Filed Electronically

February 6, 2008

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

Re: Proposed Automatic Contribution Arrangement Regulations

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations concerning the automatic enrollment provisions of sections 401(k)(13) and 414(w) of the Internal Revenue Code (Code) as added in the Pension Protection Act of 2006 (PPA). 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.

As discussed in more detail in our preliminary comment letter filed December 17, 2007, the Council urges the Treasury Department and the Internal Revenue Service (collectively, Treasury) to promptly issue guidance clarifying that plans may rely on a reasonable, good faith interpretation of the automatic enrollment provisions of Code Section 401(k)(13) and 414(w) pending the effective date of final regulations. While we greatly appreciate the efforts of Treasury in issuing the proposed regulations, many employers will choose not to implement automatic contribution arrangements during 2008 because of concerns raised by the proposed regulations. Many of those concerns are spelled out in more detail in this letter and although they may be addressed in the final regulations, the proposed regulations may discourage implementation in the meantime – thus the need for guidance clarifying that a reasonable, good faith interpretation will be sufficient for 2008.

Council members interested in implementing (or continuing) automatic contribution arrangements have expressed a number of concerns and requested several clarifications. The remainder of this letter outlines those concerns under the general categories of qualified automatic contribution arrangements (QACAs), eligible automatic contribution arrangements (EACAs), and permissive withdrawal issues.

QACA

Immediate Eligibility. Council members have several concerns relating to the implementation of a QACA for plans with immediate eligibility. Under the proposed regulations, the initial notice generally must be provided within a reasonable time period before the employee becomes an "eligible employee". There is recognition that advance notice (prior to eligibility) is not possible when employees are immediately eligible, allowing for notice on the date of employment. The regulations also state that there must be a reasonable time for the participant to opt out of the QACA before the first contribution is made.

First, while plan sponsors appreciate the flexibility demonstrated in the proposed regulations by allowing notice on the date of employment for plans with immediate eligibility, this exception may not work in practice without some adjustments. In many companies, benefits are administered in one place (including by outside service providers) and hiring in another (especially for large companies with multiple locations). The chances of missing this due date are significant and the consequences are huge – the plan is no longer a safe harbor plan and is unable to fall back on non-discrimination testing.

The Council urges Treasury to consider allowing employers to provide the notice within fifteen (15) business days of employment for immediate eligibility plans so long as the employee still has an effective opportunity to opt out or change the election prior to the first elective contribution.

The Council also strongly recommends that final regulations permit plans with immediate eligibility to implement a "grace period" for automatic enrollment. This grace period rule would permit a plan that allows for immediate eligibility to automatically enroll participants after a stated period, such as 30 days, after the date of hire. Such a grace period rule would allow for effective plan administration while ensuring that eligibility to make an affirmative election is closely correlated with automatic enrollment. It would also address concerns that there may not be a sufficient opportunity for new hires to opt out if a payroll period ends immediately after or shortly after an employment commencement date.

The Council would also appreciate clarification that the QACA is available for plans that have immediate eligibility for employee deferrals and a one-year wait for matching contributions. This would require separate testing for employees in their first year of service (treated as separate plans under the Code Section 410(b) rules) since the QACA would not exist until the second year (there could be an automatic contribution arrangement but not a qualified automatic contribution arrangement in year one). If this treatment is permitted, it would be helpful to clarify whether highly compensated

employees could be excluded from the small plan (with the one-year wait) for non-discrimination testing purposes. If this treatment is not permitted, the Council requests clarification of when enrollment has to occur (see discussion above).

Flexibility. 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 can support that goal by providing a significant level of flexibility within the requirements. For example, clarification of the following would be helpful (the first two bullet points apply to EACAs as well):

- Allow (but not require) plans to automatically enroll employees that have previously elected not to participate (forcing a second "opt out"). Such flexibility would facilitate QACAs for employers that have inconclusive evidence of prior "zero" elections and would also allow subsequent reenrollments.
- Allow (but not require) plans to increase the contributions of participants contributing at a lower rate than the appropriate QACA percentage.
- Confirm that it is permissible to increase the first year's default percentage before the employee has made a full year of contributions at that rate. In other words, allow (but not require) plans to increase the rate at the beginning of the plan year immediately after enrollment.
- Clarify that plan sponsors switching from the old 401(k) safe harbor plan that required 100 percent immediate vesting have a choice when implementing a QACA which requires vesting after two years of service. The plan sponsor can either (1) immediately vest all current employees and only apply the two-year vesting schedule to new employees, or (2) apply the two-year vesting schedule for all new employer contributions (so that current employees with less than two years of service would not be immediately vested in new contributions).

