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Fidelity Investments

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N – 5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
ATTN: 401(k) Plan Investment Advice RFI

Re: Response to Request for Information

Ladies and Gentlemen:

The U.S. Department of Labor ("Department") published a Request for Information ("RFI") in the Federal Register on December 4, 2006 (71 FR 70429). This response to the RFI is submitted on behalf of the group of financial service companies for which FMR Corp. is the parent company and which is known as Fidelity Investments ("Fidelity").

Background:

Fidelity affiliates provide record keeping, investment management, and custodial services to thousands of Code section 401(k) plans and Code section 403(b) programs covering millions of employees and their beneficiaries. Fidelity affiliates also service millions of individual retirement accounts under Code section 408 and Roth individual retirement accounts under Code section 408A (collectively, "IRAs"). Fidelity Management Trust Company serves as the trustee for many of the 401(k) and other individual account plans that are serviced by Fidelity and as IRA custodian. Fidelity provides retirement services both through a direct-sold model as well as through its products that are sold through financial intermediaries.

Strategic Advisers, Inc. ("Strategic") is a wholly-owned Fidelity company that provides investment advisory services and is registered under the Investment Advisers Act of 1940. It is contemplated that Strategic will develop a computer based methodology for the provision of investment advice to workplace retirement plan participants and IRA investors.

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For 401(k) and other employer-sponsored individual account plans, advice based on the Strategic computer-based methodology may be delivered electronically via a secure interactive website available to the participant. The participant may use the service either by himself or with the assistance of a Fidelity phone representative. For IRA investors, the Strategic computer based methodology may be delivered in the same manner or in a face-to-face meeting with a brokerage representative of a Fidelity broker-dealer entity.

It is likely that certain financial intermediary firms, who provide services to retirement plans for which Fidelity provides recordkeeping and trustee services, will also develop "eligible investment advice arrangements" as defined in the statute. In addition, depending upon the requirements in final guidance, financial intermediaries may desire to assist participants who utilize an advice service for which the computer based methodology is developed by another party. Such arrangements must also be addressed in guidance regarding the certification process, disclosure to participants and beneficiaries regarding fees and compensation, as well as the identity and role of the fiduciary advisor as defined below.

Pension Protection Act:

The RFI concerns the application of the so-called "computer model rule" in section 408(g)(2)(A)(i) of the Employee Retirement Income Security Act of 1974 ("ERISA") and section 4975(F)(8)(B)(i)(I) of the Internal Revenue Code ("Code"). These provisions were added by section 601 of the Pension Protection Act of 2006 ("PPA" or the "Act") to provide an exemption for the provision of investment advice.

Prior to the passage of PPA, the ERISA and Code prohibited transaction provisions were considered to constitute a barrier to the provision of investment advice to plan participants by Fidelity because certain Fidelity entities or affiliates may receive compensation that varies depending on the investment option(s) in which a participant's account is invested pursuant to such advice. As an example, the level of compensation received by the investment adviser for Fidelity mutual funds may vary depending on the funds in which retirement accounts are invested. Similar concerns may exist for financial intermediaries, independent of Fidelity, who provide services to plan sponsors, participants and beneficiaries.

New ERISA section 408(g)(2)(A) states that an adviser meeting certain conditions (the "Fiduciary Adviser") must satisfy either a computer model rule or a level compensation rule. The lengthy details of the computer model rule are set forth in new ERISA section 408(g)(3). The Act includes the level compensation alternative in both exemptions but prohibits reliance on the computer model rule for IRAs until the Department confirms that a computer-based methodology will accommodate the investment universe for IRAs.

Responses to the RFI

The RFI solicits information relating to the requirements in the PPA provisions that a computer model which serves as the basis for an eligible investment advice arrangement be certified as meeting certain criteria, and that information regarding certain fees and compensation be provided to participants and beneficiaries. Each Question in the RFI is quoted below, followed by Fidelity's answer ("Answer").

Computer Model Certification

1. What procedures and information would be necessary and adequate to determine whether a computer model used in connection with an investment advice program satisfies the criteria described in ERISA section 408(g)(3)(B)? For example, would it be necessary to examine underlying computer programs/algorithms, computer software/hardware, or input data including investment-specific information; would it be possible to make a determination based on the results of applying the investment advice program to a sample set of the input data?

   We believe that the Department should provide flexibility in PPA section 601 guidance in order that the certifying individual or organization may exercise its professional judgment to determine the most effective manner in which to review the computer model methodology. Thus, for example, the certifying person may decide whether to review the methodology or to run fact patterns (hypothetical participant and plan information) through the computer program to analyze the results and assess the reasonableness and appropriateness of investment solutions generated by the computer model.

