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## Plan Administrators' 2012 Checklist and 2013 Forecast

Plan administrators should review what actions need to be taken before the end of 2012 and focus on what to expect for 2013. This page provides a list of deadlines and issues for 2012 and 2013. An explanation of each item follows.

### 2012 Actions

#### Amendments and Design Changes (pages 2, 5 and 6)

- Discretionary Plan Amendments
- Funding-Based Restrictions (436) for Defined Benefit Plans
- Health Reform Amendments for Welfare Plans
- Release Language in Employment Agreements

#### Participant Notices, Disclosures and Other Considerations (pages 3, 4 and 7)

- QDIA Notice
- Diversification Notice
- 401(k) Safe Harbor Notice
- QACA/EACA Notice
- Defined Benefit Statements
- Annual Funding Notice
- Fee and Expense Disclosure
- Health Plan Summary of Benefits and Coverage

### 2013 Actions

- Determination Letter Filing for Cycle B Plans
- Reporting Deferred Vested Retirement Benefits
- 162(m) Disclosure
- ISO Exercises and ESPP Share Transfer Reporting
- \$2,500 Limit on Health Flexible Spending Arrangements
- Comparative Effectiveness Research Fee
- Annual Dollar Limit on Essential Health Benefits no less than \$2 Million
- Preventive Services Coverage Under Health Plans
- W-2 Reporting of Health Care Coverage
- Health Plan Notices



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**Amendments for All Qualified Plans**

- [ ] **Discretionary Plan Amendments:** The deadline for adopting an amendment depends on whether the amendment reflects a *tax-qualification change* or a *discretionary change*. Plan amendments that are *discretionary changes* must be adopted by the end of the plan year in which they become effective. Therefore, discretionary changes to a calendar-year plan that were effective in 2012 must be adopted *by December 31, 2012*. For example, an amendment increasing benefits is a discretionary change. For defined benefit plans, advance participant notice may be required if an amendment significantly reduces the rate of future benefit accruals (i.e., pension plan freeze).

**Other Considerations for Qualified Plans**

- [ ] **Determination Letter Filings for Cycle B Plans – Action required by January 31, 2013:** Individually-designed plans in Cycle B of the IRS determination letter program must be submitted for determination letters by *January 31, 2013*. Cycle B plans include those sponsored by companies with tax identification numbers **ending in 2 or 7**. The IRS User Fee for a standard filing for an individually-designed plan is \$2,500.
- [ ] **Forfeitures:** Employers should review whether forfeitures held in their defined contribution plans should be allocated to participants or used to pay expenses or reduce employer contributions. For a calendar year plan, the deadline is *December 31*.
- [ ] **Safe Harbor Plans:** An employer that wishes to add a safe harbor matching or non-elective contribution to a 401(k) plan must adopt the amendment *by December 31*.

**Amendments for Defined Benefit Plans**

- [ ] **Funding-Based Restrictions on Benefits – Action required by December 31, 2012:** Code section 436, which became effective in 2008, imposes restrictions on benefit payments and limits certain plan amendments in the event that the funding of a defined benefit pension plan falls below a certain level. In Notice 2011-96, the IRS extended the amendment deadline for this change to the last day of the 2012 plan year, or *December 31, 2012*, for calendar year plans. Filing for an individually-designed plan determination letter may accelerate the amendment deadline. Plans filing for a determination letter as a Cycle B Plan must generally include an amendment for Code section 436 at the time the determination letter is filed. The IRS provided a model amendment in the Notice. We suggest adopting the model IRS amendment even if the Plan has previously adopted a Code section 436 amendment.



