Benefit Practice Portfolios, End of the Year Qualified Plan Checklist (January 2014)

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November and December are the months during which plan sponsor and their advisors contemplate, project and hypothesize about end of year changes as well as changes for the forthcoming year. We have listed below some practical considerations while performing this analysis.

1. **Non-safe harbor plans.** Is the plan projected to pass ADP/ACP testing? If not discuss the expected level of failure and consider adding a safe harbor for the subsequent plan year. How does the safe harbor match compare to the current match. If the current match is conditioned on employment on the last day of the year, then estimate the cost for eliminating this provision. Also discuss the effect of full vesting versus the current match vesting schedule. In general, the larger the plan, the higher the threshold for adopting a safe harbor. For example, several years ago we analyzed a larger medical group that had perennial ADP testing failures. In general, the refunds were small. However, the cost of providing a safe harbor to terminated employees, using data from the prior year, was estimated at over $30,000. In this case it was clear that other measures should be tried to relieve a testing failure before adopting a safe harbor. Plan amendment must be executed and notice to participants provided at least 30 days prior to year end. The regulatory language offers some leeway except for the contingent non-elective safe harbor discussed below.

2. **Contingent Non-elective safe harbor.** Essentially the same analysis as above, except the safe harbor would apply for the current plan year. Notice must be provided 30 days in advance and the plan must be amended for the plan year to which the safe harbor applies. It is not enough to provide the "second" notice.

3. **Top paid group election.** Since this is a plan provision and is discretionary, the plan must be amended prior to the plan year end. First, determine if an ADP/ACP failure is likely, then do a quick analysis to see if more than 20% of participants are HCE's. If both answers are "yes", then it may be worth the effort to perform a more detailed projection to see if testing improves. Once caveat, since this election increases the number of NHCE's be careful of the effect of this election on plan using cross-testing/ new comparability.

4. **SIMPLE analysis.** A SIMPLE can be the only plan maintained by an employer for a calendar year. If an employer wishes to end the SIMPLE, the IRS interprets the rules to require a 60 day notice. Each year the SIMPLE should be reviewed to make sure it is suitable for the forthcoming plan year, or if another type of qualified plan would suit the sponsor better.

5. **Automatic contributions (auto-enrollment).** Most often, these provisions are employed to ameliorate a failed ADP test. Sometimes an employer may find lower cost, stretched payment schedule, and 2 year cliff vesting of the QACA safe harbor match more attractive than a standard safe harbor match. In this case the plan should be amended 30 days prior to year end and notice provided to employees not later than that date.

6. **Excess profits.** We like to have all plans stated on a document that can accommodate cross-tested profit sharing so that if an employer decides to adopt these provisions, they are already in the plan and no action needs to be taken by year end. However, in some cases, a defined benefit/cash balance plan might be an appropriate adjunct to the 401(k) profit sharing. The plan must be designed and executed prior to the year end.

7. **Expiring 410(b)(6)(C) relief.** For example, if a controlled group was formed by a merger or acquisition transaction in 2012, then as of 1/1/2014 (assume calendar year), the plans will need to be: (i) merged, (ii) contain mirror image provisions and the same benefit structure, or (iii) each entity tested separately for coverage (if applicable).

8. For plans that do not provide a top heavy minimum contribution, and have top heavy ratios previously near the 60% threshold, if may be prudent to project the top heavy ratio so that owners and other key people do not trigger a top heavy minimum in the forthcoming year, by continuing to make salary deferrals.

9. **Self-employed participants.** Should all have salary deferral elections made by December 30th. As of December 31st, the self employment income is deemed to be earned and therefore, can no longer be deferred. A deferral election can be linked to the maximum permitted in ADP testing, but be wary of these provisions in a plan with multiple partners who all elect the same provision. There should be a leveling rule applied.

10. **MRD's.** Applies to 5% owners, all terminees over 70 1/2, and those who have not waived the MRD and remain active after 70 1/2 (depending on the particular plan provision.

11. **Participant disclosures under 404(a)(5) of ERISA.** Since the recent reprieve from the DOL, these can be put on an annual cycle that coincides with the distribution of safe harbor and other notices (such as QDIA's). This may be worth while even of the notice was distributed in August.

12. **Small balance clean up.** It is common for these balances to accumulate under the small balance threshold of either $1,000 or $5,000 because of reluctance to involuntarily distribute without certain knowledge the participant has received a notice that benefits are available for distribution. The participant count for determining if a plan requires a Schedule H versus a Schedule I, as well as a certified audit, is determined as of the first day of the plan year. These small balances count in the determination. So it may be prudent to clean these up prior to year end. For example, consider a plan that has not required a certified audit in the past. It is a growing company the projected eligible participant count is 110 as of 1/1/2014. There are 20 terminated participants with account balances. Of these, 12 have balances of less than $5,000. The plan has selected the $5,000 cash out threshold with involuntary rollover between $1,000-$5,000. By "cleaning out" these balances prior to 1/1/2014, the count will remain under 120 and a certified audit will not be required.

13. **Other mandatory and discretionary amendments.** Make sure the client does not become a late amender for compliance amendments. This is also the time of year to consider discretionary amendments to safe harbor plans. Until more clarification is received from the IRS, there are few amendments that can, with certainty, be made to a safe harbor plan after the notice is provided in the prior year.

14. **Prior/Current year testing.** Determine if a change is appropriate for the forthcoming year. For example, a plan that recently adopted auto-enrollment may want to switch from the prior year to current year testing convention. Since this is a discretionary amendment, it must be made prior to year end.

15. **Safe harbor plans.** It might sometimes be useful to project testing for a safe harbor plan to determine the continued utility of the safe harbor, or whether a change of safe harbor is appropriate, such as switching from a basic safe harbor match to an auto-enroll safe harbor.

16. **Other end of year clean up.** Have terminated plans paid out all assets? This might be the chance to have a plan sponsor avoid the filing of another Form 5500 by making sure the plan is empty as of 1/1/2014. It is common to check whether the employer has paid the required/indicated contributions. We do not file a Form 5500 until all receivables have been paid. It is a little trickier to make sure the employer has paid all refund distributions for a failed ADP/ACP test from the previous year. The 1099's will not be issued until 2014 for a 2013 refund, for a 2012 failed test. By 2014, if the plan sponsor has failed to make the distributions, it is too late to correct by that method and EPCRS comes into play, often with much more expensive corrections.

Besides the standard end of year projections, there are a variety of elections, studies and actions that are best taken in November and December. While the list seems lengthy, administrators familiar with their clients can often efficiently determine which of these matters require more detailed attention.