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**PARTICIPANT BEHAVIOR REMAINS STEADY DESPITE MARKET DOWNTURN**

Are retirement plan participants panicking as a result of the current market turmoil? Not according to a recent Fidelity Investments study\* involving 17,500 corporate defined contribution plans and 11.3 million participants. Although participants were found to be more engaged with their investments (nearly half contacted their provider during the first quarter of 2009), the level of fund exchanges are actually down during the first quarter of 2009 vs. the last quarter of 2008, as are exchange levels year-over-year. Only about 5.2 percent of participants in the study made an exchange during the first quarter, down from 6.2 percent during the first quarter of 2008.

Further evidence that participants are maintaining an even keel is that 51 percent of new contributions are going into pure equity funds. About a quarter of new contributions are being invested in more conservative

short-term, stable value or fixed income investments, up slightly from the previous quarter. In total, participants are directing nearly 69 percent of their new contribution dollars into equity positions (including domestic, international, the equity portion of blended options, and company stock).

With all of the doom and gloom that is in the media, it is encouraging to learn that many participants are not falling into the old trap of responding in a knee-jerk reaction to market volatility. Historically, investors have been much better off entering a recovery with a well-balanced portfolio, and Fidelity's findings indicate that participants are getting the message.

\* "Fidelity Reports Majority of Workers Continued to Fund 401(k) Accounts During First Quarter of 2009" (Press Release). Fidelity Investments. May 13, 2009.

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Federal law requires that “Large” employee benefit plans conduct an audit each year as part of their obligation to file the Form 5500. Since the audit requirement is solely dependent on the number of participants, an accurate participant count is critical. By definition, a “Large Plan” is a pension plan (profit sharing, 401(k), money purchase, etc.) that has over 100 eligible participants at the beginning of the plan year. A participant can include employees who, during the year, are active (even those non-deferring), retired, terminated, or even deceased. If the plan qualifies as a Large Plan, it must file Schedule H with the Form 5500 and have the plan audited by a qualified independent public accountant.

Exceptions to the audit requirement include a Short Plan Year. This occurs if the plan would qualify as a Large Plan

and its plan year is seven months or less. In this case the plan sponsor may elect to defer the audit requirement to the following plan year. In the subsequent year, if the plan qualifies as a Small Plan, the plan sponsor will nevertheless be required to have the plan audited for the short plan year.

The other exception is the 80 to 120 Rule. If the number of participants covered under the plan as of the beginning of the plan year is between 80 and 120, and a small plan annual report was filed for the prior year, the plan administrator may elect to continue to file as a small plan.

Federal law requires that an auditor engaged for an employee benefit plan audit be licensed or certified as a public accountant by a state regulatory authority.

## BENEFITS COMPLIANCE FAQ

**Question:** Are we permitted to automatically terminate group health plan coverage for an employee or spouse because the individual is aged 65 or older and eligible for Medicare? What if we take them off of the group plan, but pay for a Medicare supplement?

**Answer:** Under Medicare Secondary Payer regulations, an employer with 20 or more employees cannot require that a Medicare-eligible participant (employee or spouse) drop group coverage. If the individual has coverage under the active employee plan (as opposed to a retiree or COBRA plan), the group health plan may not “take into account” an individual’s eligibility to Medicare and must provide the individual with the same benefits under the same conditions as other employees.

Furthermore, an employer is prohibited from offering an incentive for the individual to drop coverage under the group health plan. If an employer pays for the individual’s supplemental plan or Medicare premiums, this mostly likely would be determined to be an incentive for the individual to drop the employer’s plan. CMS has stated in publications that an employer must not “subsidize,

purchase, or be involved in the arrangement of an individual supplement policy for the employee or family member.” An employer who violates this law could be subject to a civil penalty up to \$5,000 per violation.

Some employers offer a cash-out option to individuals who voluntarily waive coverage under the employer’s group health plan. Federal officials have stated that a cash-out option is permissible as long as it is offered to all eligible employees through a cafeteria plan. In other words, the cash-out option cannot be offered to only the Medicare eligible individuals.

To determine whether the plan is subject to the Medicare Secondary Payer regulations, employers that are under common control are considered one employer. Thus, all employees of commonly controlled employers must be counted together. If the employer has 20 or more employees for 20 or more calendar weeks in either the current or the preceding calendar year, the plan is subject to the regulations regarding Medicare Secondary Payer. The 20 weeks do not have to be consecutive and the employer must count both part-time and full-time employees.

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