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SUBMITTED ELECTRONICALLY

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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: RIN 1210-AB92 "Open MEPs" and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to provide comments with respect to the request for information ("RFI"), published by the Department of Labor ("Department") in the Federal Register on July 31, 2019, which seeks comments on whether to amend existing Department regulations in order to facilitate the sponsorship of open multiple employer plans ("MEPs") by persons acting indirectly in the interest of unrelated employers.[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 American workers, but many workers, many of whom are employed by smaller businesses, do not have access to a workplace plan. To address this retirement "coverage gap," Fidelity supports expanding access to MEPs, particularly for smaller employers. This letter outlines our recommendations to the Department and asks that the Department take additional steps beyond its final rule on the Definition of Employer Under Section 3(5) of ERISA --

[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] "Open MEPs" and Other Issues Under Section 3(5) of the Employee Retirement Income Security Act (RIN 1210-AB92)

Association Retirement Plans and Other Multiple-Employer Plans ("Final ARP Rule")[3] to "open" MEPs and ensure their viability as a competitive retirement offering in the market.

Our comments largely focus on expanding the Department's interpretation of the current definition of "employer" under Section 3(5) of ERISA to permit financial institutions or other persons to maintain a single defined contribution retirement plan on behalf of multiple unrelated employers, though we also outline several other concerns under existing law and regulations which currently serve as key barriers to MEP plan formation.

In the absence of these modifications, we believe that MEPs will not experience a significant increase in sponsorship and will therefore continue to leave millions of American workers who would benefit from access to a workplace retirement plan, uncovered. The Department can and should go further to facilitate the sponsorship and establishment of Open MEPs.

I. Why Open MEPs will help increase coverage of currently uncovered and underserved workers.

Statistical and industry research demonstrate why facilitating the formation of Open MEPs is of critical importance to closing the retirement coverage gap in the small employer demographic. Approximately 58 million people (48% of the U.S workforce) are employed by small businesses today, however many small businesses do not have the resources to administer an employer-sponsored retirement plan.[4] According to the Bureau of Labor statistics, 94% of companies with 500 or more employees offer a defined contribution retirement savings plan (such as a 401k), but only 44% of companies with less than 50 employees offer access to these types of plans.[5] The unreasonably high administrative and fiduciary burden, along with cost, discourages many small businesses from offering their employees a retirement plan.

Small businesses are a fundamental part of the U.S. economy and important job creators. Small businesses are also major employers of minorities. Because many of these employers do not offer quality affordable plans, minorities are disproportionately uncovered. About two in three Hispanic workers and roughly half of African-Americans and Asian-Americans lack access to an employer-provided retirement plan. In fact, in 2014 minority workers accounted for about 41% (or 22 million) of the 55 million employees without a workplace retirement plan.[6]

But the retirement coverage gap affects more than small business workers. The U.S. Government Accountability Office (GAO) recently found that gig workers (independent contractors) or those who find work via a digital platform[7] are about "two-thirds less likely than standard workers to have a work-

[3] Definition of "Employer" Under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple-Employer Pension Benefit Plans (RIN 1210–AB88)

[4] "Small Business Profile." U.S. Small Business Administration Office of Advocacy, 2017.

[5] "Establishments Offering Retirement and Healthcare Benefits," March 2017, Bureau of Labor Statistics.

[6] "Workplace Retirement Plans Will Help Workers Build Economic Security," AARP Public Policy Institute, October 2014. Note: The cited number of workers without access to a workplace retirement plan may differ slightly based on the data set, year(s) examined, and the source.

[7] "Gig workers" find work through a digital platform such as Uber, Lyft, and Etsy. "What is a gig worker?" Gig Economy Data Hub.

provided retirement plan."[8] This is a growing problem as gig workers are becoming a significant portion of the U.S. workforce. [9]

Entrepreneurs and self-employed workers also face disadvantages from the administrative and cost burdens of employer-sponsored retirement plans. While entrepreneurship is considered to be the lifeblood of the American economy, today entrepreneurship is at a 30-year low in the United States.[10] Fidelity's research suggests this downturn could be in part the result of the current employer-sponsored benefits model, with employees not wanting to lose access to a workplace retirement plan by leaving their employer to start their own business.[11]

Open MEPs can be the solution for these smaller employers and workers to advance a retirement rooted in dignity and financial security. But in order to encourage participation in MEPs, employers need the solution to be simple, affordable, and digital, imposing as little burden and fiduciary liability as possible, so that smaller employers can do what they do best—focus on running their businesses.

