

amount of the Performance Fee will increase as the level of investment performance increases. Both the annual rate(s) of return used in determining the Threshold Amount(s) and the percentage(s) used to determine the amount of the Performance Fee will be negotiated between, and agreed to by, Fidelity and the Independent Fiduciary of the Client Plan prior to the Client Plan's initial investment in the Account.

With respect to the determination of the Threshold Amount, Fidelity represents that all amounts invested by a Client Plan in an Account will have to earn a pre-specified rate of return, which is at least equal to the minimum rate of return specified in Section IV(d) above,<sup>10</sup> for the entire period such assets are in the Account and must actually be distributed (or deemed distributed) back to the Client Plan in order for the Threshold Amount to be reached. Fidelity states that a bookkeeping account will be maintained for each Client Plan which will show the amount required to be distributed from the Account to satisfy the Threshold Amount. When a certain amount is invested in the Account on a particular date, this bookkeeping account will be reduced by the full amount of the distribution. Thereafter, the required return will be added to this reduced amount until the next distribution is made when the bookkeeping account will be reduced to reflect the amount of that distribution. Only when this bookkeeping account is reduced to zero will the Threshold Amount be satisfied. At this time, the Performance Fee will be payable to Fidelity on all further distributions (or any deemed distribution) from the Account.

Fidelity states that for any sale of an asset in an Account which causes the payment of a Performance Fee and which occurs prior to the termination of the Account, the sale price for the asset must be at least equal to a Target Amount (as defined in Section IV(e) above), in order for Fidelity to be able

to sell the asset and receive its Performance Fee without any further approvals. The Target Amount will be established by Fidelity either 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 pursuant to a formula approved by such fiduciaries at the time the Account is established. If the proposed sale price of the asset is less than the Target Amount, the proposed sale will be disclosed to the Independent Fiduciary or Responsible Independent Fiduciaries for approval in order for Fidelity to receive its Performance Fee as a result of the sale. Such approval will be deemed to have occurred unless the Independent Fiduciary or Responsible Independent Fiduciaries object to the sale within a reasonable time after notice of the proposed transaction. If the proposed sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, Fidelity will still have the authority to sell the asset in situations where the Agreement provides Fidelity with complete investment discretion for the Account. However, in such instances and in all other circumstances where the sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, the Performance Fee which would have been payable to Fidelity by reason of the sale of such asset will be paid only at the termination of the Account. In this regard, Fidelity states that any Performance Fee which is not paid currently to Fidelity because of the Target Amount rule will be segregated within the Account and invested until the termination of the Account with Fidelity to receive any income (or loss) earned by such investment.

6. All realized income, and proceeds from the sale of the assets of the Account, net of expenses (including reasonable reserves), will be either (i) distributed from the Account to the applicable investors in such Account, including Client Plan(s), or (ii) if the documents pursuant to which the Account is maintained so provide, reinvested until a specified date, with any income and proceeds (net of expenses, including reasonable reserves) of the Account after such date to be distributed to the applicable investors. All distributions from the Account shall be included in calculating whether the Threshold Amount has been reached.

Only actual distributions from an Account, and not any amounts reinvested as described above, will be included in calculating whether the Threshold Amount has been reached for purposes of the payment of the Performance Fee.

7. Fidelity may be removed as investment manager or trustee for an Account at any time, without cause, upon the delivery of a notice of removal to Fidelity by the Independent Fiduciary for a Single Client Account or by the Responsible Independent Fiduciaries of a Multiple Client Account. Fidelity may resign as investment manager or trustee of an Account at any time, without cause, upon written notice to the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account.

With respect to a Single Client Account, such removal or resignation will not become effective until a successor investment manager or trustee is appointed by the Independent Fiduciary for the Account.

With respect to a Multiple Client Account, the removal of Fidelity will become effective when either: (i) A successor investment manager or trustee is appointed by the Responsible Independent Fiduciaries; or (ii) sixty (60) days (or such greater number of days as may be specified by the Responsible Independent Fiduciaries) elapse, whichever is sooner. Any resignation by Fidelity for a Multiple Client Account will become effective when either: (i) A successor investment manager or trustee is appointed by the Responsible Independent Fiduciaries; or (ii) 180 days elapse, whichever is sooner.

Upon removal of Fidelity as investment manager or trustee, Fidelity will be entitled to receive a Performance Fee if the Client Plans would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of Fidelity's removal. Such Performance Fee will be determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value using market sources approved by the Independent Fiduciary of the Client Plan (or specified in the documents establishing the Account, in the case of a Multiple Client Account). If market sources are not available, the fair market value of the assets will be determined by an independent appraiser mutually agreed upon by Fidelity and the Independent Fiduciary of each Client Plan in the case of a Single Client Account or the

<sup>10</sup> Fidelity represents that the Independent Fiduciary acting for a Client Plan shall specifically agree in writing with Fidelity, prior to any investment in the Account, that it would be appropriate for the performance benchmark used to measure the minimum rate of return applicable to the Account to be based upon the rate of change in the CPI over the period specified in the Agreement. However, the Department notes that a Client Plan fiduciary should thoroughly scrutinize the performance objectives for the Account prior to agreeing with Fidelity that such a performance benchmark is appropriate to measure the required minimum rate of return. In this regard, the Department encourages Client Plan fiduciaries to analyze whether any performance benchmarks other than a minimum rate of return based on changes in the CPI, such as an index of publicly-traded equity or debt securities, would be more appropriate to measure the Account's performance.