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Year-End Checklist for Tax-Qualified Defined Contribution Plans

As the end of the year approaches, it is important for plan sponsors to review whether any qualified plan actions must be taken prior to year-end. Described below are potential year-end notices and plan amendments that may be required for tax-qualified retirement and savings plans. This list is not exhaustive, but is intended to serve as a reminder of items that should be reviewed and considered before the end of the year.

Required Minimum Distributions

All plans qualified under Internal Revenue Code (the "Code") Section 401(a) are subject to required minimum distribution rules. Section 401(a)(9) of the Code requires that by a participant's required beginning date, a plan must:

- Distribute to the participant 100% of the participant's vested benefit, or
- Commence distributing the participant's account at least as rapidly as under applicable IRS tables.

A participant's required beginning date is:

- >5% owner: April 1st following the calendar year the owner attains age 70½.
- All others: April 1st following the calendar year in which the later of the following occurs:
 - (a) The participant attains age 70½, or
 - (b) The participant terminates employment

Participants that met the above requirements in previous years must receive their minimum distribution no later than **December 31, 2011**. Participants age 70½ in 2011 that are either 5% owners or terminated during 2011 must be paid their first distribution no later than **April 1, 2012**. Subsequent minimum distributions must be paid no later than December 31st of each calendar year until the participant's vested account is paid in full. Please note that the participant may have the option to receive up to their total vested account balance.

Please notify our office if you would like assistance in the calculation of the minimum distributions due for 2011. Failure to comply with these requirements may affect the qualified status of your Plan.

PLAN AMENDMENTS

If your plan is not a multiemployer plan, the list below will help you determine if any amendments are required for your plan by the end of the 2011 plan year.

Required Amendments

Below is a list of amendments relating to changes in the law that may need to be adopted by the end of the 2011 plan year.

- ◆ **Determination Letter Cycle Amendments** - Individually designed plans have a five-year staggered remedial amendment cycle. The current cycle is Cycle A and applies to employers with the employer tax identification number ending in a 1 or a 6. Plan sponsors are required to submit the amended and restated plan document to the IRS no later than **January 31, 2012**.
- ◆ **The Worker, Retiree and Employer Recovery Act of 2008 (WRERA)** – the Internal Revenue Service has provided model amendment language (Notice 2009-82) for Minimum Required Distributions in 2009. Although your Plan(s) may already have been amended for WRERA, you may want to contact your ERISA attorney to ensure that the language provided in the model amendment is in your document(s). Amendments clarifying WRERA must be adopted no later than the last day of the plan year that begins in 2011 (for example, calendar year plans must adopt the amendment on or before **December 31, 2011**).
- ◆ **The Small Business Jobs Act of 2010 (SBJA)** – Additional provisions were added to the tax code which provides plan sponsors with the option to allow plan participants to convert some or all of their plan accounts to Roth moneys. Internal Revenue Service Notice 2010-84 clarifies the anti-cutback rules concerning Roth conversions. Amendments clarifying SBJA must be adopted no later than the last day of the plan year that begins in 2011 (for example, calendar year plans must adopt the amendment on or before **December 31, 2011**). If your plan was amended to allow for Roth conversions, please contact your ERISA attorney to ensure that the language in your plan amendment is in compliance with these provisions.
- ◆ **HEART Act and Code Section 401(a)(35) Diversification Rights** - the Internal Revenue Service published Notice 2010-15 which clarifies certain plan provisions governing benefits for survivors or participants who die while performing qualified military service and differential pay. Recent guidance has also been issued on publicly traded stock diversification rights of participants in certain qualified plans. Amendments clarifying these provisions must be adopted no later than the last day of the plan year that begins in 2011 (for example, calendar year plans must adopt the amendment on or before **December 31, 2011**). Again, these are amendments that may have been adopted prior to 2011 however we recommend you visit with your ERISA attorney to ensure compliance with the clarifications issued by the Internal Revenue Service.

Please contact your ERISA Attorney for additional information regarding these amendments.

Discretionary Amendments

Plan amendments for discretionary changes (i.e., changes not required by law, such as plan design changes) must be adopted by the end of the plan year in which the amendment is effective (unless earlier adoption is necessary to avoid a benefit cutback). Calendar-year plans must be amended by **December 31, 2011** for optional changes that took effect in 2011.

ANNUAL NOTICE REQUIREMENTS

Depending upon the type of qualified plan and the plan's features, one or more annual notices may be required. Please carefully review the following notices to determine whether any are required to be issued for your plan.