According to the Employee Benefits Research Institute's (EBRI) 2019 Retirement Security Projection Model,[12] if policies to open MEPs were implemented today, the retirement deficit for those who previously lacked access to an employer-sponsored plan could be reduced by more than 25%.[13] The opportunity to increase American workers' retirement security is too great to not take the steps necessary to ensure MEPs are a viable retirement option.

II. Expand the definition of "employer" under Section 3(5) of ERISA to enable financial services institutions to sponsor a MEP.

Fidelity believes that certain entities are better positioned than others to eliminate the complexity, employer liability and inertia associated with employer retirement plans sponsored by smaller businesses. As retirement plan service providers, many financial services institutions have broad experience in administering employee benefit plans, providing investment expertise, and engaging participants to save at meaningful rates. Moreover, due to their scale, many financial services companies could provide the

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[8] "Contingent Workforce: Size, Characteristics, Earnings, and Benefits," April 20, 2015, U.S. Government Accountability Office, https://www.gao.gov/assets/670/669766.pdf.

[9] If current growth rates continue, the majority of the U.S. workforce would become independent workers by the year 2027. "Freelancing in America," Upwork and Freelancers Union, October 2017, https://www.upwork.com/i/freelancing-in-america/2017/. This study, conducted by independent research firm Edelman Intelligence and commissioned in partnership with Upwork and Freelancers Union, surveyed 6,000 U.S. workers to analyze the size of the growing freelance economy and the major role freelancers play in the future of work.

[10] J.D. Harrison, "The Decline of American Entrepreneurship— In Five Charts," *The Washington Post*, February 12, 2015. Edward C. Prescott and Lee E. Ohanian, "U.S. Productivity Growth Has Taken a Dive," The Wall Street Journal, February 3, 2014. Jordan Weissmann, "The 30-Year Decline of American Entrepreneurship," The Atlantic, September 25, 2012.

[11] Fidelity Investments, Survey Findings from National Sample of Indy Workers, December 2016.

[12] EBRI Retirement Security Projection Model® Version 3437.

[13] EBRI, "Under the Dome – A Closer Look at Legislative Proposals Impacting Retirement," https://www.ebri.org/docs/default-source/policy-forum-documents/jack-vanderhei3e7e599d443d6688bc58ff0000a8d73a.pdf?sfvrsn=83433f2f_2

highest quality service to employee benefit plans and offer investment options at the lowest cost per participant.

Fidelity believes that the viability of MEPs strongly relies on the provider's ability to remove the complexity, financial and legal burdens that workplace plans typically impose on an employer. Many financial services institutions are best situated to achieve the simplicity smaller employers want.

For the reasons outlined in our December 21, 2018 comment letter to the Department regarding its proposal on the Definition of Employer under Section 3(5) of ERISA – Association Retirement Plans and Other Multiple Employer Plans (RIN 1210-AB88), the Department can interpret the current definition of "employer" under ERISA more broadly than the interpretation adopted in the final regulation. The Department can shift its interpretative focus away from whether a 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. Expanding the Department's current interpretation would also enable the entities most prepared and appropriate to sponsor a MEP—financial services and similar institutions— to do so.

In adopting a broader interpretation of the definition of "employer," the Department should not place any undue limitations on the types of commercial entities that could be recognized as employers under ERISA 3(5). Rather, as discussed above, the fundamental test should be whether the entity is acting in a fiduciary capacity, and as a result, indirectly in the interest of the employer with respect to the plan. We believe that any limitations beyond this important requirement will continue to create further impediments to MEP plan formation and result in the ongoing proliferation of the retirement coverage gap for small employers.

III. Mitigation of Conflicts of Interest for Financial Services Institutions

In its RFI, the Department seeks feedback on whether the sponsorship of Open MEPs by financial services institutions (including retirement plan recordkeepers and third-party administrators) would result in conflicts of interest under ERISA and the Internal Revenue Code ("IRC"), and if so, what approaches could be used to mitigate such conflicts. The principle conflict of interest for financial services institutions would be any self-dealing that might arise to the extent that the firm caused its own compensation to increase by exercising its own discretion. However, as in other contexts in which a fiduciary may cause its own compensation to increase, this conflict can be eliminated through adequate disclosure by the financial institution to an independent fiduciary and approval of the compensation by such fiduciary following a determination that the compensation is reasonable.

