Testimony Of

Christine M. Hanna
On Behalf of
Fidelity Investments

For the ERISA Advisory Council

Considerations for Recognizing and Addressing Participants with Diminished Capacity

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Ladies and Gentlemen:

Fidelity Investments ("Fidelity") appreciates the opportunity to provide written comments to assist the ERISA Advisory Council in its effort to examine considerations for recognizing and addressing participants with diminished capacity in workplace savings plans, including those that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). As one of the nation's leading retirement services providers, Fidelity is committed to helping workplace savings plan participants meet their retirement security goals. Diminished capacity and financial exploitation concerns are a growing challenge that may impede financial security for plan participant populations as they age. Fidelity noted a 23% increase in diminished capacity and financial exploitation cases in 2019 and projects a 27% increase of diminished capacity cases in 2020. The Council's review and recommendations are an important step toward assisting plan sponsors in addressing these increasing plan participant diminished capacity issues and working to avoid potential fraud and financial hardship.

1. **Overview**

Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering approximately 25 million participants and beneficiaries. As part of our directed recordkeeping service offering, on behalf of our plan sponsor clients, Fidelity provides representatives[1] to field questions and assist participants with transactions related to their retirement plan accounts. During these interactions, Fidelity has the opportunity to observe participants that may be impacted by diminished capacity or financial exploitation.

Generally, "diminished capacity" describes a condition where an individual's mental functions and decision-making capabilities are diminished or impaired due to a physical infirmity, emotional

[1] Fidelity provides representatives via telephone and under certain circumstances in-person at an employer's work site. Plan participants may also interact with Fidelity representatives in-person at a Fidelity branch location.

distress, mental impairment or other factors. In a financial context, this may result in a retirement plan participant who is not fully able to understand or participate effectively in the management of their retirement plan account assets. Such individuals may be also be at greater risk to succumb to an ever-growing variety of financial scams and financial exploitation. "Financial exploitation" occurs when an individual misuses or takes the assets of a vulnerable adult for their own personal benefit. Given shifting population demographics, instances of plan participants exhibiting potential diminished capacity and becoming subject to undue influence or even victims of financial crimes are becoming more prevalent. In order to properly address diminished capacity and elder issues as they arise, Fidelity has developed processes to escalate these concerns to plan sponsors to enable them to consider the best manner to address these situations.

2. Fidelity's Diminished Capacity and Financial Exploitation Identification and Escalation Process

As part of plan servicing provided in our role as a directed recordkeeper, Fidelity representatives are made available to service plan participants. Fidelity representatives are required to participate in regular training modules, at least annually, to assist them in identifying potential diminished capacity and financial exploitation signs during the course of interactions with plan participants. This training includes identification of red flags related to diminished capacity and financial exploitation such as:

Diminished Capacity

- Confusion with simple concepts or familiar tasks
- Repeating instructions or questions
- Dramatic shift in investment strategy
- Memory loss
- Verbal confirmation of health issues

Financial Exploitation

- Changes in trading strategy
- Confusion regarding account balance
- Request to add authorized individuals
- Third party coaching or posing as participant

When a Fidelity phone representative identifies a participant that appears to be exhibiting signs of diminished capacity or may be a potential victim of financial exploitation, such matters are escalated to a group of Fidelity associates, the "At-Risk Team[2]", who are familiar with diminished capacity and elder issues and are tasked with helping plan sponsors in addressing these matters and communicating with participants related to these concerns.

The At-Risk Team will review the circumstances that resulted in the escalation and related information. If based on this initial review it appears that diminished capacity or financial exploitation concerns may be founded, a temporary restriction on plan account distributions is placed on the participant's plan account and further research of the issue may be conducted. The initial distribution restriction is placed on the plan account in order to protect the participant's assets where there are concerns that the participant may not have the capacity to direct their financial affairs or they may be a victim of financial exploitation. An alert is also added to the account and subsequent calls from the participant will be transferred to the At-Risk Team. The At-Risk Team then initiates a process to engage the plan sponsor and enable them to review the issue and determine next steps.

If, upon reviewing the circumstances, a plan sponsor concurs with the concerns escalated to them by Fidelity, the participant is asked to provide a power of attorney or contact a trusted friend or relative and execute a power of attorney in order to provide assistance with their plan account. Alternatively, in circumstances where a participant may not be capable of executing a power of attorney, the plan may determine that a court appointed guardian or conservator is a preferable option. In instances where financial exploitation is suspected, a referral is made to adult protective services in the state of the participant's residence. Fidelity may also contact local law enforcement to request a wellness check where concerns may warrant.

3. Recommendations

Plan sponsors are in need of tools to help equip them to address the emerging trend of participants exhibiting signs of diminished capacity that may inhibit their ability to meet their retirement goals and

[2] Fidelity's At-Risk team has tripled in size over the last four years due to the increased volume of diminished capacity and financial exploitation matters.

may ultimately make them more vulnerable to financial exploitation. As an administrative service provider that does not typically occupy a fiduciary role related to plans that we recordkeep, it is incumbent upon Fidelity to escalate potential concerns regarding participant behavior to enable the plan fiduciary to make determinations regarding plan participants, including those participants that have terminated employment but are still participants in the plan. In our experience, plan sponsor fiduciaries often struggle with these matters where they do not have regulatory guidance to rely on that is specific to employer sponsored retirement plans, they do not have medically trained professionals on staff to assess these challenging circumstances and in many instances these issues relate to participants that are no longer active employees and thus the plan sponsor does not have regular contact with the participant. In order to assist plan sponsors in their efforts to address these issues, clear guidance related to diminished capacity and other elder issues would be beneficial.

Fidelity supports the Council's effort to address these issues in workplace savings plans, including those governed by ERISA, and recommends:

1. The Council consider supporting and recommending clear guidelines for plan sponsors to follow in identifying and taking steps to address participants that exhibit signs of diminished capacity or financial exploitation.
2. The Council consider supporting and recommending that plan sponsors execute reasonable restrictions on participant plan accounts temporarily preventing the distribution of assets where participants exhibit signs of diminished capacity or financial exploitation and that the Council support a recommendation to relieve plan sponsors from protentional fiduciary implications for instituting reasonable account restrictions.
3. The Council consider supporting and recommending that plan sponsors adopt the use of a "trusted contact" selected by plan participants, where the "trusted contact" could be approached where concerns related to diminished capacity or financial exploitation are raised.
4. The Council consider supporting and recommending that the plan sponsor community adopt programs to have participants designate and maintain Powers of Attorney related to their workplace savings plans.

5. The Council consider supporting and recommending educational training opportunities to assist plan sponsors in assessing and taking action where participants exhibit signs of diminished capacity or financial exploitation.

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We applaud the Council's interest and anticipated recommendations related to diminished capacity and financial exploitation. I am available to discuss any questions you may have with respect to these comments or these issues generally.

Sincerely,

Christine M. Hanna