

(l) Fidelity shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (m) of this Section III to determine whether the conditions of this exemption have been met, except that: (1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Fidelity, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest, other than Fidelity, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (m) below.

(m)(1) Except as provided in paragraph (m)(2) and notwithstanding any provisions of sections 504(a)(2) and (b) of the Act, the records referred to in paragraph (l) of this Section III shall be unconditionally available at their customary location for examination during normal business by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to any Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of any Client Plan, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraph (m)(1)(ii)-(iv) shall be authorized to examine the trade secrets of Fidelity or any commercial or financial information which is privileged or confidential.

Section IV—Definitions

(a) An "affiliate" of a person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative of, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(b) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term "Responsible Independent Fiduciaries" means with respect to a Multiple Client Account the

Independent Fiduciary of Client Plans invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of the Act (such as governmental plans, university endowment funds, etc.) that are independent of Fidelity and that collectively hold at least 50% of the interests in the Account.

(d) The term "Threshold Amount" means with respect to any Performance Fee an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A non-fixed rate which is at least equal to the rate of change in the CPI during the period from the deposit of the Client Plan's assets in the Account until distributions of the Client Plan's assets from the Account equal or exceed the Threshold Amount; or

(2) A fixed rate which is at least equal to the average annual rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(e) The term "Target Amount" means a value assigned to each asset in the Account established by Fidelity either (1) at the time the asset is acquired, by mutual agreement between Fidelity and the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, or (2) pursuant to an objective formula approved by such fiduciaries at the time the Account is established. However, in no event will such value be less than the acquisition price of the asset.

(f) The term "Account" means any Single Client Account or Multiple Client Account established with Fidelity, under a written investment management or trust agreement, that is invested primarily (i.e. more than 50%) in securities or other assets which are not publicly-traded equity securities or publicly-traded, investment grade debt securities, pursuant to written instructions and guidelines established and approved by an Independent Fiduciary for the Client Plan prior to any investment by the Client Plan in the Account. For purposes of an "Account" meeting the 50% test for assets which are *not* "publicly-traded equity securities" or "publicly-traded, investment grade debt securities", any private market securities held by the Account that become publicly-traded securities shall not be considered as such for a period of thirty (30) months following the date such securities become publicly-traded so as to allow

Fidelity sufficient time to dispose of such securities in order for the Account to remain primarily invested in assets which are not publicly-traded securities, including for such purposes any publicly-traded debt securities which are not investment grade.¹

The availability of this exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions which are the subject of this exemption.

Summary of Facts and Representations

1. FMTC is a Massachusetts trust company with its principal office located in Boston, Massachusetts, and is a "bank" as defined under the Investment Advisers Act of 1940. FMTC manages approximately \$24 billion worth of assets for a variety of clients, virtually all of which are employee benefit plans. FMTC's client accounts consist of either separate accounts for a single client or commingled accounts for multiple clients.

2. Fidelity will offer the investment arrangement described below involving the payment of a Performance Fee to Client Plans that seek to invest primarily in securities and have aggregate net plan assets with a fair market value in excess of \$50 million.² Fidelity will serve such Client Plans as the investment manager or discretionary trustee of either a Single Client Account or a Multiple Client Account. In general, Fidelity will have complete discretion for identifying appropriate investments, making investment decisions, and managing and disposing of the securities or other assets acquired for the Accounts. However, with respect to certain Single Client Accounts, Fidelity will not exercise absolute investment discretion and will be required to obtain approval for certain investment

¹ As noted above in Section III(f), an Independent Fiduciary must specifically agree in writing with Fidelity that it would be appropriate for the minimum rate of return applicable to the Account to be based upon the rate of change in the CPI during the period specified in the Agreement. However, with respect to any Account with an investment strategy designed to invest in distressed, defaulted or other non-performing debt instruments that may be publicly-traded securities at the time they are acquired by the Account, the Department encourages Client Plan fiduciaries to determine whether or not any of the published indices for publicly-traded debt securities would be a more appropriate performance benchmark to measure a minimum rate of return for such securities.

² In the case of multiple plans maintained by a single employer or a single controlled group of employers, the assets of which are invested on a commingled basis (e.g. through a master trust), this \$50 million threshold will be applied to the aggregate assets of all such plans.