James Barr Haines
Senior Vice President &
Deputy General Counsel

FMR LLC Legal Department

200 Seaport Blvd., V6B, Boston, MA 02210
Phone: 617-392-0227 Fax: 617-217-0896
Email: Jay.Haines@fmr.com

Fidelity INVESTMENTS

<u>SUBMITTED ELECTRONICALLY</u>

December 21, 2018

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: Definition of Employer – MEPs RIN 1210-AB88

Re: *Definition of Employer under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans (RIN 1210-AB88)*

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to provide comments with respect to the proposed regulation ("Proposal"), published by the Department of Labor ("Department") in the Federal Register on October 23, 2018, clarifying the criteria that an employer group, association or professional employer organization ("PEO") must satisfy to constitute an "employer" within the meaning of section 3(5) of ERISA.[2] As one of the nation's leading retirement services providers, Fidelity has a deep and long-standing commitment to working with the Department on its rulemaking in the area of expanding access to retirement plans, plan formation and employer engagement.

---

[1] 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. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

[2] Definition of Employer under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Plans (RIN 1210-AB88)

Fidelity believes that facilitating the formation of multiple employer plans ("MEP") is of vital importance to expanding access to workplace retirement plans, particularly among small employers and self-employed workers, including so-called "gig" workers. As the Department has indicated in the Proposal, an estimated 38 million private industry workers do not have access to retirement plans in 2018.[3] We applaud the Department's efforts in promulgating its Proposed Regulation. The Proposal would clarify and expand the scope of potential MEP sponsors, which should in turn create new opportunities for MEPs to be established.

However, we do not believe that the regulation, if finalized as proposed, would result in a significant increase in sponsorship of MEPs and thus coverage of workers in employee benefit plans. We believe that the Department could and should go further in expanding the availability of MEPs under current law. Moreover, legislation and/or regulation by the Treasury is also needed to make MEPs both a viable and an attractive means of covering America's small business employees.

Proposed Interpretation of "Employer" under ERISA

Under ERISA section 3(5), the term "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." The Department acknowledges in the Proposal that the text of the statute does not explain what it means to "act[] indirectly in the interest of an employer." Consistent with long-standing sub-regulatory guidance, however, the Department proposes that only bona fide groups or associations, or professional employer organizations (PEOs), that meet certain criteria may act indirectly in the interest of an employer within the meaning of the statutory definition. In that regard, the Department proposes to explicitly exclude from the definition any group or association that is a bank or trust company, insurance issuer, broker-dealer, or other similar financial services firm, including pension record keepers and third-party administrators (except in their capacity as an employer member of a group or association).

With due respect to the Department's prior guidance, it does not appear that the plain meaning of the definition of "employer" requires limiting its scope to employer groups, associations or PEOs. Rather, an "employer" is "any person acting … indirectly in the interest of an employer, in relation to an employee benefit plan…." While an employer group or association could certainly act indirectly in the interest of an employer in relation to a plan, the definition makes clear that "any person" may do so. Similarly, nothing in the plain language of the definition would disqualify financial services firms from being a "person" that could act in the interest of an employer in relation to an employee benefit plan. The Department suggests that because such firms often act in a commercial relationship to the employer in providing services to a plan, they cannot act indirectly in the employer's interest in doing so. However, such firms may agree to act as fiduciaries under ERISA in performing

[3] 83 Federal Register 53534.

administrative services for plans. It is not clear why a financial services firm that agreed to act as a fiduciary under ERISA could not thereby “act in the interest of” an employer in carrying out those fiduciary functions. Because many financial services firms have extensive experience and expertise in the administration of employee benefit plans, indeed far more experience and expertise than many non-financial services employer groups and associations, it would seem particularly detrimental to exclude such firms from employing that experience and expertise with respect to MEPs.[4]

The Department also appears to distinguish PEOs from other firms on the grounds that they perform employment functions outside the context of an employee benefit plan, such as paying wages and recruiting and firing employees. However, the plain language of the definition of “employer” provides only that a person act indirectly in the interest of an employer “in relation to an employee benefit plan”. Thus, the scope of the person’s activities in the interest of an employer is defined by reference to the plan, not employment functions outside of the plan.

