Just over a month ago, we wrote about the Department of Labor’s guidance on cryptocurrency as a 401(k) investment option, and the landscape has already shifted multiple times.

Fidelity Investments made news on April 26 when it announced its new cryptocurrency-based investment option for 401(k) plans and other investment vehicles. If elected by a plan sponsor, this option would allow plan participants to invest up to 20% of their account balance in bitcoin via a “Digital Assets Account” (a custom account that holds bitcoin along with short-term money market investments
to provide liquidity for daily transactions). The Department quickly responded, telling the Wall Street Journal it has “grave concerns” about the intended offering and intends further discussions. Senators Elizabeth Warren (D-MA) and Tina Smith (D-MN) also weighed in, sending Fidelity an inquiry about the appropriateness of the offering.

But other investment firms are already working on their own cryptocurrency-based products. There is also a sense within the retirement plan industry that not only more guidance but more consideration of the issue is needed by the Department. In a joint letter to the Department, several financial industry groups representing retirement plan sponsors expressed concerns about the nature of the Department’s cryptocurrency guidance, asking for it to be withdrawn, pending a “robust” notice and comment period, and/or replaced with best practices guidance.

The joint letter also points out that the Department seems to have shifted its position on the fiduciary obligations of plan sponsors by offering a self-directed brokerage account (“SDBA”) option for participants. The Department guidance states that “EBSA expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products and take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments. The plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described [in the guidance]”. (emphasis added)

SDBAs, which allow participants to select investment options outside of a plan’s core investment lineup, can be a tricky offering. It is a fiduciary obligation on the part of the plan sponsor (or its designated investment fiduciary) to determine whether offering an SDBA is prudent and in the best interest of a plan’s participants. But, as the joint letter points out, before the Department guidance, plan sponsors were not necessarily required to monitor the investments made by participants via an SDBA. While the Department’s guidance seems only to raise this obligation regarding cryptocurrency investments via an SDBA, it is a notable change and, as pointed out in the joint letter, challenging to administer in practical terms. In some ways, the issue of potential fiduciary responsibility for SDBA investments may be even more important for plan sponsors than the cryptocurrency issue since many currently offer SDBA options. The issue has caught the attention of legislators as well. Sen. Tommy Tuberville (R-AL) recently introduced the Financial Freedom Act, which would prohibit the Department from limiting the types of investments that 401(k) plans can offer through an SDBA.

**The Takeaway?**

Plan sponsors may see more cryptocurrency investment options available to plans in the future. The hope, of course, is the Department will continue to evolve its guidance around this growing trend—especially as it relates to SDBAs. But, for now, there is much for a plan sponsor to weigh and discuss with its advisors when it comes to offering cryptocurrency investment options and determining the proper level of oversight associated with implementing or maintaining an SDBA.