AMERICAN BENEFITS
COUNCIL

CC:PA:LPD:PR (REG-133300-07)
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Automatic Contribution Arrangements

Dear Sir or Madam:

We are writing on behalf of the American Benefits Council (the "Council") to urge the Treasury Department and the Internal Revenue Service (collectively, the "Service") to promptly issue guidance clarifying that plans may rely on a reasonable, good faith interpretation of the automatic enrollment provisions of sections 401(k)(13) and 414(w) of the Internal Revenue Code (the "Code") pending the effective date of final regulations. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

We greatly appreciate the efforts of the Service in issuing proposed regulations on automatic contribution arrangements described in sections 401(k)(13) and 414(w). However, we are deeply concerned that, unless the Service promptly issues guidance providing transition relief, employers will choose not to implement automatic contribution arrangements in 2008 because of concerns raised by the proposed regulations. It would be disheartening if the effect of the proposed regulations is to discourage automatic contribution arrangements, rather than encourage these arrangements as Congress intended in enacting sections 401(k)(13) and 414(w) in the Pension Protection Act of 2006.

Sections 401(k)(13) and 414(w) are generally effective for plan years beginning on or after January 1, 2008, and many employers with calendar-year plans have been planning to add automatic contribution provisions as of January 1, 2008. The proposed regulations, however, were not released until November

7, 2007, and there has been very little time to digest the new rules. As discussed below, the proposed regulations have included a number of "surprises" for plan sponsors and we are concerned that, without some form of transition relief, many employers will choose not to implement automatic enrollment features in 2008 for fear that doing so could expose their plans to potential disqualification and costly corrections.

EACAs

Section 414(w) provides that plans with automatic contribution arrangements that satisfy certain minimum requirements may allow participants to receive an in-service "unwind" distribution within 90 days of the first automatic contribution. The proposed regulations refer to these arrangements as eligible automatic contribution arrangements or "EACAs."

One of the issues that has created the greatest time sensitivity is that the proposed regulations appear to require that an EACA be in place as of the first day of the plan year and preclude implementation of an EACA during a plan year. Thus, employers with calendar-year plans have been forced to fully absorb the proposed regulations within a very short period of time.

This time crunch has been exacerbated by the fact that EACA notices must be provided "a reasonable period before each plan year" and the proposed regulations provide a safe harbor of 30 days before the start of each plan year. Many employers view the 30-day safe harbor as an effective deadline given the lack of guidance on what a reasonable period may otherwise be. As mentioned above, the proposed regulations were issued on November 7 and the 30-day notices were required on December 1, leaving employers less than a month to master the proposed regulations.

It has been particularly difficult for many employers to get their notices out in a timely manner in part because the proposed regulations on EACAs have also been a surprise in terms of the employees required to receive the notice. Many employers anticipated that notices would be required for employees that are automatically enrolled in the plan, but that notices would not be required for employees that are affirmatively participating in the plan or that have elected not to participate. This is intuitive in the sense that the notice is fundamentally a notice about automatic enrollment. The proposed regulations, however, require that the notices be provided to all employees that are eligible to participate in the arrangement. This has required substantial last-minute changes for employers.

The content of the notices has also come as a surprise to many. The proposed regulations indicate that the notices need to include more than simply information about automatic enrollment and the right to a distribution within 90

days of the first automatic contribution. The proposed regulations require a much more extensive notice that effectively replicates the information that is required to be disclosed in a plan that is intended to satisfy one of the nondiscrimination testing safe harbors. This information is sometimes referred to as the "mini-SPD" requirement because it requires disclosures of contribution, vesting and distribution information.

