



SUBMITTED ELECTRONICALLY

October 1, 2020

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

Re: *Registration Requirements for Pooled Plan Providers*, 85 FR 54288 (RIN 1210-AB94)
(September 1, 2020)

Ladies and Gentlemen:

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to provide comments with respect to the proposed regulation, published by the Department of Labor (“Department”) on the registration requirements for entities that wish to operate as “pooled plan providers” for “pooled employer plans,” as defined under sections 3(43) and 3(44) of ERISA (“Proposal”).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.

Fidelity recognizes the value workplace retirement plans provide to American workers, but many workers, including a significant percentage of those employed by smaller businesses, do not have access to a workplace plan. To address this retirement “coverage gap,” Fidelity broadly supports expanding access to pooled employer plans, particularly for smaller employers.

We appreciate the Department’s efforts in promulgating this Proposal which will assist in PEP plan formation by providing necessary registration requirements for pooled plan providers.

I. The Department Should Modify Its Definition of When a Provider Begins Operations as a Pooled Plan Provider

Under paragraph 2510.3-44(b) of the Proposal, the Department requires the entity registering as a pooled plan provider to provide certain information, prior to “beginning operations as a pooled plan

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 thirty million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts (“IRA”) with more than nine 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 *Registration Requirements for Pooled Plan Providers*, 85 FR 54288 (September 1, 2020).

provider.” In this context, the Department defines “beginning operations as a pooled plan provider” to include publicly marketing services as a pooled provider or publicly offering a pooled employer plan. The Department has invited comments on this definition to determine if it is appropriate in scope. Fidelity believes that the Department should exclude marketing and solicitation activities from the definition. It is common for marketing and solicitation activities to begin before a new product or service is actually available in the marketplace. In this way, providers enable prospective customers to obtain access to information about product or service attributes, prior to launch, so that they may make informed choices about currently available services and weigh those against anticipated future services. Otherwise, employers may choose to utilize services that may not be best for their situation when a new service is on the eve of release.

Ensuring that prospective employer customers are able to learn more about various pooled employer plans is particularly important given that there may be a variety of new offerings. Providers must be able to market their pooled employer plan services as early as practicable so the prospective participating employers can assess their options.

The Department appears to recognize this in the preamble to the Proposal where it states that it does not intend to require registration as a result of “actions and communications designed to evaluate market demand.....”³ However, it is unclear from the preamble where in the Department’s view evaluating market demand ends and “marketing” begins. Rather than create ambiguity and risk for service providers intent on establishing pooled employer plans and releasing information about their particular pooled employer plan services, the Department should remove the concept of marketing and solicitation from the definition of “beginning operations as a pooled plan provider” altogether. The requirements applicable to pooled employer plans and pooled plan providers, including the registration requirements, must be met before an employer may participate in a pooled employer plan. But there is no need to prevent providers from marketing to such employers before all those requirements are met.

II. The Department Should Modify the Required Initial Registration Information

a. Contact Information for a Primary Compliance Officer Should Not Be Required

Under paragraph 2510.3-44(b)(1)(v) of the Proposal, the Department requires the entity registering as a pooled plan provider to disclose the name, address, contact telephone number and email address for the primary compliance officer of the pooled plan provider. The Department states in the Proposal that this information is needed to “give the Department and others with compliance concerns a means of contacting a responsible person at the registrant” and to provide “a way for interested/participating employers and covered employees to contact the pooled plan provider for information.”⁴

Participants and beneficiaries of pooled employer plans must receive contact information for the plan administrator of such plans as part of the summary plan description.⁵ In addition, the proposed registration document requires the business address and phone number for the pooled plan provider. Accordingly, it is not clear why a third method to contact the pooled plan provider should be needed.

³ 85 FR at 54292.

⁴ 85 FR at 54292.

⁵ 29 CFR §2520.102-3.

In addition, this registration requirement effectively means that the registering entity is required to identify a primary compliance officer. This would be a new requirement and is not mandated by the statute. If a point of contact other than the plan administrator or pooled plan provider is necessary, we would suggest that the Department require pooled plan provider registrants to provide general contact information for interested/participating employers, participants and beneficiaries to use but not require that such contact be the “primary compliance officer” of the registrant.

b. The Department Should Require Disclosures of Administrative Proceedings Only When They Are Non-Routine in Nature

Under paragraph 2510.3-44(b)(1)(x) of the Proposal, the Department requires the entity registering as a pooled plan provider to disclose “any ongoing criminal, civil, or administrative proceedings related to the provisions of services to, operation of, or investments of any employee benefit plan, in any court or administrative tribunal by the federal or state government or other regulatory authority against the pooled plan provider, or any officer, director or employee of the pooled plan provider.” Fidelity believes that the requirement to disclose ongoing “administrative proceedings” is overly broad and could require the disclosure of ongoing and routine regulatory activity such as standard audits and investigations by federal and state agencies. We would respectfully request that this requirement be limited to requiring disclosure of only such ongoing administrative proceedings that are not routine in nature. This would provide the Department with more meaningful information while at the same time reducing the reporting burden on pooled plan providers.

In addition, the Department has requested comments on whether there are other federal or state filings on which it could rely as an alternative source of information about pooled plan providers and the plans they operate.⁶ We believe that the Department could obtain similar information on pooled plan providers that are regulated financial institutions from other sources such as Form ADV, Form BD, Form TA and other state registration forms. Where such information is available through such other sources, we request that the Department permit pooled plan providers to submit appropriate links to websites where this similar information can be accessed and obtained. Where a pooled plan provider provides such a link, the Department should thereafter obtain this information through the website, and the pooled plan provider should only be required to update the registration if the website no longer applies to the pooled plan provider.

III. The Department Should Require Supplemental Information Only Upon Material Changes

Under paragraph 2510.3-44(b)(3)(i) of the Proposal, the Department requires the entity registering as a pooled plan provider to file a supplemental report using Form PR for any change in information previously reported. As indicated earlier in this letter, some of the information filed in the initial Form PR (if not modified as suggested) may change frequently and the supplemental information requirement would necessitate the frequent filing of supplemental reports. We would request that this requirement be altered to require a supplemental report to be filed only if there are material changes in the information previously provided on the initial Form PR. Alternatively, we would suggest that pooled plan providers be required to file supplemental reports using Form PR only on an annual basis. This would provide the Department with necessary supplemental information while reducing the burden on pooled plan providers.

⁶ 85 FR at 54295.

Office of Regulations and Interpretations,
EBSA/DOL, Open MEPs RIN 1210-AB92
October 29, 2019

We are available to discuss any questions you may have with respect to these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Barr Haines". The signature is fluid and cursive, with the first name "James" being the most prominent.

James Barr Haines

SVP & Deputy General Counsel