For these reasons, it appears that the Department could interpret the current definition of “employer” under ERISA much more broadly than is set forth in the Proposal. The Department could shift its interpretive focus away from whether the person is a group, association or professional organization, and away from whether the person performs non-plan related employment functions as an employer, and instead focus on whether the person is fulfilling the employer’s fiduciary functions and thereby acting in the interest of the employer with respect to the plan. This would eliminate the limitations imposed by the Department’s historical commonality requirements and greatly expand the potential availability of MEPs. By requiring the person to carry out the employer’s fiduciary functions, such an interpretation would also seem to fully protect the interests of plans and their participants.

Plans without Employees Should Continue to be Excluded from ERISA Coverage

In the Proposal, the Department has requested comments on whether clarifying amendments or regulations should be made to confirm that sole proprietor or working owner plans that are maintained, other than through a MEP, continue to be excluded from ERISA coverage. As the Department acknowledges in the preamble to its Proposal, regulatory complexity has historically discouraged employers, especially small businesses, from offering workplace retirement plans for their employees.[5] In an effort to reduce regulatory complexity and foster plan formation, the Department should make it clear that plans without employees will continue not to be covered by Title I of ERISA. The Department can achieve this goal by

---

[4] The Proposal would also expand the scope of bona fide employer groups or associations to include those based upon geographic location. While a welcome expansion, it is unclear why geographic location should be more determinative of “employer” status under ERISA than, for example, a person’s actions and fiduciary responsibilities with respect to the maintenance and administration of a plan and its investments.

[5] 83 Federal Register 53534.

clarifying the Proposal to explicitly provide that nothing in proposed subsection 2510.3-55(d) shall affect the application of the existing regulation defining the term "employee benefit plan." [6] The existing regulation excludes from the definition of employee benefit plan a plan, fund or program under which no employees are covered.

Expand Definition of Employer to Include Working Owners

Under paragraph (d) of the Proposal, the Department indicates that a "working owner of a trade or business without common law employees may qualify as both an employer and as an employee of the trade or business *for purposes of the requirements in paragraph (b)…...*" (emphasis added). Paragraph (b), in turn, defines the criteria that must be met to constitute a "bona fide group or association of employers." This suggests that a working owner may only constitute an employer for purposes of determining whether it is a "bona fide group or association of employers", rather than constituting an employer for any purpose with respect to establishing or participating in a MEP. We would encourage the Department to revise paragraph (d) of the Proposal to make it clear that a working owner of a trade or business without common law employees can meet the definition of an "employer" under ERISA Section 3(5) for any purpose in connection with a MEP. In that way, the Department can ensure that working employers may participate in MEPs even if the requirement to be part of a bona fide group or association of employers is eliminated in future guidance or legislation,

Need for Additional Formal Guidance on MEP Plan Administration

The Department has requested comments on whether there is a need for further guidance as it relates to various aspects of MEP plan administration including investment management, recordkeeping and allocating plan costs and expenses among participating employers. We agree that further guidance may be needed in the area of MEP plan administration. However, we urge the Department to issue such guidance only following an opportunity for notice and comment. While the goals of such guidance would be unlikely to be controversial, the complexity involved in many practical applications deserves careful consideration and discussion before official guidance is issued, in many cases for the first time.

Need for Additional Legislative and Regulatory Action to Truly Open MEPs

As discussed above, a broader interpretation of the term "employer" by the Department would support "open MEPs" or "pooled employer plans" as employment-based arrangements under ERISA. As further discussed below, Fidelity strongly believes that open MEP pooled employer plans are a critical vehicle to assist federal policy makers and the Department in their stated goals of increasing and expanding access to workplace retirement plans among small employers and self-employed workers, including gig workers. To the extent that the

---

[6] DOL Reg. §2510.3-3.

Department remains constrained by its historical interpretation of the definition of "employer" under ERISA, however, we believe that these goals must be directly addressed through legislation. In addition, there are issues that arise under the Internal Revenue Code with respect to MEPs that must also be addressed through legislation and/or regulatory action by the Treasury to ensure that MEPs become both viable and attractive options for small employers.