   Some of the requirements set forth in new ERISA section 408(g)(3)(B) appear to require different types of review. As suggested by the RFI, the following discussion is broken down separately for each requirement in the order followed in the RFI:

   i. First is the need to apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time. This requirement could be confirmed through (a) a review of the basic methodology applied by the computer model, which presumably could be provided to the certifying person in the form of a comprehensive summary of methodology, or (b) applying the methodology to hypothetical participant scenarios selected by the certifier, or (c) a combination of (a) and (b). The certification report would describe the review process.

A review of the methodology document should be sufficient for the certifier to make a judgment on whether the computer model satisfies the criteria. If the certifier feels it cannot make a determination, based on lack of sufficient detail in the methodology document(s), additional documentation such as design specification documents or supplementary methodology disclosure for the computer model may be requested.

ii. The model must utilize relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments. This requirement probably can be verified by running various fact patterns through the computer model and may not require specific program access.

The provider of the computer model could provide the certifier with a representative set of pre-run test cases which illustrate the investor information collected for use in the computer model and the investment solutions provided by the model, and associated graphical content and narrative descriptions that accompany the investment solution. The certifier may also wish to run a number of use cases that it deems to represent a cross-section of investor use cases. We do not believe it would be necessary for the certifier to validate the underlying code in order to verify that this criteria is satisfied. The requirement of a comprehensive code audit may present an unreasonable burden of time and expense on the computer model provider and significantly increase the time necessary for the certifier to complete the certification process. It would also narrow the set of potential certifiers by requiring not only knowledge of generally accepted investment theories and financial planning practice but of computer programming and systems design.

The statutory language in PPA does not appear to require that an acceptable model utilize all of the criteria listed in new ERISA section 408(g)(3)(B)(ii). We note that the Default Investment

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Alternatives guidance proposed by the Department in September, 2006, includes among the qualifying categories an account portfolio managed by an investment manager for which age is the only necessary criteria. In its guidance on the certification process, the Department should confirm that the list in section 408(g)(3)(B)(ii) is not inclusive in a mandatory sense and that the certifier is free to determine which of these factors, alone or in combination, is appropriate for the model under review.

iii. The model must utilize prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan. This appears to require an analysis similar to that described in (i) above.

iv. The model must operate in a manner that is not biased in favor of investments offered by the Fiduciary Adviser or a person with a material affiliation or contractual relationship with the Fiduciary Adviser. This analysis could be accomplished by a review of how inputs are handled during the portfolio construction process from the methodology document. Material affiliations should be outlined in disclosure statements. The certifier should be given independent and controlled access to the computer model tool for such purpose.

v. The model must take into account all investment options under the plan in specifying how a participant's account balance should be invested and must not be inappropriately weighted with respect to any investment option.

To determine that this criteria is satisfied a certifier would need to review the furnished methodology documents, pre-run test cases, and have controlled access to the computer model. The certifier may wish to review system requirement documents, internal documentation or processes, and/or run comparisons on similar independent computer models. The certifier should examine how the advice provider limits the investment universe and applies portfolio construction techniques.

Certain investments, particularly individual securities provided in an employer stock fund or in a brokerage window, may be excluded from the investment results based on the applied methodology. We would greatly appreciate confirmation that such approach is acceptable under the computer model rule. That is, Department guidance should confirm that the exclusion of such individual securities would be permissible.

We can appreciate the time and effort needed to analyze the information received in response to the RFI. We ask that the Department consider the issuance of a "good faith" standard to allow Fiduciary Advisers to proceed with the certification process before final guidance is issued. This would allow plan participants to start to receive the benefits of investment advice while giving the Department time to fully consider the appropriate certification process in succeeding years.

Finally, to the extent that a certifying person is provided access to the Fiduciary Adviser's computer programs/algorithms, we would expect that the Fiduciary Adviser may request that the certifying firm sign an appropriate confidentiality agreement.

2. <u>What types (e.g., technological, financial, other) and levels (e.g., educational, professional experience, professional certification) of expertise would be required to determine whether a computer model used in connection with an investment advice program satisfies the criteria described in ERISA section 408(g)(3)(B)?</u>

We have spent some time considering the appropriate criteria for an individual or firm that would be deemed eligible to handle the responsibility of determining whether a computer model satisfies the statutory requirements set forth in new ERISA section 408(g)(3)(B). Our initial conclusion is that some of the statutory requirements in section 408(g)(3)(B) appear to require different types of expertise. Again, as suggested by the RFI, the following discussion is broken down separately for each requirement in the order followed in the RFI:

i. First is the need to apply generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time.

