I thank you for your efforts to ensure that we achieve this essential goal.

Sincerely,

Letitia James

Letitia James
Attorney General of New York

cc: Commissioner Charles P. Rettig
Internal Revenue Service

Secretary Martin J. Walsh
Department of Labor