For example, a financial institution serving as an employer and plan administrator of a multiple employer plan could provide full disclosure of the compensation it would receive for performing those roles to each other participating employer in the MEP. Each participating employer would be responsible for determining the reasonableness of such compensation and approving it or else leaving the MEP (e.g., through a spin-off) and continuing as a stand alone plan or joining a different MEP. Note that

participating employers other than the financial institution serving as an employer and plan administrator would likely be responsible for determining the investments made available to their employees through the MEP (either by selecting their own fund lineups or by selecting a MEP that only offers a specific set of fund options for investment). To the extent that a financial institution exercised its discretion regarding investments in ways that could cause its own compensation to increase, it would need to avail itself of one or more prohibited transaction exemptions.

IV. Amending Existing Regulatory Framework to Facilitate Open MEPs

Under its RFI, the Department requested comments on whether and how the current Final ARP Rule could be amended to facilitate the formation of Open MEPs. Specifically, the Department asked whether the provisions regarding bona fide group or association and/or the professional employment organization ("PEO) provisions should be revised. Fidelity believes that, in order to truly expand the ability of small employers to adopt MEPs, the Final ARP Rule should be revised in two important ways.

First, we suggest that Department alter the Final ARP Rule to eliminate the commonality requirements which currently serve as significant barriers to small employers banding together and leveraging their resources collectively to form, maintain and participate in Open MEPs. We appreciate the fact that the Department expanded the parameters of the commonality requirement under the Final ARP Rule to allow, among other things, commonality based on a common geographic location. However, we believe that this expansion does not go far enough to allow small, unaffiliated employers to form Open MEPs. Under the Final ARP Rule, small employers who are not in the same industry, trade, profession or line of business or who may not have a principal place of business in a common state or metropolitan area would be precluded from joining together under a MEP.

Maintaining these commonality requirements will still constrain the use of MEPs, their potential to achieve scale and thus minimize cost, and their potential to increase retirement coverage among small employers. Therefore, we recommend the Department eliminate these commonality requirements in whole, so as not to preserve a major roadblock for small employers participating in a MEP. Eliminating these requirements would also align with several pieces of legislation in Congress including the Setting Every Community Up for Retirement Enhancement ("SECURE") Act of 2019, which seeks to open MEPs by eliminating any requirement that the groups or associations of employers participating in a MEP must have a close economic or representational nexus.

Secondly, as noted earlier in Section II above, Fidelity believes that many financial services companies have significant experience as retirement plan service providers in administering employee benefit plans, providing investment expertise and engaging participants and are thus suited to act as sponsors of MEPs. As a result, we recommend that the Department revise the Final ARP Rule to permit financial services companies and other commercial entities to act as MEP plan sponsors. Eligibility to sponsor a MEP should not be based on whether a particular entity qualifies as a bona fide group or association or a PEO. Rather, it should depend on the ability and willingness of a commercial entity to act indirectly in the interest of an employer, under ERISA 3(5), as a plan fiduciary.

In addition to these suggested changes to the Final ARP Rule, we encourage the Department to facilitate additional regulatory and legislative changes, to provide nondiscrimination testing relief. To maintain tax-qualified status, employee benefit plans must satisfy certain non-discrimination testing requirements under the Internal Revenue Code. However, these requirements are often costly and burdensome, particularly for small employers.

Existing non-discrimination testing relief for plans allows employers to avoid the necessity of non-discrimination testing, as long as certain requirements are met. Fidelity data shows that nearly 40% of existing employer-sponsored plans access the safe harbor in order to be relieved from testing requirements. This significant percentage of safe harbor plans, as an overall portion of plans in market, suggests employers' willingness to provide higher nonelective contributions in order to circumvent the current burdensome testing protocol.

However, as the Department suggested in its RFI, the current safe-harbor rules, which require employers to make substantial matching or nonelective contributions, are often too costly for small employers and could discourage the potentially large numbers of employers that theoretically could participate in a nationwide open MEP, from doing so.

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 contributions to avoid nondiscrimination testing, so long as all employees are eligible and fully vested in any contributions that are made to the plan.

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

Sincerely,

James Barr Haines

SVP & Deputy General Counsel