   A certifying individual or firm should have familiarity with mathematical algorithms and quantitative investment methods in addition to strategic asset allocation. This may be derived from professional or academic experience. In the case of the latter, the individual should hold degrees in finance or mathematics from a graduate or undergraduate college. For the former, professionals should hold industry certification such as the CFA – Chartered Financial Analyst or a similarly recognized certification in the investment advisory industry. To ensure credibility, the certifier should also have some level of organizational stability.

ii. The model must utilize relevant information about the participant, which may include age, life expectancy, retirement age, risk tolerance, other assets or sources of income, and preferences as to certain types of investments. This requirement may require credentials similar to those specified in (i), but basically an understanding of suitability and asset allocation principles.

iii. The model must utilize prescribed objective criteria to provide asset allocation portfolios comprised of investment options available under the plan. Credentials similar to those described in (i) above may be helpful, although a review of the methodology documents may not require such expertise.

iv. The model must operate in a manner that is not biased in favor of investments offered by the fiduciary adviser or a person with a material affiliation or contractual relationship with the fiduciary adviser. This does not appear to require credentials similar to those described in (i) above.

v. The model must take into account all investment options under the plan in specifying how a participant's account balance should be invested and must not be inappropriately weighted with respect to any investment option. Only the "inappropriate weighting" review may require credentials similar to those described in (i) above.

3. With respect to currently-available computer models or programs for providing investment advice to plan participants or beneficiaries in the form of asset allocation portfolios comprised of plan investment options:

a. What is the process for designing, developing and implementing the computer model/program? What parties are involved, and what are their roles? What hardware and software technologies are used to construct computer model investment advice programs? What direct economic costs are associated with the process for designing, developing and implementing the computer model/program?

b. What types of modifications are made to the computer model/program after use has begun? Why and how often are the modifications made (e.g., changes in methodology, technology, economy, marketplace, or plan), and how do the modifications affect the investment advice provided? What parties are involved in the modification process, and what are their roles? What direct economic costs may be associated with the modifications?

c. What economic costs and benefits are associated with the use of the computer model/program for providing investment advice, including changes in investment performance and in retirement wealth due to the provision of such advice? What are the indirect costs and benefits, such as impact on markets for financial services, including investment advice services, and impact on financial markets, including demand for and pricing of securities?

Due in part to the prohibited transaction concerns described above, Fidelity does not currently provide an investment advice service for retirement accounts. Work is underway on the development of a computer model for such purpose and, based on the work to date, the following resources are needed to create a computer model investment advice program:

- investment expertise capable of applying generally accepted investment theories
- legal expertise, particularly with respect to ERISA, investment adviser and broker/dealer rules, and intellectual property
- programming expertise to determine what is technologically feasible
- access to plan participant and investment option data
- links or other access to relevant information for each investment option in a plan's investment menu

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The methodology currently in use for Fidelity investment educational tools and a managed account product for 401(k) plans considers the diversified investment options offered under the plan: mutual funds, commingled bank pools and (for some larger plans) individually – managed portfolios. Individual securities, including securities held under a plan brokerage window, are generally not considered in constructing model account portfolios because of their non-diversified nature. There is also the need to deal with employer stock for many 401(k) plans. The investment methodology may either ignore the employer stock position altogether or seek to counterbalance the existing equity position in employer stock. The following paragraphs respond to the separate portions of Question 3.

3a. The process for designing, developing and implementing our current educational tools is a complicated effort requiring participation and alignment across multiple business units and centralized functions. A central group program manages and provides governance for the tools from ideas to launch. An e-business group is responsible for the development and the technology environment that the tools operate within. As described above, an internal registered investment adviser is responsible for methodology. Several forms of legal expertise are needed, particularly with respect to ERISA, investment adviser and brokerage rules and intellectual property. The hardware and software ranges from databases to storage security and customer information to advanced mathematical optimization software to assist in portfolio construction. Data feeds from external sources such as Morningstar and Bloomberg are used to import security characterization information. Access to a trading or brokerage platform would be needed if the advice is to be executable. The direct costs can be broken into three primary categories: the cost to build, the cost to support, and the cost of risk mitigation such as the process for service recoveries.

3b. Modifications to the computer model are largely driven by changes in the universe (plan options change), market driven assumptions (analyzed annually), or the freshness of the data inputs. In the current educational model, the inputs are reviewed frequently including questions to investors, plan information and external data inputs. Roles for modifications again cover multiple parties including the different business units that communicate to clients, internal investment adviser reviews of market assumptions and data, technology and legal updates.

