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# Employee Benefits

## Alert

### DOL Releases Proposed Regulations on Disclosure of 401(k) Fees and Conflicts of Interest

BY JEANNE FLOYD

In response to the increased scrutiny of fees charged by benefit plan service providers, the DOL released proposed regulations on December 13 that require more comprehensive written disclosures by service providers of fees and potential conflicts of interest. Under ERISA, a service relationship between a plan and a service provider cannot exist unless the contract or arrangement is reasonable. The new proposed regulations provide that if a plan service provider does not fulfill the new disclosure requirements, the service agreement will not be considered reasonable.



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**Parties Subject to the Disclosure Requirements.** The requirements apply to health and welfare plans, as well as retirement plans. The requirements do not, however, apply to a benefit plan's contracts or arrangements with entities that are merely providing plan benefits to participants and beneficiaries, rather than providing services to the plan itself.

The disclosure requirements apply to a broad range of service providers. Fiduciary service providers, providers of banking services, consultants, custodians, insurance providers, providers of investment advice or management, recordkeepers, securities brokerage, third party administration services, or a provider who receives indirect compensation for

accounting, actuarial, appraisal, auditing, legal, or valuation services are all service providers subject to the disclosure requirements.

**Disclosure Requirements.** In an effort to assist plan fiduciaries in assessing the reasonableness of fees and the potential for any conflicts of interest, the proposed regulations require that contracts and arrangements between employee benefit plans and certain service providers now include provisions that will ensure disclosure of information.

The contract or agreement with the service provider must be in writing, must specifically require the service provider to provide written disclosure of the information required by the proposed regulations, and must include a representation by the service provider that all required information has been provided to the responsible plan fiduciary. Specifically, the service provider must disclose all direct and indirect compensation, monetary or otherwise, it will receive in connection with the services. The proposed regulations provide rules for bundled services and for estimating the amount of prospective compensation.

The service provider must also inform the plan fiduciary of the service provider's relationships or interests that could potentially result in conflicts of interest for the service provider in connection with its performance of services to the plan. The proposed regulations provide that a service provider



### Questions?

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must disclose any participation or interest in transactions to be entered into by the plan, any material relationships that may create a conflict, any compensation the provider may receive that it can affect without prior approval by an independent fiduciary, and any policies or procedures to address potential conflicts of interest.

Service providers must notify plan fiduciaries of any material changes to this information within 30 days of the service provider's knowledge of the change. In addition, the service provider must disclose any information related to the contract or agreement that is requested by the plan in order to comply with ERISA's reporting and disclosure requirements.

**Relief for "Innocent" Plan Fiduciaries.** The proposed regulation provides a class exemption that provides relief to plan fiduciaries who enter into a contract that is not "reasonable" because, unknown to the plan fiduciary, the service provider failed to comply with the disclosure requirements under the proposed regulation.

**Effective Date.** The proposed regulations are expected to be effective 90 days after the regulations are finalized. Service providers and plan fiduciaries should contact any member of the Williams Mullen Employee Benefits Group with questions about the new disclosure requirements.

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