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### Notices for Defined Contribution Plans

- [ ] **QDIA Notice – Annual Notice and Action required 30 days before initial investment:** The DOL Qualified Default Investment Alternative (QDIA) safe harbor regulations shield plan administrators from fiduciary liability with respect to default investments. Plans using QDIAs must provide a notice to participants and beneficiaries that satisfies the requirements of the regulations. An initial notice is required before the investment in the QDIA. Plan administrators must also provide an annual notice at least 30 days in advance of each subsequent plan year. For calendar year plans, the annual notice must be provided by *December 1, 2012*. The IRS issued a model notice, which is available at [http://www.irs.gov/pub/irs-tege/sample\\_notice.pdf](http://www.irs.gov/pub/irs-tege/sample_notice.pdf).
- [ ] **Diversification Notice – Action required 30 days before direction:** Defined contribution plans that invest in publicly-traded employer securities must provide participants with a notice of diversification rights. Plan administrators must distribute a notice at least 30 days before the first date on which a participant may direct the investment of the proceeds of employer securities. The IRS issued a model notice, which is available at [http://www.irs.gov/irb/2006-51\\_IRB/ar09.html](http://www.irs.gov/irb/2006-51_IRB/ar09.html).
- [ ] **401(k) Safe Harbor Notice – Action required 30 days before plan year:** Plans that intend to make a safe harbor matching or non-elective contribution to avoid the ADP/ACP tests for 2013 must provide a safe harbor notice to participants within a reasonable period before the beginning of the 2013 plan year. Thirty days' notice is considered reasonable, which is *December 1, 2012*, for a calendar year plan.
- [ ] **QACA Notice – Action required 30 days before plan year:** A Qualified Automatic Contribution Arrangement (QACA) is a safe harbor automatic contribution 401(k) plan that passes nondiscrimination testing. The QACA safe harbor requires annual increases to the automatic enrollment amount up to a limit and safe harbor employer contributions. Plan administrators must issue a QACA notice to participants at least 30 days before the beginning of the 2013 plan year. The notice may be distributed with the QDIA notice *by December 1, 2012*, for a calendar year plan as described above. The IRS issued a model notice, which is available at [http://www.irs.gov/pub/irs-tege/sample\\_notice.pdf](http://www.irs.gov/pub/irs-tege/sample_notice.pdf).
- [ ] **EACA Notice - Action required 30 days before plan year:** An Eligible Automatic Contribution Arrangement (EACA) is another safe harbor automatic enrollment plan that specifically permits a participant to withdraw automatic contributions made within 90 days after the first automatic contribution. Plan administrators must issue an EACA notice at least 30 days before the beginning of the 2013 Plan Year, or by *December 1, 2012*, as described above.



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- [ ] **Fee Disclosure:** Department of Labor (DOL) regulations require enhanced retirement plan investment disclosure relating to (i) fees paid by plan service providers to plan sponsors (the “fiduciary fee disclosure rules”) and (ii) the disclosure of such fees by plan sponsors to participants (the “participant disclosure rules”).

*The Fiduciary Fee Disclosure Rules:* Final DOL regulations require plan service providers to provide information that will allow plan fiduciaries to understand the reasonableness of the fees being charged for plan services and to assess potential conflicts of interest. Service providers must provide updates on changes to plan fee and expense information to plan fiduciaries as soon as practicable after any changes occur.

*The Participant Disclosure Rules:* The DOL also has published final rules requiring the disclosure of plan fee and expense information by plan administrators to plan participants and beneficiaries. These rules include modifications to the disclosure requirements for participant-directed “404(c)” accounts. These rules also require quarterly reporting of fees and expenses actually deducted from a participant’s account. The first quarterly reporting deadline for calendar year plans is *November 14, 2012*, which is 45 days after the third quarter of 2012, the period during which initial service provider disclosures were required. The quarterly statement should reflect fees and expenses deducted during the quarter (July – September) to which the statement relates.

### Notices for Defined Benefit Plans

- [ ] **Benefit Statements – Action required in 2012:** Defined benefit plans are generally required to furnish participants with a pension benefit statement at least once every three years. However, a simplified alternative notice requirement may be used. Rather than sending a complete benefit statement every three years, the administrator may instead send an *annual* notice telling the participant of the availability of the pension benefit statement and the ways in which the participant may obtain it. Such alternative notice must be furnished *at least once each year*. The DOL provided model language, which is available at <http://www.dol.gov/ebsa/pdf/fab2006-3.pdf>.
- [ ] **Annual Funding Notice – Action required in 2013:** The administrator of a defined benefit plan must notify the PBGC, participants, beneficiaries, unions, and contributing employers with detailed information about the funded status of the plan, the plan’s investments, the group covered by the plan and a description of the rules for terminating the plan *within 120 days after end of plan year*. For calendar year plans, the notice is due *by April 30, 2013*. Plans with fewer than 100 participants must provide the notice by the filing due date of the plan’s IRS Form 5500. Additional notice requirements apply if the plan is subject to benefit restrictions for being underfunded.