Eliminate the "commonality" requirement

The Department's proposal would maintain a so-called commonality requirement, although it would clarify and expand the historical parameters of that requirement to allow, among other things, commonality based on a common geographic location. While the Proposal would provide welcome clarification and expansion, it would still significantly constrain the use of MEPs and their potential to increase coverage. There are currently several legislative proposals which seek to allow and facilitate the formation of open MEPs. One of the most important provisions under these proposals is a proposed amendment to eliminate any requirement that the groups or associations of employers participating in a MEP must have a separate economic or representation nexus. This commonality requirement has been a major roadblock to small employers being able to participate in MEPs.

Allow small employers to limit their fiduciary responsibility

Another important impediment to a broader increase of MEP formation has been the imposition of fiduciary responsibility under ERISA on the participating employer. Under ERISA section 3(21), a person is a fiduciary to an employee benefit plan if, among other things, "he has any discretionary authority or discretionary responsibility in the administration of the plan." Small employers are often ill-equipped to undertake the responsibilities of a fiduciary under ERISA. As the Department indicates in the preamble to its Proposal, employers often cite exposure to potential fiduciary liability as a major impediment to plan sponsorship.[7] For "open MEPs", the MEP sponsor would act as the plan administrator for the plan. As a result, this entity would become a fiduciary to the plan on behalf of the participating employers, alleviating this burden and greatly increasing the attractiveness of participating in a MEP.

Legislation or additional regulatory guidance that would facilitate fiduciary responsibility being assumed by a person other than the small participating employer would be extremely helpful. For example, legislation could provide for a person or entity that is independent of both the participating employers and the MEP sponsor to perform certain functions and oversight, such as appointing and monitoring plan fiduciaries, and determining the reasonableness of, and approving, their compensation. This would limit participating employer responsibilities to the decision to participate in the MEP, approving the independent

[7] 83 Federal Register 53535.

person or entity, providing data to manage the plan and making payroll and employer contributions.

Eliminate the "one-bad-apple" rule

While outside the scope of the Department's regulatory authority, another important and necessary improvement that would foster MEP plan formation is removing the so-called "one-bad-apple rule." Under this rule, an operational failure by one participating employer potentially disqualifies the MEP arrangement for all participating employers for federal tax purposes. Needless to say, small employers have been reluctant to be held accountable for the mistakes made by other participating employers with respect to the plan.

Safe Harbor nondiscrimination testing relief

To maintain tax-qualified status, employee benefit plans must satisfy certain non-discrimination testing requirements under the Internal Revenue Code. Due to the demographics in the small employer context, it is often quite difficult for small employers to successfully pass this testing. Existing safe-harbor relief for plans allows employers to avoid the necessity of non-discrimination testing, as long as certain requirements are met. However, the conditions of the safe-harbor which require employers to make matching or nonelective contributions are often too costly for small employers.

We believe that it would be appropriate and desirable in the MEP context to create a new safe harbor for non-discrimination testing. The safe harbor should be based on universal employee eligibility for the plan and full and immediate vesting of all contributions, rather than requiring minimum contributions to be made by the employer. In other words, there should be no need for small employers to make a certain level of employer contribution to avoid nondiscrimination testing, so long as all employees are eligible and fully vested in any contributions that are made to the plan.

Financial incentives

Finally, certain proposed legislation would provide tax credits for small plan sponsors. Our research and analysis has led us to conclude that such credits would provide significant support and thus be a significant incentive to small employers to establish and maintain retirement plans for their workers. We strongly encourage the Department to work with Congress to create and implement such credits as soon as possible.

****

We appreciate that many of the above issues cannot be resolved by the Department in the context of its Proposal. However, we urge the Department to adopt a broader, plain language

interpretation of the current definition of "employer" in order to facilitate open MEPs and pooled employer arrangements. We believe that a broader interpretation would greatly increase the potential for MEPs to cover the workers of America's small employers. Even if the Department does not adopt that interpretation, however, we encourage the Department to continue to clarify and expand the availability of MEPs and to facilitate additional legislative and regulatory changes to the extent possible.

We are available to discuss any questions the Department may have with respect to these comments or to MEPs generally.

Sincerely,

James Barr Haines
SVP & Deputy General Counsel