# Year End Brings Fiduciary Liability Risk for 401(k) Plans

Gray Reed & McGraw Legal Alert

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As a result of new U.S. Department of Labor requirements, employers sponsoring 401(k) plans will be receiving communications from their "service providers" (mutual funds, investment advisors, claims and third party administrators, COBRA advisers, etc.). The deadline for these disclosures is December 31, 2011, and the materials will disclose detailed information about the services provided, the fees paid, and the fiduciary status of the provider.

While most of the burden of complying with the regulations seems to fall on the service providers, employers have obligations also: they must assure themselves that the combination of the services provided and the fees charged is "reasonable", i.e. competitive in the market. If a service arrangement is not reasonable, it is a prohibited transaction, the company is potentially liable to the plan for its losses, and the service provider can be liable for excise taxes.

So, how does an employer act reasonably? Putting in place a compliance process and documenting the company's attention to it is the best course of action. Here is a good table of contents:

- Identify all "covered service providers."
- Review the disclosures received and request the information from any covered service providers that do not provide the information.
- Review disclosures before engaging new service providers, concluding a contract extension or renewal, and adding new investment options.
- Follow up if any compensation disclosed by the provider is surprising, ambiguous, or apparently unreasonable.
- Ensure that the services described in the disclosures are consistent with the plan's needs and expectations.
- Document your review of the disclosures provided and the provider's response to questions or inquiries regarding the disclosures.

- Revise any standard "requests for proposal" and requested contract terms to incorporate requirements or representations that a covered provider will provide all disclosures required by ERISA.

- Develop a process for complying with the requirements when a service provider fails to provide the required disclosures.

Companies that "rubber stamp" the disclosures without due diligence are asking for trouble. Implementing a compliance protocol is good business and will go a long way toward avoiding ERISA liability.