3c. Internal studies (for example, the annual Fidelity "Building Futures" summary of individual account plan data) as well as external research from other recordkeepers illustrate the need to assist participants in becoming more diversified. Participants are frequently in all cash or all stock. We believe the economic benefits to participants of advice would be a better diversified portfolio which should result in a stronger retirement plan. Participants do not have to take the advice from a computer model and we expect that, due to inertia, some participants will not be likely to implement it, so we believe default options will also make a big impact.

4. Would the responses to 3.a., 3.b., or 3.c. differ in the case of a computer model/investment advice program intended to satisfy the requirements of ERISA section 408(g)(3)(B)?

The main difference resulting from ERISA section 408(g)(3)(B) is the need to demonstrate to a third party that the computer methodology satisfies the statutory requirements in section 408(g)(3)(B) of ERISA.

Some of the statutory language in PPA section 601 also raises questions about advice services provided by multiple parties. It would be helpful if the Department could clarify that in a situation where a model is delivered and/or results explained by a provider other than the provider that developed the model, that by written agreement, only one of the two parties shall be considered a Fiduciary Advisor with respect to a plan and its participants.

5. With respect to the Department's development of regulatory guidance, what special considerations, if any, should be made for small businesses or other small entities? Are there unique costs and benefits for small businesses or other small entities?

A major challenge for small businesses is the need to deal with a legal framework not directly related to the products or services offered by the business. The computer rule in section 408(g)(3)(B) does require documented due diligence by an independent third party knowledgeable in such matters, which should provide an additional level of comfort to employers too small to have in-house expertise. The regulatory guidance should confirm that the fiduciary adviser may pay the fees of the certifying party and the annual auditor.

Many small plans are serviced at least in part by financial intermediaries. The regulatory guidance should also confirm that either the developer of a computer model, the person providing the advice, or the plan sponsor of a plan that intends to make such model available may contract with the certifying party with respect to services related to the certification process.

Model Form for Disclosures of Fees and Other Compensation

1. In general, what types of information relating to fees received by fiduciary advisers and their affiliates would be helpful to participants and beneficiaries in making their investment decisions?

   We believe that, in making investment decisions based on investment advice provided by a fiduciary adviser, participants and beneficiaries would benefit most from the following types of information relating to fees and compensation paid to the Fiduciary Adviser and/or its affiliates:

- A description of the advisory fee (if any) that the Fiduciary Adviser receives on account of the provision of investment advice to the participant, whether the fee is payable by the participant or the plan sponsor. This disclosure should be specific about the amount of fee paid to the Fiduciary Adviser (stated as either a dollar amount or an asset-based percentage).

- A general description of each of the types and sources of fees and other compensation that the Fiduciary Adviser and/or an affiliate may receive if the participant decides to implement the investment advice. The disclosure should identify which of these fees will be borne by the participant (e.g., as part of the expense ratio for a particular investment option) and direct the participant to sources of more detailed information concerning the participant-paid amounts (e.g., the section 404(c) disclosure materials or the mutual fund prospectus). [1] This disclosure should also inform the participant that the amount of compensation payable to the Fiduciary Adviser and/or an affiliate may vary depending on the investment option which the participant's account is invested.

- A general statement as to whether the fees and other compensation that the Fiduciary Adviser may receive if the advice is implemented comprise a significant source of revenue for the Fiduciary Adviser (e.g., more than 5% of gross revenue). Fiduciary Advisers should not be required to provide participants

[1] In this connection, we note that the Department currently has several initiatives to improve the disclosure of fee information to participants and plan sponsors, including the development of a proposed rule regarding the fee information required to be delivered to participants in section 404(c) plans. Fidelity believes the disclosure requirements for Fiduciary Advisers should avoid any duplication of the participant fee disclosure requirements that may result from these initiatives.

with specific dollar amounts or fee formulas with respect to any fees or compensation (other than the direct advisory fee) payable to the Fiduciary Adviser in exchange for its investment advice. We believe that such detailed information could be confusing to participants, especially where the fees or other compensation are not paid by the participant (e.g., in the case of payment to the Fiduciary Adviser from non-affiliated vendors), and ultimately would detract from the fundamental purpose of the fee disclosure required by the PPA, which is to alert participants to potential conflicts of interest of the Fiduciary Adviser. Detailed information on fees payable by participants in respect of their investment options is available to the participant elsewhere and participants should be directed to these other sources.

- The fee disclosure should include a statement reminding the participant to consider carefully the potential impact of any fees and compensation paid to the Fiduciary Adviser and/or affiliates in his or her evaluation of the advice provided.

2. What types of fees and compensation (including those provided by third parties) would be encompassed by ERISA section 408(g)(6)(A)(iii)?