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### Considerations for Employment/Severance Agreements

- [ ] **Review/Correct Employment and Severance Agreements for Impermissible Release:** Employment and severance agreements often contain provisions that require an employee to complete a release of potential claims against the employer as a condition of receiving benefits. The IRS has made it clear that employee discretion over the timing of the release could result in a Code section 409A violation. Certain approaches to drafting these releases have been approved by the IRS. Relief from 409A penalties is available for pre-2011 documents corrected before the severance is paid and *by December 31, 2012*. This correction involves an attachment to the employer's tax return. Depending on the terms of a particular agreement, other alternatives may be available. Post-2010 agreements should also be reviewed now, and new agreements should be drafted with these rules in mind, in each case to address or prevent errors that could result in a more complicated correction process.

### Considerations for Stock-Based Plans, Other Performance-Based Plans

- [ ] **162(m) Disclosure and Shareholder Approval:** Public companies must seek and receive shareholder approval of compensation plans that satisfy Code section 162(m), which provides an exception to the \$1 million deduction cap on annual compensation paid to an executive of a public company. To qualify for the 162(m) exception, the compensation must be subject to certain performance goals. Once the material terms of a performance goal are disclosed and approved by shareholders, no additional disclosure is required, unless the compensation committee changes the material terms of the performance goal. If the compensation committee has authority to change the targets under a performance goal, the material terms of the performance goals must be disclosed and reapproved no later than the first shareholder meeting that occurs in the *fifth year* following the year in which shareholders previously approved the performance goal. Therefore, if shareholders approved the material terms of such a performance goal in *2008*, the shareholders must approve these terms again in *2013*.
- [ ] **ISO Exercises and ESPP Share Transfer Reporting:** Employers whose employees exercised an incentive stock option (ISO) in 2012 or made an initial transfer of shares acquired under an employee stock purchase plan (ESPP) in 2012 are subject to information reporting. Employers will report information to the IRS relating to ISO exercises and initial transfers of ESPP shares on IRS Forms 3921 and 3922. The *filing deadline is February 28, 2013* (paper filing), or *April 1, 2013* (electronic filing). Employers must *provide this year's statements to employees by January 31, 2013*.



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**Amendments and Considerations for Welfare Plans**

- [ ] **Health Flexible Spending Arrangement Limit:** Effective January 1, 2013, the maximum annual health flexible spending arrangement contribution for a Plan Year will be \$2,500. Plans must be amended for the new limit *no later than December 31, 2014*. The limit does not apply to employer contributions.
- [ ] **Comparative Effectiveness Research Fee:** Insurers and self-insured plans must pay a fee equal to \$1 multiplied by the number of covered individuals under the plan for the Plan Year. The fee is *due July 1, 2013* and will be paid by filing IRS Form 720. The fee, which will increase to \$2 for the 2013 Plan Year, will be used to fund the Patient-Centered Outcomes Research Institute.
- [ ] **Annual Dollar Limit on Essential Health Benefits:** The annual dollar limit on essential health benefits under a Plan must be increased to at least \$2 million for the 2013 plan year.
- [ ] **Preventive Services Coverage under PPACA:** Non-grandfathered group health plans must cover certain preventive services with no cost sharing, including certain women's preventive health services such as contraceptives. The required preventive services are based on recommendation of the U.S. Preventive Services Task Force. Each year, plan sponsors should confirm that their plans comply with the list of required preventive services. Information about the required preventive services is available at: <http://www.healthcare.gov/law/resources/regulations/prevention/recommendations.html>.
- [ ] **Additional Medicare Tax:** Effective January 1, 2013, individuals earning more than \$200,000 (\$250,000 for married filing jointly) will pay an additional 0.9% of Medicare tax on wages and self-employment income. An employer is required to begin withholding Additional Medicare Tax in the pay period in which it pays wages and compensation in excess of \$200,000 to an employee (\$250,000 for married filing jointly).