Annual Safe-Harbor 401(k) Plan Notices

- ◆ **Traditional Safe-Harbor Plan Notice.** Safe-harbor 401(k) plans must provide an annual safe harbor notice to all plan participants describing the safe-harbor contribution and other material plan features. For calendar-year plans, the notice must be provided by **December 1, 2011**.
- ◆ **“Wait and See” Safe-Harbor Notice.** Sponsors of safe-harbor 401(k) plans that intend to satisfy the safe-harbor requirements through a 3% non-elective contribution may wish to follow the “wait and see” approach. Plan sponsors that follow this approach must provide a notice prior to the beginning of the plan year notifying eligible employees that the safe harbor may be adopted. Additionally, plan sponsors that previously provided a “wait and see” notice prior to the beginning of the ongoing plan year and that decide to implement a safe-harbor arrangement prior to the end of the plan year (by making the 3% non-elective contribution) must provide a supplemental notice to eligible employees informing them that the safe-harbor arrangement will be adopted. The traditional safe-harbor notice and the contingent and supplemental notices must be provided at least 30 days and no more than 90 days prior to the beginning of the plan year. Thus, calendar-year plans will need to provide the applicable notice by **December 1, 2011**.

Note: If you previously provided a “wait and see” safe-harbor notice and have decided to implement the 3% non-elective safe-harbor contribution for this plan year, in addition to providing the notice described above, you will also need to amend your plan to provide for the safe-harbor contribution prior to the end of the plan year.

Qualified Default Investment Alternative Notices

Participant-directed 401(k) plans that invest participant contributions for which no affirmative investment election has been made into a qualified default investment alternative (QDIA) must provide an annual notice. The notice must be distributed to all participants who have been or may be defaulted into a QDIA. The notice must be provided at least 30 days before the beginning of each plan year. For calendar-year plans, notice must be provided by **December 1, 2011**. A QDIA is an investment alternative (for example, a balanced fund or target-date fund) in a participant-directed 401(k) or profit-sharing plan into which participant contributions are “defaulted” if the participant has not made an affirmative investment election. If a plan fiduciary properly selects a QDIA and follows the specific QDIA requirements, which include providing an initial and an annual notice, the plan fiduciary will generally receive fiduciary protection for those defaulted investments under Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), because participants will be “deemed” to have elected to invest their contributions into the QDIA.

Note: One of the many QDIA notice requirements is that the notice be “separate” from any other notices that are provided. However, the QDIA notice is permitted (not required) to be combined with the safe harbor notice and the automatic enrollment notices.

401(k) Plan Annual Automatic Enrollment Notice

Sponsors of 401(k) plans that automatically enroll participants must provide an annual notice to all eligible employees describing the circumstances under which contributions may be automatically contributed to the plan. This notice may be combined with the QDIA notice described above. This notice must be distributed at least 30 days, but no more than 90 days, prior to the beginning of each plan year.

For calendar-year plans, the notice must be provided by **December 1, 2011**.

Note: There are a number of different automatic enrollment arrangements (for example, one arrangement simply provides for the automatic enrollment of participants, while another is linked to satisfying 401(k) plan discrimination tests), but each requires a notice.

Notice of Consequences of the Failure to Defer Benefits

Under Code Section 411(a), a plan is required to obtain participant consent in order to distribute defined contribution or defined benefit plan benefits that have a present value exceeding \$5,000 (or \$1,000 in accordance with the plan document). Code Section 411(a) regulations indicate that the consent is only valid if the participant is properly informed of the right to defer receipt of distribution. The Pension Protection Act (PPA) added the requirement that participants must also be informed of the consequences of failing to defer their distributions until normal retirement age. While the notice requirement is in effect for plan years beginning after December 31, 2006, the PPA included a “reasonable attempt to comply” standard until 90 days after the issuance of final regulations. IRS Notice 2007-7 contained a safe harbor description of what would be considered a “reasonable attempt” to comply with the notice requirement. In October 2008, the IRS issued proposed regulations. Until issuance of the final regulations occurs, plan sponsors should continue to take good-faith reasonable steps to comply with the notice requirements.

Participant Benefit Statements

Depending upon the type of qualified plan, specific participant benefit statement requirements apply, as described below.

- ◆ **Participant-Directed Defined Contribution Plans.** Participant-directed defined contribution plans are required to provide participant statements on a quarterly basis. Plan sponsors are deemed to timely provide statements if they are provided within 45 days following the end of the calendar quarter.
- ◆ **Non-Participant-Directed Defined Contribution Plans.** Plans that do not permit participants to individually direct their account balances are required to provide statements at least once each calendar year. Plan sponsors are deemed to timely provide statements if they are provided on or before the date on which the Form 5500 (Annual Return/Report of Employee Benefit Plan) is filed by the plan sponsor/administrator (including extensions).

Summary Plan Description

One of the most important documents participants are entitled to receive automatically when becoming a participant of an ERISA-covered retirement benefit plan is a summary of the plan, called the Summary Plan Description or SPD. The plan administrator is legally obligated to provide the SPD to participants and beneficiaries, free of charge. The summary plan description is an important document that tells participants what the plan provides and how it operates. It provides information such as when an employee can begin to participate in the plan, how service and benefits are calculated, when benefits become vested, when and in what form benefits are paid, and how to file a claim for benefits.

Every plan administrator must provide a copy of the SPD to participants (a) when a new plan takes effect, (b) when an employee becomes eligible to participate in a plan and (c) upon written request of a plan participant or beneficiary.