The statutory language would encompass a broad range of fees and compensation that may be payable to a Fiduciary Adviser and/or affiliates by participants or third parties in connection with the investment options associated with the investment advice, including but not limited to:

- direct advisory fees for the investment advice offered by the Fiduciary Adviser
- investment advisory fees or management fees payable in respect of an investment option (e.g. mutual fund advisory fees)
- distribution and marketing fees
- 12b-1 fees or shareholder servicing fees
- transfer agent fees
- sub-accounting fees
- finder's fees and consulting fees
- insurance product fees
- commingled pool/fund charges (e.g. unitization, account fees)
- brokerage commissions/transaction fees
- redemption fees
- back end loads
- surrender charges

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Many of these fees are embedded in the expense ratio or capital charges of an investment option and would be difficult to break out separately.

3. What challenges might be encountered in assembling and/or presenting the information on fees and compensation described in section 408(g)(6)(A)(iii) in a manner that is clear and understandable by the average participant? Are there any suggestions as to how these challenges can be addressed?

The challenge that may be presented depends upon the level of detail that will be required in making the disclosures. Should detailed fee and disclosure information be required (involving dollar amounts or fee formulas), it will be difficult to present this information in a form that is clear and understandable to the average participants. As noted above, much of the amount that will be payable to the Fiduciary Adviser and/or affiliates will be embedded in the expense ratio for a particular fund, which will vary across investment options. Payments from third parties are also likely to vary depending on the investment option.

More importantly, we do not believe it is necessary to provide such detailed fee and compensation information to participants in order to fulfill the purpose of the statutory disclosure requirement. We believe it is sufficient to apprise participants of potential conflicts if participants are provided with disclosure that generally outlines the fees and compensation payable to the Fiduciary Adviser and/or affiliates on account of the advice given, with a statement, as described above, as to whether such fees and compensation comprise a significant portion of the revenue of the Fiduciary Adviser.

4. Is there a form or format for presenting information on fees and compensation described in section 408(g)(6)(A)(iii) (e.g., narrative, chart, combination of both) that might be particularly suitable in giving participants a clear and understandable description of the fees and compensation received by a Fiduciary Adviser or its affiliates? Is there an optional time frame, relative to when the advice is provided, for providing this information to participants and beneficiaries? What impact, if any, will the receipt of a model form have on investment decisions made by participants and beneficiaries?

Fidelity believes a simple short narrative form, perhaps combined with a hypothetical illustration, would be most suitable for describing the Fiduciary Adviser's fees and other compensation on account of the investment advice. This kind of form would also have the advantage of being easily delivered to participants in a number of formats (paper, email, oral communications).

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A sample of such a form is attached to this letter as Exhibit A. Section 408(g)(6) provides that the required disclosures (including the fee disclosures) are to be provided to participants "before the initial provision of investment advice" to the participant. We believe the fee disclosure would most effectively inform a participant of potential conflicts of the Fiduciary Adviser if it is provided at the beginning of any investment advice interaction.

We would be pleased to provide additional information or to meet with Department staff to discuss this matter in more detail at your convenience.

Sincerely,

Douglas O. Kant

Douglas O. Kant
Senior Vice President & Deputy General Counsel

Donna S. Hanlon

Donna S. Hanlon
Vice President & Associate General Counsel

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Exhibit "A"
Sample Fee Disclosure

Affiliates of [Fiduciary Adviser] provide investment advisory and other services to the Fidelity mutual funds. These services include investment advisory, underwriting, transfer agent, custodial, and shareholder services for the funds. When [Fiduciary Adviser] recommends that you invest your assets in Fidelity mutual funds, if you follow that advice, those affiliates will receive compensation from the funds based on the amount of your invested assets. The amounts that will be paid by you are the standard fees and expenses that all fund shareholders pay. These fees and expenses will vary depending on the particular fund in which you invest your assets and may range from ___% to ____% on average.

Affiliates of [Fiduciary Adviser] also receive compensation from certain non-Fidelity mutual funds. When [Fiduciary Adviser] recommends that you invest your assets in a non-Fidelity mutual fund, if you follow that advice, those affiliates may receive compensation from the non-Fidelity fund based on the amount of your invested assets. The amount of this compensation may vary depending on the particular non-Fidelity fund in which you invest your assets, and may range from 0% to ___% on average.

The fees and other compensation that affiliates of [Fiduciary Adviser] receive on account of assets that are invested in Fidelity and non-Fidelity mutual funds are a significant source of revenue for [Fiduciary Adviser] and its affiliates. You should consider carefully the impact of any such fees and compensation in your evaluation of the investment advice that [Fiduciary Adviser] provides to you.