Another set of challenges for employers attempting to add EACAs to their plans as of January 1, 2008 has been the broad scope of the proposed regulations' automatic contribution requirements. The proposed regulations appear to require automatic enrollment for all employees that have not previously made an affirmative election to either participate or not participate. Employers do not have the flexibility to automatically enroll only new hires. While many employers were aware of this issue with respect to the qualified automatic enrollment arrangements described in section 401(k)(13), the notion that all employees had to be automatically enrolled in the absence of an affirmative election as a condition of the 90-day unwind distribution right has been a surprise for the vast majority of employers. Moreover, this aspect of the regulations is not very clearly articulated in the proposed regulations, and it is only as representatives of the Service have begun to give speeches that employers have become aware of this very substantial issue.

Implementation of an EACA by January 1, 2008 has also been complicated by the interaction of section 414(w) and the final Department of Labor regulations under section 404(c)(5) of ERISA. In order for an automatic contribution arrangement to be an EACA eligible for the unwind distribution right, employees must be defaulted into an investment that satisfies the final regulations. The Department of Labor regulations, however, were issued on October 24, 2007 and are first effective December 24, 2007, and 30 days advance notice is required in order for an investment to satisfy the final regulations.

Many employers with calendar-year plans will be unable to meet the requirements of the default investment regulations by January 1, 2008. This may arise because of the notice requirement. Similarly, it may arise because of the numerous questions about qualified default investments. The Council understands that the Department of Labor is working on follow-up guidance that will attempt to clarify the myriad issues under the final regulations. However, pending release of that guidance, we are concerned that employers may not be able to have a qualified default investment alternative in place on January 1, 2008.

More generally, there are any number of technical programming issues presented by the proposed regulations. These programming challenges include dealing with the fact that the proposed regulations link the 90-day timing period

for EACA distributions to the payroll for the affected employee. Many recordkeeping systems simply do not have this information, particularly for employers that may have multiple payrolls and payroll periods for different classes of employees. Similarly, many recordkeeping systems are not currently able to precisely identify amounts attributable to automatic contributions and affirmative contributions, particularly because the regulations require that employees have the right to simultaneously elect an unwind distribution and continue to participate. There are numerous other programming challenges. The key point, however, is that many (even most) recordkeepers will not be able to offer EACAs as of January 1, 2008, and the position reflected in the proposed regulations that EACAs cannot be offered mid-year will foreclose many plans from adding these features.

QACAs

Section 401(k)(13) provides a new nondiscrimination testing safe harbor for plans with automatic contribution arrangements that satisfy certain requirements. The proposed regulations refer to these arrangements as qualified automatic contribution arrangements or "QACAs." On balance, there are fewer issues related to implementation of QACAs, in part because employers were familiar with the notion that the nondiscrimination safe harbors generally must be in place for the entire plan year and because status as a QACA does not depend on satisfying the Department of Labor's default investment regulations. Nonetheless, we believe that it would be appropriate for transition relief to encompass QACAs because that relief would encourage some employers to implement QACAs for 2008 that might not otherwise do so.

The primary issues for QACAs have been the short period of time between issuance of the proposed regulations and the due date for the annual notice. Like EACAs, QACAs generally must provide notice "a reasonable period before each plan year," and the proposed regulations provide a safe harbor of 30 days before the start of each plan year. Many employers have been concerned about timing, particularly the notion that they may fail to qualify for the safe harbor solely because the notices were not timely provided.

There have also been concerns about a number of more technical issues. For example, the proposed regulations generally require automatic enrollment following a 6-month suspension for hardship distributions and many recordkeeping systems are not equipped for this feature. Similarly, there has been some confusion about the timing of automatic escalation and some of the features of the uniformity requirement. We believe that transition relief in the form of a reasonable, good-faith compliance standard makes sense because it will encourage the adoption of automatic contribution arrangements.

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We greatly appreciate your consideration. The Council anticipates submitting a detailed comment letter on the substantive provisions of the proposed regulations before the comment letter deadline on February 6, 2008. As discussed above, this letter focuses on the urgent need for transition relief.

Respectfully submitted,

Jan Jacobson
American Benefits Council
Retirement Policy Legal Counsel