



**AMERICAN BENEFITS**  

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**COUNCIL**

**Testimony of Jan M. Jacobson  
Senior Counsel, Retirement Policy  
The American Benefits Council**

**Before the  
U.S. Department of the Treasury  
And the  
Internal Revenue Service**

**Washington, D.C.  
May 19, 2008**

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Good morning and thank you for the opportunity to appear today. I am Jan Jacobson, Senior Counsel, Retirement Policy, for the American Benefits Council, 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 employee benefit plans covering more than 100 million Americans.

I would like to start by commending you for taking the first steps to address legal and regulatory issues involved in implementing automatic contribution arrangements under the provisions contained in the Pension Protection Act of 2006. While legislators drafting the Pension Protection Act often focused on defined benefit plan issues, the Council strongly encouraged Congress to include two sections we believed would help strengthen defined contribution plan sponsorship and participation. We are pleased to say both provisions were included in the enacted bill.

The first provision made permanent the provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) relating to pension and retirement savings, including increased limits, administrative simplification, catch-up contributions for those who have reached age 50 or above, and the ability to add Roth contributions to qualified plans. The second provision would encourage employers to use automatic enrollment, under which employees automatically participate in workplace retirement plans, unless they opt out. This is the subject of today's hearing and is also the focus of increasing interest among Council members. Many Council members either already have or plan to implement automatic enrollment. Studies have shown that automatic enrollment and automatic increases raises employee participation, particularly among low- and moderate-income workers.

The Pension Protection Act also instructed the Department of Labor to publish regulations that provide guidance to employers selecting default investments to be used when participants have not directed their investments (such as would happen with automatic enrollment). The final qualified default investment alternative or QDIA

regulations and the follow-up Question & Answer guidance work in tandem with the automatic enrollment regulations to provide employers with answers they need to implement these programs. The Council recognizes and appreciates the degree of coordination that was necessary between the agencies in order to provide this guidance and we especially appreciate the model notice.

The Council does believe, however, that there are ways in which the guidance can be improved in order to further facilitate implementation of these programs. Our testimony today will focus on suggested improvements in four areas – (1) eligible automatic contribution arrangements, (2) permissive withdrawals, (3) automatic contribution arrangements that are not qualified nor eligible automatic contribution arrangements, and (4) the need for flexibility in order to further Congress' obvious goal of encouraging these arrangements.

### Eligible Automatic Contribution Arrangements

I will start with eligible automatic contribution arrangements or EACAs. These are the arrangements described in the regulations that do not get the benefit of the safe harbor from non-discrimination testing offered to qualified automatic contribution arrangements or QACAs. The Council recommends that the final regulations greatly simplify the requirements for EACAs. The proposed regulations impose a level of administration and regulation on EACAs that seems more consistent with a non-discrimination testing safe harbor, rather than a plan design that is merely entitled to a modest additional in-service distribution right and an extended period to determine excess contributions.

First, the Council requests clarification that mid-year EACAs are permitted. The proposed regulations seem to imply that a full plan year is required to implement an EACA. However, the statutory language does not specify that automatic contribution arrangements must be in place for a full year in order for the plan to offer permissive withdrawals or for the six-month time period for distributions of excess contributions to apply. Many plan sponsors have been discouraged from implementing automatic contribution arrangements because they were unable to meet notice requirements prior to a first of the plan year implementation. Congress clearly intended to encourage automatic contribution arrangements and the Council would like to see final regulations that clearly allow mid-year implementation.

Second, the Council believes that additional flexibility should be provided to EACAs, as opposed to QACAs, so that an EACA can be offered only to new hires. The proposed regulations indicate that all participants under the plan that have not made a prior affirmative election need to be automatically enrolled under an EACA. At the very least, it should be permissible to exclude or selectively include collectively bargained employees in an EACA and employees covered under different portions of a multiple employer plan.

And third, the Council would like to see clarification about any special requirements that apply if an employer decides to discontinue an EACA. The Council believes that an employer merely needs to ensure that its plan document is consistent with the discontinuance and to notify participants whether automatic contributions will continue or will cease in connection with the discontinuance of the automatic contribution arrangement.

### Permissive Withdrawals

The Council also seeks several clarifications with regard to permissive withdrawals. First, it is important that the final regulations clarify that plan sponsors can limit the 90-day permissive withdrawals provision to first-time enrollees. This would alleviate concerns of some plan sponsors that have previously implemented automatic contribution arrangements.

Second, the proposed regulations state that the election to withdraw an EACA contribution must be made within a prescribed 90-day election period that begins on the date of the first EACA contribution. However, the proposed regulation does not explicitly state when the distribution actually must be made. The Council believes that the final regulations should provide significant flexibility in the timing of distributions. Withdrawals, like distributions generally, are typically made as soon as administratively feasible consistent with the terms of the plan and the Council believes that this standard is appropriate for permissive withdrawals under section 414(w) as well.

The Council is also concerned that, under the proposed regulations, the 90-day clock begins running from the date an employee would have received an elective deferral but for the negative election to defer. In effect, the 90-day clock works off of the employer's payroll. This approach would be extremely difficult for employers and recordkeepers to administer. Many employers have numerous payroll periods for different classes of employees and we understand that recordkeepers typically do not keep track of payroll periods of the plan sponsor. Instead it is very common to receive contributions on a bundled basis, e.g., a single transfer that includes contributions attributable to more than one payroll period. In short, this rule could be extremely costly and complicated to administer and would require major systems changes at significant cost. The Council instead recommends that the 90-day clock run from the date the first contribution is received by the plan for a participant. This rule is administrable and will not require significant systems changes. Moreover, any difference in timing will be negligible, especially considering the Department of Labor's recently proposed small plan safe harbor on plan deposits.

The Council also requests clarification that matching contributions on a permissive withdrawal need only be forfeited if they have actually been made at the time of the

distribution request. Otherwise, no matching contribution need be made. In addition, it would be appreciated if the final regulations could confirm that forfeitures may be adjusted for investment gains or losses.

### Automatic Contribution Arrangements

The Council also recommends that the final regulations include guidance on automatic contribution arrangements (ACA) that do not meet either the requirements of the QACA or the EACA. This is especially warranted if the final regulations do not include the Council's recommended simplifications of the EACA rules since many employers interested in implementing automatic enrollment may want to include elements not permitted for EACAs and QACAs.

For example, the ACA could allow a non-uniform automatic salary deferral amount such as a varying percentage based on location or job classification. Presumably, a non-uniform amount is allowable provided nondiscrimination testing is required but, in this regard, the guidance should confirm that a default contribution amount is not a benefit, right or feature subject to separate nondiscrimination testing.

The guidance needs to include a definition of an ACA and describe the ACA notice timing and content requirements, and clarify that ACAs can have immediate eligibility without implementing permissive withdrawals.

### Flexibility

Finally, Congress clearly demonstrated that it wants to encourage plan sponsors to adopt automatic contribution arrangements by providing a safe harbor if the plan meets the QACA requirements. Treasury and the Service can support that goal by providing a greater level of flexibility within the requirements. For example, final regulations could clarify that plans are allowed to automatically enroll employees that have previously elected not to participate (forcing a second "opt out"). Such flexibility would facilitate automatic enrollment when employers have inconclusive evidence of prior "zero" elections and would also allow subsequent reenrollments. In addition, the final regulations could allow plans to increase the contributions of participants contributing at a lower rate than the appropriate QACA percentage and clarify that it is permissible to increase the first year's default percentage before the employee has a full year of contributions at that rate.

Thank you for the opportunity to testify today, and I welcome any questions you may have.