If a plan is amended or modified within a five year period, the Summary Plan Description must be updated and the new SPD must be distributed to participants. If there is no change to the Plan, the original SPD must be distributed to plan participants every ten years.

Summary of Material Modifications

If a plan is changed, participants must be informed either through a revised Summary Plan Description or in a separate document called a summary of material modifications. This information must also be given to participants free of charge.

Summary Annual Report

The Summary Annual Report must be furnished to all participants of the Plan within nine months after the close of the plan year or two months after the close of the period for which an extension of time to file the Annual Report was granted.

According to the Department of Labor regulations, a copy of this Summary Annual Report must be distributed to active participants, terminated participants with beginning or ending balances and beneficiaries receiving or entitled to receive benefits from the Plan. If you have fewer than 100 participants, 25% of which are literate in the same non-English language, or more than 100 participants, 10% of which are literate in the same non-English language, you must provide these participants with an English language Summary Annual Report along with a common non-English language notice outlining the procedures to follow in order to obtain assistance in translating the Report.

Beneficiary Designation Form

In order to (a) ensure a participant's account balance is paid to the beneficiary of their choice in the event of death, and (b) avoid time consuming research for the plan sponsor in the event of a missing designation, the Beneficiary Designation Forms on file for the plan should be audited annually. As life situations change frequently, we recommend distributing a Beneficiary Designation Form to all participants in the plan on an annual basis along with other required disclosure materials.

Notice of Deferred Vested Benefits

Participants that separate from service with a vested benefit are required to be reported to the Social Security Administration in the plan year following the year they terminate if they have not been paid their benefit under the Plan. The Plan Administrator is further required to notify each participant that they have been reported to the Social Security Administration no later than the earlier of the date the Form 5500 is filed with the Department of Labor or the due date (including extensions) for filing the annual Form 5500. The IRS may impose penalties on the Plan Administrator for failure to provide this Notice.

Participants with a deferred vested benefit had been reported on the Form 5500 Schedule SSA. The Form 5500 Schedule SSA is no longer accepted and has been replaced by a new form, the Form 8955-SSA. The new Form 8955-SSA is not filed with the Department of Labor, but with the Internal Revenue Service. Due to the late issuance of the Form 8955-SSA (which is used to report deferred benefits to the Social Security Administration) by the Internal Revenue Service, all Forms 8955-SSA for 2009 and 2010 plan years, plus those for plan years ending through March 31, 2011, are due to be filed with the Social Security Administration on or before **January 17, 2012**.

Distribution Tax Notice

In order to satisfy Code Section 402(f), the IRS issued two model safe-harbor Distribution Tax Notices for eligible rollover distributions from an employer plan. The first notice applies to distributions that are not from a designated Roth account. The second safe-harbor notice is designed for distributions from a designated Roth account. The revised notices serve as safe harbors for distributions made on and after January 1, 2010. Please contact our office if you have not yet received an updated Distribution Tax Notice.

Distribution Timing and Required IRS Forms

The timing of distributions from qualified retirement plans must comply with the plan document and, if applicable the written distribution policy. It is highly recommended that distributions from the plan be processed no later than 10 months after your plan's year end as distributions paid later

than that may be considered as being paid with a “stale” valuation. In no event should distributions be paid after your plan year end.

All distributions (including pass-through dividends) paid to participants from the retirement plan of \$10.00 or more must be reported to the IRS on Form 1099-R for the calendar year in which the distribution is paid. Forms 1099-R must be provided to the participants no later than **January 31, 2012** for distributions paid during the 2011 calendar year. Additionally, Federal income tax withholding remitted (or due) to the IRS/Federal Agent on behalf of participants must be reported to the IRS on Form 945. The due date for the Form 945 is **January 31, 2012**. Your state may also require reporting of distributions paid to participants. Please contact your CPA to ensure compliance with the applicable state filing requirements.

Dividends deducted under Internal Revenue Code Section 404(k) and paid directly to participants from the Company must be reported on the IRS Form 1099-DIV for the calendar year in which the dividend is paid. Forms 1099-DIV must be provided to the participants no later than **January 31, 2012** for dividends deducted under Section 404(k) paid directly from the Company to the participant during the 2011 calendar year.

It is important to note that participant loans in default must also be reported on the Form 1099-R in the calendar year the loan is deemed distributed. If your plan allows participant loans, be sure to contact your plans’ trustee and third party administrator in the event of missed loan payments or termination of employment so that loans in default are reported timely.

Federal Income Tax Withholding

The Internal Revenue Service eliminated the Form 8109 (Tax Withholding Coupon) effective January 1, 2011. Financial Institutions will no longer be accepting the payments on behalf of the taxpayers. Mailing of the coupons or depositing the payments with financial institutions was replaced by mandatory electronic filing. If you are required to use the electronic filing service and use Form 8109 you may be subject to a 10% failure-to-deposit penalty. R.K. Schaaf Associates, Inc. offers its clients the service of transmitting the Federal income tax withholding to the IRS. If you would like additional information on this service, please contact your representative.

For additional information on the timing and remittance of Federal income tax withholding, you may reference the IRS’s website at www.irs.gov.