Hardship Distributions. The proposed regulations allow plans to suspend employee contributions for 6 months after a hardship distribution without violating the QACA uniformity requirement. The Council requests clarification of whether the employee deferrals are required to restart after the 6-month hardship suspension and what adjustments must be made, if any, for QACA contribution rate increases that occurred during the suspension. For example, an employee takes a hardship distribution when the QACA rate is 3 percent and during his 6-month suspension of automatic deferrals, the rate for other employees is raised to 4 percent. Is the plan required to reinstate the automatic deferrals and at what rate? The proposed regulations can be read to suggest that QACAs must automatically resume deferrals after a participant has had a 6-month suspension from salary deferrals in connection with a hardship distribution. Any automatic resumption of deferrals will be inordinately difficult to program and will require material systems changes. The changes will be disproportionately expensive relative to any perceived benefit from automatic resumption in connection with hardship suspension. Instead, the final regulations should provide that this is a matter of plan design. This same issue is presented for EACAs.

Compensation. The Council also requests clarification that the compensation considered for QACAs incorporate the Code Section 414 compensation analysis, including base pay. If the plan fails the Section 414(s) compensation non-discrimination test, it would be helpful to know whether the plan could use "failsafe" language to add back successive amounts of compensation to pass the Section 414(s) test such as a dollar leveling using the lowest participant's compensation or the highest excluded percentage of compensation participant.

Amendments. The proposed regulations indicate that amendments for QACAs (and, potentially, EACAs if no mid-year EACAs are permitted; see discussion below), normally must be in place before the first day of the plan year. The Council requests clarification that an amendment for the 2008 and/or 2009 plan years need not be in place prior to the end of the remedial amendment period as outlined in Section 1107 of the PPA (by the end of the plan year beginning in 2009).

EACA

Immediate Eligibility. As described in more detail in the QACA section of this comment letter, the Council urges Treasury to allow notices to be provided within a reasonable period after employment for plans with immediate eligibility (or allow immediate eligibility with a later EACA enrollment).

Mid-year EACA. Many plan sponsors have expressed an interest in implementing automatic contribution arrangements during the plan year and the Council urges Treasury to clarify that mid-year EACAs are permitted. The proposed regulations are not clear on this issue but seem to imply (with "for the plan year" language) that a full plan year is required to implement an EACA. 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. It should also be clarified that implementation of permissive withdrawals are not required in order to qualify for the six-month correction period.

EACA Eligibility. 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. The Council continues to believe that additional flexibility should be provided so that an EACA may be offered only for new hires. Similarly, 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. Multiple employer plans are generally disaggregated for nondiscrimination testing purposes and therefore should be added to the list of exceptions from the uniformity requirement provided that the plan applies a uniform percentage of compensation for the automatic contribution arrangement to each controlled group within the multiple employer arrangement. Likewise, the exceptions should also be expanded so that a uniform percentage may be applied separately to collectively bargained and non-collectively bargained groups.

Notice Issues. The Council would appreciate clarification of which employees are entitled to the annual notice. Should notice be sent to every employee eligible to participate in the

401(k) plan or only those who have not elected a different deferral percentage (including zero percent)? Are there other employees who would not be required to receive the notice? The Council prefers clarification that the notice is only required to be sent to every employee eligible for the EACA, as set forth in the statute.

In addition, the Council urges Treasury to clarify which parts of the old safe harbor notice contents must be included, if any, particularly for an EACA that does not offer permissive withdrawals. Is it adequate to include information at 1.414(w)-1(b)(3)(ii)(A)-(D) without adding the additional plan-level detail from the prior safe harbor regulations? More generally, the Council urges Treasury to reconsider the portion of the proposed regulations that seems to suggest that the notice include the information in the Code Section 401(k)(12) safe harbor, often referred to as the "mini-SPD" requirement. 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.

<u>Rehires.</u> There are a number of programming challenges related to rehired employees. In this regard, recordkeeping systems often track only very limited information related to a rehired employee's prior participation. The proposed regulation, however, can be read to require that rehired employees resume their participation in the plan as if they had not left, for example, at an automatic enrollment level that takes into account prior years of participation. The Council recommends that the final regulations provide that rehired employees may be treated as new hires for automatic enrollment purposes. The cost associated with modifying recordkeeping systems far outweighs the benefits of any system that requires tracking of prior participation. This is also relevant to whether a rehired employee that is automatically enrolled is entitled to a second 90-day in-service withdrawal.

<u>Interaction with Permissive Withdrawals.</u> It would be helpful if the final regulations confirm that an EACA need not offer permissive withdrawals. This appears to be correct under the proposed regulations but it would be helpful if the regulations were clear on this point.

<u>Discontinuance of an EACA</u>. One issue that has arisen is whether there are any special requirements that apply if an employer decides to discontinue an EACA or an ACA, for example, because of cost issues or numerous small accounts. 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

First-time Enrollees. The Council seeks clarification that plan sponsors can limit the 90-day permissive withdrawals provision to first-time enrollees. This would apply to plan sponsors that have previously implemented automatic contribution arrangements.