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Notices for Welfare Plans

- [ ] **General Notices:** In addition to the new PPACA notice requirements, employers must provide participants with the following annual group health plan notices:
- Children's Health Insurance Program Reauthorization Act Notice
  - Women's Health and Cancer Rights Act Notice
  - Medicare Part D Noncreditable/Creditable Coverage Notice
  - HIPAA Special Enrollment Notice
- [ ] **Grandfathered Plan Notice:** Grandfathered plans under PPACA must continue to provide the grandfathered plan notice in enrollment materials, summary plan descriptions and other written materials describing the plan.
- [ ] **Health Insurance Exchange and Premium Tax Credit Notice:** Employers must provide employees a notice *by March 1, 2013*, describing the health insurance exchanges and the premium tax credit that may be available if the employer does not offer affordable health care coverage.
- [ ] **Summary of Benefits and Coverage:** Insurers and group health plans (whether or not grandfathered) must provide a Summary of Benefits and Coverage (SBC) for each coverage option offered by the insurer or plan. The SBC must be provided with materials issued for open enrollment periods beginning on or after September 23, 2012. Participants who enroll mid-year must be provided an SBC within 90 days of enrollment. Calendar year plans have already complied or are in the process of complying with this requirement. The SBC also must be provided at least 30 days before the beginning of each plan year. Plans also must provide 60 days advance notice of changes to the content of an SBC.
- [ ] **Reporting Health Care Coverage on Form W-2:** Employers that issued 250 or more Forms W-2 in 2011 must report the aggregate cost of the applicable employer-sponsored health insurance coverage on an employee's Form W-2 starting in January 2013 for the 2012 tax year. Employers that issued fewer than 250 Forms W-2 for the 2011 tax year are not required to report these amounts on their employee's Form W-2.



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Benefit Limits Under the Internal Revenue Code and Social Security Act		
Description	2012 limit	2013 limit
Compensation Cap	\$250,000	\$255,000
Elective Deferral Limitation under 402(g)(1) for elective deferrals for 401(k) plans, SEPs, and 403(b) plans	\$17,000	\$17,500
Catch-Up Contributions for Individuals Age 50 and Older	\$5,500	\$5,500
Catch-Up Contributions For SIMPLE IRAs or SIMPLE 401(k) plans	\$2,500	\$2,500
Defined Benefit Maximum	\$200,000	\$205,000
Defined Contribution Maximum	\$50,000	\$51,000
Highly Compensated Employees Compensation Limit	\$115,000	\$115,000
Key Employee in Top-Heavy Plans Compensation Limit	\$165,000	\$165,000
ESOP Threshold for determining maximum account balance subject to 5-year distribution period		
Regular Limit	\$1,015,000	\$1,035,000
Lump Sum Distributions (Income Averaging)	\$200,000	\$205,000
SEP Compensation Threshold for Participation	\$550	\$550
SEP Contribution Maximum	\$50,000	\$51,000
SIMPLE IRA Maximum Pre-Tax Contribution	\$11,500	\$12,000
Deferral Limit for State and Local Governments and Tax-Exempt Entities	\$17,000	\$17,500
Social Security Taxable Wage Base	\$110,100	\$113,700
IRA Maximum Deduction	\$5,000	\$5,500
IRA Age 50 Catch Up	\$1,000	\$1,000
Health Savings Account Maximum Contributions		
Family Coverage	\$6,250	\$6,450
Single Coverage	\$3,100	\$3,250
HSA Catch Up (55 and older)	\$1,000	\$1,000

If you have any questions regarding these changes, please contact any member of the Employee Benefits Section at Williams Mullen.

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