

securities.<sup>6</sup> Fidelity states that it would not necessarily enter into a Performance Fee arrangement for all Accounts which are invested in the these types of assets. However, Fidelity wishes to have the opportunity to do so in circumstances where an Independent Fiduciary has specifically approved the particular investment objectives and fee arrangements for the Account, as being appropriate for the payment of such a Performance Fee. The Accounts may be designed as either "blind" accounts for which Fidelity will select the investments after the Client Plans have invested therein or "pre-identified asset" accounts for which Fidelity identifies particular securities or other assets for investment prior to the Client Plans' investments in the Accounts.

5. Fidelity proposes to have the Client Plans pay for investment management or discretionary trustee services rendered to the Accounts based upon a two-part fee structure which will be approved in advance by the Independent Fiduciaries of the Client Plans. In addition to an on-going investment management or trustee fee (the Base Fee) paid to Fidelity by the

Client Plan, the fee structure may include the Performance Fee, a fee payable upon a distribution (or deemed distribution) of the assets from the Account after the Client Plan has received (or would receive) a return of all its invested capital plus a certain pre-specified rate of return on its investments in the Account. Fidelity requests an exemption for the payment by Client Plans of the Performance Fee under circumstances described below.

With respect to the Base Fee, such fee will be paid throughout the term of the Account on a pre-specified periodic basis. The amount of the Base Fee will be based on either (i) a percentage of the net fair market value of the Client Plan assets in the Account (i.e. without regard to any leveraged amounts) as of the last day of each period or (ii) a percentage of the assets allocated to the Account (i.e. the invested capital) less any amounts thereof which have been distributed from the Account. In either event, the Base Fee will be pro-rated for any partial periods. The exact percentage to be used in determining the Base Fee will be negotiated between Fidelity and the Independent Fiduciary of the Client Plan prior to the initial investment of any Plan assets in the Account.

If the Base Fee is calculated based upon the fair market value of the assets in the Account as of a specified determination date, the fee will be based upon values determined using market sources approved in writing by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account).<sup>7</sup> If market sources are not available, the fee will be based upon values determined immediately prior to the payment of such fee by an appraiser independent of Fidelity. For any appraisal used to determine the Base Fee, Fidelity will initially notify in writing the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account regarding the identity of the appraiser whom Fidelity proposes to retain to value the asset. The Independent Fiduciary or the Responsible Independent Fiduciaries will have an opportunity to approve or

disapprove the suggested appraiser with an approval being deemed to have occurred unless such fiduciaries object to the appraiser within a reasonable time. Once approved, the appraiser could perform all future valuations of the particular asset unless either (i) the Independent Fiduciary or Responsible Independent Fiduciaries affirmatively withdraw the prior approval of the appraiser, or (ii) Fidelity suggests a different appraiser, in which case an approval by such fiduciaries would again be required.

In lieu of the Base Fee described above, Fidelity and the Independent Fiduciaries of the Client Plans may agree to an alternative fee arrangement for an Account (the Alternative Fee) which is based upon either a fixed amount or amounts or an objective formula to be negotiated (in either case) between Fidelity and the Independent Fiduciary of the Client Plan prior to the initial investment of any Client Plan assets in the Account. Neither the Base Fee nor any such Alternative Fees will be covered by the requested exemption.<sup>8</sup>

The Performance Fee will be payable either (i) after the Client Plan has actually received distributions from the Account, or (ii) in the case of the removal or resignation of Fidelity, based on deemed distributions from the Account (as discussed in Item 7 below), which in each case must be at least equal to such Plan's invested capital plus a pre-specified annual compounded cumulative rate of return (i.e. the Threshold Amount). The Performance Fee will be equal to a fixed percentage (or several fixed percentages) of all amounts distributed from an Account in excess of the Threshold Amount (or several Threshold Amounts). In this regard, Fidelity represents that there is a possibility that several Threshold Amounts may be established with different percentages being utilized to determine the Performance Fee depending upon which Threshold Amount has been exceeded.<sup>9</sup> Fidelity states that this structure will allow a Client Plan to negotiate an arrangement pursuant to which the

<sup>6</sup>In this regard, Fidelity represents that an Account will not invest in or use any swap transactions (including caps, floors, collars, or options relating thereto), forward contracts, exchanged-traded futures transactions, or options (other than covered call options). The Department notes that no relief is being provided in this proposed exemption for any underlying investments made by an Account which may involve parties in interest with respect to the Client Plans invested in the Account.

In addition, the Department is expressing no opinion as to whether the investment of "plan assets" by an Account in any particular type of asset would violate any provision of Part 4 of Title I of the Act. Thus, the Department is not providing an opinion regarding whether any particular category of investments or investment strategy would be considered prudent or in the best interests of a Client Plan as required by section 404 of the Act.

However, the Department notes that in order to act prudently in making investment decisions, plan fiduciaries must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. A particular investment by a plan, which is selected in preference to other available investments, would generally not be prudent if such investment involves a greater risk to the security of "plan assets" than other comparable investments offering a similar return.

The Department notes further that Client Plan fiduciaries must thoroughly understand the risks involved with any investment course of action and must be capable of monitoring at appropriate intervals the investment course of action taken by Fidelity, particularly with respect to any period when the payment of a Performance Fee to Fidelity would be applicable. In this regard, section 405(a) of the Act states, among other things, that a plan fiduciary shall be liable for a breach of fiduciary responsibility of another fiduciary for the same plan if, by his failure to comply with section 404(a)(1) in the administration of his specific duties which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach.

<sup>7</sup>Fidelity states that in instances where the Base Fee is determined based on the amount of capital invested in the Account, rather than on the value of the assets in the Account, no such market valuations will be utilized to determine the Base Fee. Thus, the independent valuation requirements discussed herein, including any independent appraisal of assets in an Account, will be limited to situations where such valuations are used to calculate either the Base Fee or the Performance Fee.

<sup>8</sup>Fidelity represents that both the Base Fee and the Alternative Fee would be covered by section 408(b)(2) of the Act and the regulations thereunder (see 29 CFR 2550.408b-2). However, the Department expresses no opinion as to whether the payment of such fees, as described herein, would meet the conditions of section 408(b)(2) of the Act.

<sup>9</sup>For example, a Client Plan could negotiate a Performance Fee whereby Fidelity would receive 10% of all distributions from the Account once an initial Threshold Amount (e.g. return of all invested capital plus an 8% annual return) has been achieved and 20% of all distributions once a second Threshold Amount (e.g. return of all invested capital plus a 12% annual return) has been achieved.