Timing and Characterization of Withdrawals. The proposed regulation indicates 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 proposed regulation's use of the phrase "effective date of an election" has led some to believe that the withdrawal must be made by the "effective date." Clearly, however, a permissive withdrawal can be made after the 90-day period since it is not administratively feasible to allow an election on the same date the distribution must take place. Similarly, it should be permissible to delay the distribution until pending contributions have had an opportunity to post. For this reason, 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 also requests clarification that normal fees such as monthly asset charges can be assessed.

Some questions arise in the permissive withdrawals context because circumstances change after an election is made. For example, if the employee requests a permissive withdrawal and then terminates employment, it is not clear whether the resulting distribution will be a permissive withdrawal or a termination distribution. Similarly, an employee requesting a loan that then requests a permissive withdrawal (and significant amounts could be involved if the employee was rehired or executed a rollover), it is not clear whether the resulting distribution will be a loan or a permissive withdrawal. In most cases, it may make administration easier to characterize the request in the manner it was first requested but, again, flexibility would be helpful.

The in-service distribution right is only available with respect to amounts that are attributable to automatic enrollment. It would be helpful if the final regulations clarify that an amount will be treated as attributable to automatic enrollment so long as the participant has not made an affirmative deferral election. As a result, for example, the mere fact that a participant has exercised affirmative investment control should not cause the participant to be ineligible for an in-service distribution with respect to deferrals made on or after the date the participant exercises investment control.

Timing of 90-Day Period. The proposed regulations provide that the 90-day clock begins running from the date an employee would have received an elective deferral but for the negative election to defer. Thus, 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, in some cases, these payroll periods change. This is particularly problematic for automatic

contributions that may be made out of irregular pay, e.g., a signing bonus. Further, we understand 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 and payroll period. In short, the rule in the proposed regulations could be extremely costly and complicated to administer and would require major systems changes at a 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.

Multiple Checks. The statute and the proposed regulations make clear that a participant is only entitled to one permissive withdrawal election. However, it would be helpful if the final regulations confirm that a plan may pay more than one permissive withdrawal distribution. This may occur, for example, where the plan makes prompt payment following an election but a residual contribution is made before the participant's election to stop deferring is effective. In such a case, the regulations should clarify that two payments may be made.

Forfeited Match. 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 (which would then be forfeited) for employee contributions distributed in a permissive withdrawal. It would also be appreciated if the final regulations confirm that forfeitures may be adjusted for investment gains or losses.

Roth 401(k). It would also be helpful for Treasury to clarify whether a plan that automatically enrolls employees in the Roth portion of the plan needs to reset the five-year clock if the participant requests a permissive withdrawal.

Reporting. The Council also requests that Treasury clarify some of the reporting issues that will arise in connection with reporting the permissive withdrawals on Form 1099-R. Employers will need guidance on excluding permissive withdrawals on W2-G so they can properly track the Code Section 402(g) limit. Employer payroll system will need to exclude the permissive withdrawal for calculation of taxable income on W2-G and also exclude it for calculating the 402(g) limit. This is different from the treatment of other distributions where the employer will exclude it for income tax purposes (because it is included in the 1099-R) but include it for 402(g) calculations. This guidance is needed for employer payroll systems and could create balancing issues between Form W-2 and Form 5500.

Top Heavy. The final regulations should clarify that permissible withdrawals do not count as a distribution for top-heavy purposes Permissible withdrawals do not count towards actual deferral percentage (ADP) or actual contribution percentage (ACP) nondiscrimination testing. Essentially, the amounts are being treated as if they never were deposited into the plan. Therefore, they should not count as a distribution for top-heavy purposes.

ACAs

The Council also recommends that the final regulations include guidance on an automatic contribution arrangement (ACA) which does not meet the requirements for an EACA. The guidance should 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.

In addition, the definition of an ACA should indicate if a non-uniform automatic salary deferral amount (i.e. dollar amount, varying percentage based on location or job classification) may be allowed. Presumably, a non-uniform amount is allowable provided actual deferral percentage (ADP) nondiscrimination testing is required. In this regard, the guidance should confirm that a default contribution amount is not a benefit, right or feature subject to nondiscrimination testing. The guidance should also specify what should be done in those circumstances when ADP nondiscrimination testing is not required (such as the traditional 401(k) safe harbor plan design or a 403(b) arrangement).

Again, we appreciate the opportunity to comment on the regulations relating to automatic contribution arrangements. We believe that the American Benefits Council offers an important and unique perspective of the employer sponsors of retirement plans and we would be pleased to make this perspective and additional information available to Treasury. If this would be helpful, please call me at 202-289-6700.

Sincerely,

Jan M. Jacobson
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American Benefits Council